PCA CASE NO. 2018-41

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

-and-

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

JSC DTEK KRYMENERGO (UKRAINE)

Claimant

v

THE RUSSIAN FEDERATION

Respondent

AWARD

The Arbitral Tribunal
Mr. J. William Rowley, KC
Professor Vladimir Pavić
Professor Juan Fernández-Armesto (Presiding Arbitrator)

Registry
Permanent Court of Arbitration

1 November 2023

INDEX

ABBREVIATIONS AND ACRONYMS

21 Exhibits	Exhibits marshalled by Respondent with its Second PHB and disputed by Claimant
Adjusted Auction Price	Auction Price with the adjustments performed by the Tribunal in this award
Administrative Costs	The fees and expenses of the arbitrators, of the appointing authority, of any other assistance required by the tribunal, and the expenses of the PCA, under paragraphs (a), (b), (c) and (f) of Article 38 UNCITRAL Rules
Amendment Resolution	State Council of the Republic of Crimea, Resolution No. 416-1/15, dated 21 January 2015
Annexation	The change that occurred in the status of the Crimean Peninsula in February-March 2014, without prejudice to any determination of its lawfulness or unlawfulness under international law
Annexation Treaty	Treaty Between the Russian Federation and the Republic of Crimea on the Admission to the Russian Federation of the Republic of Crimea and the Formation of New Constituent Entities Within the Russian Federation, dated 18 March 2014
Appointing Authority	Professor Andreas Reiner, the appointing authority for all purposes under the UNCITRAL Rules, as designated by the Secretary-General of the PCA on 25 May 2018
Asoskov ER	Expert Opinion of Professor Anton Asoskov, dated 10 April 2020
Assistant	The assistant to the Tribunal, Mr. Adam Jankowski
Auction Price	Price for the acquisition of the 45% participation in Krymenergo's capital by DTEK Energy
Belyaev WS	Witness Statement of Sergey Belyaev, dated 5 December 2018
BIT or **Treaty**	Agreement between the Government of the Russian Federation and the Cabinet of Ministers of Ukraine on the Encouragement and Mutual Protection of Investments, dated 27 November 1998
BIT Interest Rate	The interest rate contained in Article 5(2) BIT
Branch	The branch office opened by Claimant in Crimea on 29 May 2014
C I	Claimant's Statement of Claim, dated 7 December 2018
C II	Claimant's Statement of Reply, dated 26 November 2019
C SofC	Claimant's Statement of Costs, filed on 21 January 2022
CE-*x*	Claimant's factual exhibits
Challenge	Respondent's Notice of Challenge against Mr. J. William Rowley, KC and Professor Vladimir Pavić, filed on 29 June 2020
CLA-*x*	Claimant's legal authorities
Claimant or **DTEK Krymenergo** or **Krymenergo**	JSC DTEK Krymenergo, the claimant in these proceedings

Claimant's Counter-Application	Claimant's response to Respondent's application for security for costs and counter-application for security for award, dated 17 September 2019
CMU Resolution on Electric Power	Resolution No. 148 "On the Specifics of Regulating Relations in the Sphere of Electric Power in the Occupied Territory of the Autonomous Republic of Crimea and the City of Sevastopol", issued on 7 May 2014 by the Ukrainian Cabinet of Ministers
Commission	A "Special Control Commission" created in 1993 by the Ukrainian Parliament on the privatization of State enterprises
Compass ER	Expert Report of Dr. Moselle and Mr. Delamer, dated 10 April 2020
Competency Requirement	Competency of Krymenergo to carry out the specific investment in the territory of Crimea, in accordance with the legislation of Ukraine
Costs of Arbitration	The fees and expenses of the arbitrators, the PCA, and the fees and expenses incurred by the Parties for their defense in the arbitration
CPHB I	Claimant's first Post-Hearing Brief, filed on 19 November 2021
CPHB II	Claimant's Second post-Hearing Brief, filed on 17 December 2021
CPreHS	Claimant's Pre-Hearing Summary, filed on 25 November 2020
Danylenko ER	Expert report of Professor Andriy Danylenko, dated 25 May 2020
DCF	Discounted Cash Flow
Dolmatov ER	Expert Report of Dr. I.A. Dolmatov, PhD, dated 7 April 2020
DRC	Depreciated Replacement Cost
DTEK B.V.	DTEK Energy B.V.
DTEK Energy	DTEK Energy LLC
DTEK Energy Group	Group of companies beneficially owned by Mr. Rinat Akhmetov
DTEK Holdings	DTEK Holdings Limited
ECHR	European Convention of Human Rights
ECtHR	The European Court of Human Rights
Explanatory Note to the Amendment Resolution	The explanatory note to the draft resolution of the State Council of the Republic of Crimea "On Amendments to Certain Resolutions of the State Council of the Republic of Crimea"
Expropriation Resolution or **Resolution No. 2085-6/14**	Resolution No. 2085-6/14 adopted on 30 April 2014 by the State Council of Crimea, expropriating certain properties within the Republic of Crimea
Expropriatory Measures	Three main events, carried out on 21 January 2015, involving the taking of Claimant's assets
FET	Fair and Equitable Treatment
FMV	Fair Market Value
FPS	Full Protection and Security

GNR	Gross Necessary Revenue
H-*x*	Exhibits produced at the Hearing
Hearing	Hearing that took place from 6 to 15 September 2021 in the Peace Palace in The Hague, the Netherlands
HT	Hearing Transcript
ICJ	International Court of Justice
ILC Draft Articles	The International Law Commission Draft Articles on State Responsibility
Incorporation Law or **Law No. 6-FKZ**	Russian Federation, Federal Constitutional Law No. 6-FKZ "On the Procedure of Acceptance into the Russian Federation and Formation Within its Composition of a New Subject of the Russian Federation," dated 17 December 2001
Independence Resolution	Resolution No. 1745-6/14 enacted by the State Council of Crimea, declaring the Republic of Crimea an independent state
JSC	Joint Stock Company
Krymenergo Auction	Auction organized on 4 May 2012 for the sale of a 45% stake in JSC DTEK Krymenergo, the Claimant
Kurokhtina ER	Expert Opinion of T.N. Kurokhtina, dated 27 March 2020
Lapuerta ER	Expert report of Mr. Carlos Lapuerta, dated 7 December 2018
Law on Ownership	Ukrainian Law on Property, adopted on 7 February 1991 (Doc. CE-518)
Law No. 345-ZRK	Law of the Republic of Crimea No. 345-ZRK/2016 "On the peculiarities of regulation in the Republic of Crimea of certain property relations", dated 30 December 2016
Legal Costs	Reasonable costs and expenses incurred by the "successful party" for their defense in the arbitration, as well as the travel and other expenses of witnesses to the extent such expenses are approved by the tribunal, under paragraphs (d) and (e) of Article 38 UNCITRAL Rules
M	Million
Maggs ER	Expert Report of Peter B. Maggs, dated 6 December 2018
Maslov WS	Witness Statement of Igor Maslov, dated 5 December 2018
MFN	Most-Favoured Nation standard
National Commission	National Commission for State Regulation of Energy and Public Utilities of Ukraine
NBU Resolution No. 699	Resolution of the Board of the National Bank of Ukraine No. 699, of 3 November 2014, "On the Application of Certain Currency Legislation Provisions during the Temporary Occupation in the Territory of the 'Crimea' Free Economic Zone" (Doc. VS-18)
NEC Ukrenergo	State Enterprise "National Energy Company Ukrenergo"
Omelchenko ER	Expert Report of Vladimir Omelchenko, dated 26 November 2019
OSW	The Centre for Eastern Studies, in Polish *Ośrodek Studiów Wschodnich*

Outbound Investments	Investments made by Ukrainians in territories outside Ukraine
Paliashvili ER I	First Expert Report of Dr. Irina Paliashvili, dated 6 December 2018
Paliashvili ER II	Second Expert Report of Dr. Irina Paliashvili, dated 26 November 2019
Parties	Claimant and Respondent
PCA	The Permanent Court of Arbitration
PH Summary	Parties' pre-Hearing summaries
PO	Procedural Order(s)
PO 1	Procedural Order No. 1, dated 26 September 2018
PO 2	Procedural Order No. 2, dated 26 September 2018
PO 3	Procedural Order No. 3, dated 23 April 2019
PO 4	Procedural Order No. 4, dated 5 June 2019
PO 5	Procedural Order No. 5, dated 23 July 2019
PO 6	Procedural Order No. 6, dated 7 August 2019
PO 7	Procedural Order No. 7, dated 8 November 2019
PO 8	Procedural Order No. 8, dated 13 November 2019
PO 9	Procedural Order No. 9, dated 28 November 2019
PO 10	Procedural Order No. 10, dated 4 May 2020
PO 11	Procedural Order No. 11, dated 4 May 2020
PO 12	Procedural Order No. 12, dated 9 June 2020
PO 13	Procedural Order No. 13, dated 18 June 2020
PO 14	Procedural Order No. 14, dated 24 September 2021
PWC	PricewaterhouseCoopers
R I	Respondent's Corrected Statement of Defense, dated 23 May 2019
R II	Respondent's Statement of Rejoinder, dated 10 April 2020
R SofC	Respondent's Statement of Costs, filed on 21 January 2022
RAB	Regulatory Asset Base
RE-*x*	Respondent's factual exhibits
Request for Arbitration	Claimant's Request for Arbitration, filed on 16 February 2018
Resolution 116-r	Resolution approved on 5 March 2012 by the Ukrainian Cabinet of Ministers
Respondent or **Russian Federation** or **Russia**	The Russian Federation, the respondent in this case
Respondent's Application	Respondent's application for security for costs
RLA-*x*	Respondent's legal authorities

RPHB I	Respondent's first Post-Hearing Brief, filed on 19 November 2021
RPHB II	Respondent's second Post-Hearing Brief, filed on 17 December 2021
RPreHS	Respondent's Pre-Hearing Summary, filed on 24 March 2021
Russian Krymenergo	State Unitary Enterprise of the Republic of Crimea "Krymenergo"
SCM	PJSC System Capital Management
SOFR	Secured Overnight Financing Rate
Sokolovskyi ER	Expert Opinion of Mr. Vladyslav Sokolovskyi, dated 8 April 2020
Sokolovskiy WS I	Witness Statement of Eduard Sokolovskiy, dated 5 December 2018
Sokolovskiy WS II	Supplementary Witness Statement of Eduard Sokolovskiy, dated 25 November 2019
Soviet Assets	List of assets which had come into operation before 1992 as of 2013, provided by Claimant
Soviet Union or **USSR**	The Union of Soviet Socialist Republics
SPF	State Property Fund
Temporal Requirement	Competency of Krymenergo to make investments in the territory of Russia at the inception of the investment, in accordance with the legislation of Ukraine
Tyulenev ER	Expert Opinion of Professor Sergey Vladimirovich Tyulenev, dated 27 March 2020
UNCITRAL Rules	Arbitration Rules of the United Nations Commission on International Trade Law, 1976
UNCLOS	United Nations Convention on the Law of the Sea, dated 10 December 1982
Valuation Date	22 January 2015, as per the agreement of the Parties' damages experts
VAT	Value Added Tax
VCLT	Vienna Convention on the Law of Treaties, dated 23 May 1969
Verbal Note	Verbal Note addressed by the Ministry of Foreign Affairs of the Russian Federation to the Ministry of Foreign Affairs of Ukraine on 21 August 2023
Vygovskyy ER	Expert Opinion of Oleksandr Vygovskyy, dated 9 April 2020
WACC	Weighted average cost of capital

LIST OF CASES

ADC	*ADC Affiliate Limited & Another v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006	Doc. CLA-27
Aegean Continental Shelf (Greece v. Turkey)	*Aegean Sea Continental Shelf (Greece v. Turkey)*, I.C.J. Reports 1978, p. 3, Judgment, 19 December 1978	Doc. CLA-101
Amoco	*Amoco International Finance Corporation. v. Iran et al.*, IUSCT Case No. 56, Partial Award, 14 July 1987	Doc. RLA-352
Ampal	*Ampal-American Israel Corporation & Others v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss, 21 February 2017	Doc. RLA-300
Antoine Goetz	*Antoine Goetz & Others v. Republic of Burundi*, ICSID Case No. ARB/95/3, Award, 10 February 1999	Doc. RLA-272
Belbek	*Aeroport Belbek LLC & Mr.Igor Valerievich Kolomoisky v. Russian Federation*, PCA Case No. 2015-07, Interim Award, 24 February 2017	Doc. CLA-3
Belbek (Appeal)	*Russian Federation v. Aeroport Belbek LLC and another*, Hague Court of Appeal, Case No. 200.266.443/01, Judgment, 19 July 2022	Doc. CLA-139
British Caribbean Bank	*British Caribbean Bank Limited (Turks & Caicos) v. Belize*, PCA Case No. 2010-18, Award, 19 December 2014	Doc. CLA-28
Broniowski	*Broniowski v. Poland*, [GC] no. 31443/96, ECtHR 2004	Doc. RLA-288
Cem Cengiz	*Cem Cengiz Uzan v. Republic of Turkey*, SCC Case No. V 2014/023, Award on Respondent's Bifurcated Preliminary Objection, 20 April 2016	Doc. RLA-88
Chemtura Corp.	*Chemtura Corp. v. Government of Canada*, UNCITRAL, Award, 2 August 2010	Doc. RLA-270
Chorzów Factory	*Factory at Chorzów (Germany v. Poland)*, Merits Judgment, 1928 P.C.I.J., Series A, No. 17, 13 September 1928	Doc. CLA-67
Clorox Spain	*Clorox Spain S.L. v. Bolivarian Republic of Venezuela*, PCA Case No. 2015-30, Award, 20 May 2019	Doc. CLA-114
Coastal State rights (Ukraine v. Russian Federation)	*Dispute Concerning Coastal State rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. Russian Federation)*, PCA Case No. 2017-06, Award concerning the Preliminary Objections of the Russian Federation, 21 February 2020	Doc. RLA-129
Compañía del Desarrollo de Santa Elena	*Compañía del Desarrollo de Santa Elena SA v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Final Award, 17 February 2000	Doc. RLA-301

Crystallex	*Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016	Doc. CLA-33/ RLA-353
Dennis Grainger	*Dennis Grainger & Others v. United Kingdom*, no. 34940/10, ECtHR 2012	Doc. RLA-283
Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua)	*Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, I.C.J. Reports 2009, p. 213, Judgment, 13 July 2009	Doc. RLA-13
ECE Projektmanagement	*ECE Projektmanagement International GmbH and Another v. Czech Republic*, PCA Case No. 2010-5, Award, 19 September 2013	Doc. CLA-115
EDF	*EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009	Doc. RLA-104
Emanuel Too	*Emanuel Too v. Greater Modesto*, IUSCT Case No. 880 (460-880-2), Award, 29 December 1989	Doc. RLA-276
Everest	*Everest Estate LLC & Others v. Russian Federation*, PCA Case No. 2015-36, Decision on Jurisdiction, 20 March 2017	Doc. CLA-5
Everest (Appeal)	*Russian Federation v. Everest Estate LLC & Others*, Hague Court of Appeal, Case No. 200.252.396/01, Judgment, 19 July 2022	Doc. CLA-140
Flughafen	*Flughafen Zurich A.G. & Gestión e Ingeniería IDC S.A.*, ICSID No. ARB/10/19, Award, 18 November 2014	Doc. CLA-74
García Armas (Appeal I)	*Bolivarian Republic of Venezuela v. Serafín García Armas and Karina García Gruber*, Cour d'appel de Paris, docket no. 15/01040, Judgment, 25 April 2017	Doc. RLA-89
García Armas (Appeal II)	*Bolivarian Republic of Venezuela v. Serafín García Armas and Karina García Gruber*, Cour d'appel de Paris, docket no. 19/03588, Judgment, 3 June 2020	Doc. RLA-412
Glencore	*Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, 17 August 2019	
Gold Reserve	*Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, [2016] EWHC 153 (Comm), Judgment, 2 February 2016	Doc. RLA-229
Gold Reserve (Award)	*Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014	Doc. CLA-70
Holy Monasteries	*Holy Monasteries v. Greece*, nos. 13092/87 and 13984/88, ECtHR 1994	Doc. RLA-285
Inceysa Vallisoletana	*Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006	Doc. RLA-247
Ioannis Kardassopoulos	*Ioannis Kardassopoulos & Another v. Republic of Georgia*, ICSID Case No. ARB/05/18, ICSID Case No. ARB/07/15, Award, 3 March 2010	Doc. CLA-32
Jahn	*Jahn & Others v. Germany*, [GC], nos. 46720/99, 72203/01 and 72552/01, ECtHR 2005	Doc. RLA-282

Jan Oostergetel	*Jan Oostergetel & Another v. Slovak Republic*, UNCITRAL, Final Award, 23 April 2012	Doc. CLA-116
Koch Minerals	*Koch Minerals Sàrl and Koch Nitrogen International Sàrl v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/19, Award, 30 October 2017	Doc. RLA-102
Laboratoires Servier	*Les Laboratoires Servier, S.A.S., Biofarma, S.A.S., Arts et Techniques du Progres S.A.S. v. Republic of Poland*, Final Award, 14 February 2012	Doc. RLA-277
Lemire	*Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010	Doc. CLA-37
Marfin	*Marfin Investment Group Holdings S.A. & Ors. v. Republic of Cyprus*, ICSID Case No. ARB/13/27, Award, 26 July 2018	Doc. RLA-284
Metal-Tech	*Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013	Doc. RLA-92
Middle East Cement Shipping	*Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, 12 April 2002	Doc. CLA-34
Mobil	*Venezuela Holdings, B.V., Mobil Cerro Negro Holding, Ltd., Mobil Venezolana de Petróleos Holdings, Inc., Mobil Cerro Negro, Ltd., and Mobil Venezolana de Petróleos, Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Award, 9 October 2014	Doc. RLA-298
Monetary Gold	*Monetary Gold Removed from Rome in 1943 (Italy v. France, et al.)*, Judgment, 15 June 1954, 1954 ICJ Rep. 19	Doc. RLA-49
Naftogaz (Appeal)	*Russian Federation v. NJSC Naftogaz of Ukraine & Others*, [Hague Court of Appeal] Case No. 200.274.564/01, Judgment, 19 July 2022	Doc. CLA-137
Naftogaz (Final Award)	*NJSC Naftogaz of Ukraine & Others v. Russian Federation*, PCA Case No. 2017-16, Final Award, 12 April 2023	Doc. CLA-142
Naftogaz (Partial Award)	*NJSC Naftogaz of Ukraine & Others v. Russian Federation*, PCA Case No. 2017-16, Partial Award, 22 February 2019	Doc. CLA-106
OAO Tatneft	*OAO Tatneft v. Ukraine*, UNCITRAL, Award on the Merits, 29 July 2014	Doc. CLA-55
OI European Group	*OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Award dated 10 March 2015	Doc. RLA-344
Oschadbank (Appeal)	*Russian Federation v. JSC Oschadbank*, Cour d'appel de Paris, docket no. 35L7-V-B7D-B7MGP, Decision, 30 March 2021	Doc. RLA-414
PAO Tatneft	*PAO Tatneft v. Ukraine*, [2018] EWHC 1797 (Comm), Judgment, 13 July 2018	Doc. RLA-230
Penwell	*Penwell Business v. Kyrgyz Republic*, PCA Case No. 2017-31, Final Award, 8 October 2021	

Philip Morris	*Philip Morris Brand Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016	Doc. RLA-101
Phoenix	*Phoenix Action LTD. V. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009	Doc. RLA-86
Plama	*Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008	Doc. RLA-257
Pressos Compania Naviera	*Pressos Compania Naviera S.A. & Others v. Belgium*, no. 17849/91, ECtHR 1995	Doc. RLA-286
Privatbank	*PJSC CB Privatbank & Finance Company Finilon v. Russian Federation*, PCA Case No. 2015-21, Interim Award, 24 February 2017	Doc. CLA-2
Privatbank (Appeal)	*Russian Federation v. JSC CB PrivatBank*, Hague Court of Appeal Case No. 200.266.442/01 and 200.266.444/01, Judgment, 19 July 2022	Doc. CLA-141
PV Investors	*The PV Investors v. The Kingdom of Spain*, PCA Case No. 2012-14, Final Award, 28 February 2020	Doc. CLA-120
Quiborax	*Quiborax S.A. and Non Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, 16 September 2015	Doc. RLA-100
Ruby	*Ruby Roz Agricol LLP v. Republic of Kazakhstan*, UNCITRAL, Award on Jurisdiction, 1 August 2013	Doc. RLA-221
Rusoro	*Rusoro Mining Limited v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016	Doc. RLA-103
Saluka	*Saluka Investments BV v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006	Doc. CLA-62
Saur	*Saur International S.A. v Republic of Argentina*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability, 6 June 2012	Doc. CLA-22
Siag	*Waguih Elie George Siag & Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009	Doc. CLA-35
Soufraki	*Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Award, 7 July 2004	Doc. RLA-328
South American Silver	*South American Silver Limited v. The Plurinational State of Bolivia*, PCA Case No. 2013-15, Award, 22 November 2018	Doc. RLA-280
Southern Pacific Properties	*Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award on the Merits, 20 May 1992	Doc. RLA-302
Stabil (Appeal)	*Russian Federation v. Stabil LLC & Others, Bundesgericht*, [Swiss Federal Supreme Court], docket no. 4A-246/2019, Judgment, 12 December 2019	Doc. CLA-123

Stabil (Award on Jurisdiction)	*Stabil LLC & Others v. Russian Federation*, PCA Case No. 2015-35, Award on Jurisdiction, 26 June 2017	Doc. CLA-8
Stabil (Final Award)	*PJSC Ukrnafta v. Russian Federation*, PCA Case No. 2015-34, Final Award, 12 April 2019	Doc. RLA-339
SVP	*Sergei Viktorovich Pugachev v. Russian Federation*, UNCITRAL, Award on Jurisdiction, 18 June 2020	Doc. RLA-411
Tecmed	*Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003	Doc. CLA-20
Temple of Preah Vihear (Separate Opinion)	*Temple of Preah Vihear (Cambodia v. Thailand)*, Merits Judgment, 1962 I.C.J. Rep. 6, Separate Opinion of Vice President Alfaro	Doc. CLA-012
Tenaris	*Tenaris S.A. & Talta – Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/23, Award, 12 December 2016	Doc. RLA-357
Tidewater	*Tidewater Investment SRL., Tidewater Caribe, C.A., et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Award, 13 March 2015	Doc. RLA-299
Ukrnafta (Appeal)	*Russian Federation v. PJSC Ukrnafta, Bundesgericht*, Swiss Federal Supreme Court, docket no. 4A-244/2019, Judgment, 12 December 2019	Doc. CLA-122
Ukrnafta (Award on Jurisdiction)	*PJSC Ukrnafta v. Russian Federation*, PCA Case No. 2015-34, Award on Jurisdiction, 26 June 2017	Doc. CLA-4
Ukrnafta (Final Award)	*PJSC Ukrnafta v. Russian Federation*, PCA Case No. 2015-34, Final Award, 12 April 2019	Doc. RLA-338
Vivendi II	*Vivendi Universal S.A. & Another v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007	Doc. CLA-25
von Pezold	*Bernhard von Pezold & Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015	Doc. CLA-30
Zvolský and Zvolská	*Zvolský and Zvolská v. Czech Republic*, no. 46129/99, ECtHR 2002	Doc. RLA-287

I. INTRODUCTION

1. This is an *ad hoc* investment arbitration dispute subject to the Arbitration Rules of the United Nations Commission on International Trade Law of 1976 [the "**UNCITRAL Rules**"]. The proceedings concern the alleged breaches by the Russian Federation of Articles 2, 3 and 5 of the Agreement between the Government of the Russian Federation and the Cabinet of Ministers of Ukraine on the Encouragement and Mutual Protection of Investments, dated 27 November 1998[1] [the "**BIT**" or the "**Treaty**"].

2. The claimant is a Ukrainian joint stock company ["**JSC**"], which owned the formerly State-owned electricity network in Crimea, buying electricity from a Ukrainian state-owned wholesaler, and then selling the electricity to industrial and domestic customers in Crimea[2]. Claimant alleges that it held an investment protected under the Treaty and that the Russian Federation took a series of measures that led to the dispossession and nationalization of its electricity network and associated assets in Crimea without any compensation. It therefore requests an award of USD 421.2 million ["**M**"], plus fees, costs, and interest in compensation for its expropriated assets[3].

[1] **Doc. CLA-1** (Claimant's translation); **Doc. RLA-127** (Respondent's translation).
[2] R I, paras. 12-17.
[3] R I, paras. 2-5, 44-67.

II. THE PARTIES

1. CLAIMANT

3. The claimant in these arbitration proceedings is the joint stock company JSC DTEK Krymenergo ["**DTEK Krymenergo**" or "**Krymenergo**" or "**Claimant**"] a Ukrainian company primarily engaged in the electricity distribution business on the Crimean Peninsula, with its registered address at:

JSC DTEK Krymenergo
57 Lva Tolstoho street
Kyiv, Ukraine, 01032

4. Claimant is represented in these proceedings by:

Mr. Jonathan Gimblett
Ms. Marney L. Cheek
Mr. Nikhil V. Gore
Mr. Volodymyr Shkilevych
COVINGTON & BURLING LLP
22 Bishopsgate
London EC2N 4BQ
United Kingdom
Emails: mcheek@cov.com
jgimblett@cov.com
ngore@cov.com
vshkilevych@cov.com

2. RESPONDENT

5. The respondent in these arbitration proceedings is the Russian Federation ["**Russian Federation**" or "**Russia**" or "**Respondent**"].

6. Respondent is represented in these proceedings by[4]:

Mr. Mikhail Vinogradov
Director General
GENERAL DEPARTMENT FOR INTERNATIONAL LEGAL COOPERATION
PROSECUTOR GENERAL'S OFFICE OF THE RUSSIAN FEDERATION
Bolshaya Dmitrovka str., 15a, build. 1,
Moscow 125993
Russian Federation
Email: legalprotection@genproc.gov.ru

[4] Respondent was initially represented by the Ministry of Justice and by the firms Houthoff Coöperatief U.A. (Rotterdam) and Ivanyan and Partners (Moscow). On 8 July 2021, Respondent informed that the Russian Federation had transferred the authority to represent the State in international courts and arbitrations from the Ministry of Justice to the General Prosecutor's Office and that the Russian Federation was now represented by Schellenberg Wittmer Ltd. (Zurich). The latter resigned as of 11 April 2022.

Mr. Andrey Kondakov
Mr. Sergey Morozov
Mr. Konstantin Ksenofontov
International Centre for Legal Protection
Krasnopresnenskaya Nab. 12
Moscow 123610
Russian Federation

* * *

7. Claimant and Respondent will jointly be referred to as the "**Parties**".

3. THE ARBITRAL TRIBUNAL

8. On 16 February 2018, Claimant appointed as arbitrator:

Mr. J. William Rowley KC
Twenty Essex
20 Essex Street
London WC2R 3AL
United Kingdom
Email: wrowley@20essexst.com

9. On 18 June 2018, following Respondent's failure to appoint an arbitrator, the appointing authority appointed as arbitrator:

Professor Vladimir Pavić
University of Belgrade, Faculty of Law
Bul. kralja Aleksandra 67
11000 Beograd
Serbia
Email: pavic@ius.bg.ac.rs

10. On 3 July 2018, Mr. Rowley and Professor Pavić appointed Mr. Stanimir A. Alexandrov as Presiding Arbitrator.

11. On 29 June 2020, following Mr. Alexandrov's resignation, Mr. Rowley and Professor Pavić appointed as Presiding Arbitrator:

Professor Juan Fernández-Armesto
Armesto & Asociados
General Pardiñas, 102, 8º izda.
28006 Madrid
Spain
Email: jfa@jfarmesto.com

12. By letter of 1 July 2020, Professor Fernández-Armesto accepted his appointment as Presiding Arbitrator.

4. ADMINISTRATIVE SERVICES

4.1 REGISTRAR AND DEPOSITARY

13. In accordance with the Terms of Appointment, the Permanent Court of Arbitration ["**PCA**"] has provided administrative services in support of the Parties and the Tribunal, including by acting as registrar and as depositary of funds.

14. The contact details of the PCA are as follows:

Attn: Mr. Garth Schofield
Permanent Court of Arbitration
Peace Palace
Carnegieplein 2
2517 KJ The Hague
The Netherlands

15. The PCA and its officials are bound by the same confidentiality duties applicable to the Parties and the Tribunal in this arbitration.

4.2 ASSISTANT TO THE TRIBUNAL

16. With the consent of the Parties and his co-arbitrators, the President appointed the following Assistant to the Tribunal [the "**Assistant**"][5]:

Mr. Adam Jankowski
Armesto & Asociados
General Pardiñas, 102, 8º izda.
28006 Madrid
Spain

17. The Parties received the Assistant's *curriculum vitae* and declaration of independence and impartiality on 22 June 2021[6].

[5] Parties' communications of 2 July 2021.
[6] Tribunal's communication A8.

III. PROCEDURAL HISTORY

1. COMMENCEMENT OF THE ARBITRATION AND APPOINTMENT OF THE TRIBUNAL

18. On 16 February 2018, Claimant filed the **Request for Arbitration**, appointing Mr. J. William Rowley KC as arbitrator.

19. On 30 March 2018, Claimant requested the designation of an appointing authority for the appointment of the second arbitrator by the Secretary-General of the PCA.

20. On 25 May 2018, after giving Respondent an opportunity to comment, the Secretary-General of the PCA designated Professor Andreas Reiner as the appointing authority for all purposes under the UNCITRAL Rules ["**Appointing Authority**"].

21. Respondent having declined to appoint an arbitrator, on 18 June 2018, Professor Reiner appointed Professor Vladimir Pavić as arbitrator.

22. On 3 July 2018, Mr. Rowley and Professor Pavić appointed Mr. Stanimir Alexandrov as Presiding Arbitrator.

23. On 10 September 2018, the Tribunal circulated draft Procedural Orders ["**PO**"] No. 1 and No. 2 to the Parties for their comments.

24. On 26 September 2018, the Tribunal issued **PO 1** and **PO 2**. In PO 2, the Tribunal set out two alternative procedural timetables for these proceedings (Annex A predicated on Respondent's participation in the present proceedings and Annex B based on Respondent's non-participation).

2. WRITTEN SUBMISSIONS AND DOCUMENT PRODUCTION

A. Statement of Claim

25. On 7 December 2018, in accordance with the procedural timetable set forth in PO 2, Claimant filed its Statement of Claim ["**C I**"], together with:

- The witness statements of Mr. Sergey Belyaev ["**Belyaev WS**"], Mr. Igor Maslov ["**Maslov WS**"], and Mr. Eduard Sokolovskiy ["**Sokolovskiy WS I**"];

- The expert reports of Mr. Carlos Lapuerta ["**Lapuerta ER**"], Mr. Peter B. Maggs ["**Maggs ER**"] and Dr. Irina Paliashvili ["**Paliashvili ER I**"];

- Fact exhibits **CE-1** through **CE-275**; and

- Legal authorities **CLA-1** through **CLA-76**.

B. Respondent's participation in the arbitration

26. On 5 April 2019, Respondent submitted a letter to the Tribunal stating that it "would like to participate in the Arbitration". It also "confirm[ed] its intention to file a Request for Bifurcation" and requested an extension of six months to do so. By letter dated 15 April 2019, Claimant objected to Respondent's request.

27. Accordingly, Respondent did not file its Statement of Defense nor an application seeking to bifurcate the proceedings by the deadlines stipulated in the procedural calendar.

28. On 23 April 2019, the Tribunal issued **PO 3**, extending the deadline for Respondent to submit its Statement of Defense and make the payment of its share of the advance requested by the PCA. Moreover, the Tribunal noted that Respondent was entitled to raise in its Statement of Defense any jurisdictional arguments it wished, which would be considered by the Tribunal in conjunction with the merits. Finally, the Tribunal decided that Annex A of PO 2, subject to certain adjustments to be agreed between the Parties, would be applicable to the proceedings, unless Respondent failed to submit its Statement of Defense or make the payment that was due.

C. Statement of Defense

29. On 23 May 2019, in compliance with the extended deadline provided in PO 3, Respondent filed its Statement of Defense, together with a Power of Attorney. Four days later, Respondent filed a corrected Statement of Defense ["**R I**"] together with:

- Fact exhibits **RE-1** through **RE-43**; and
- Legal authorities **RLA-1** through **RLA-114**.

30. In its Statement of Defense, Respondent made an application for security for costs.

31. On 31 May 2019, Respondent paid the sum of USD 200,000, representing its share of the initial deposit of costs, as acknowledged by the PCA by letter of the same day.

32. On 5 June 2019, the Tribunal issued **PO 4**, deciding that the proceedings should continue pursuant to the schedule provided in Annex A of PO 2, albeit subject to certain adjustments – to be agreed between the Parties – in view of the extension granted to Respondent for the filing of its Statement of Defense and the late payment of its share of the advance payment, and in light of Respondent's application for security for costs.

D. Document Production

33. On 28 June 2019, the Parties exchanged their requests for document production and, on 19 July 2019, submitted their responses.

34. On 23 July 2019, the Tribunal issued **PO 5**, with a revised procedural calendar.

35. On 24 July 2019, Claimant made an additional application for document production.

36. On 7 August 2019, the Tribunal issued **PO 6**, setting out its rulings on the Parties' requests for document production.

E. Security for costs

37. The Parties agreed on a schedule – approved by the Tribunal – for further briefing in relation to Respondent's application for security for costs ["**Respondent's Application**"].

38. On 17 September 2019, Claimant filed its response to Respondent's Application and submitted a counter-application for security for award ["**Claimant's Counter-Application**"].

39. On 1 October 2019, Respondent filed its Reply to Claimant's response to Respondent's Application and Reply to Claimant's Counter-Application.

40. On 15 October 2019, Claimant filed its Rejoinder on Respondent's Application.

41. On 8 November 2019, the Tribunal issued **PO 7**, dismissing both Respondent's Application for Security for Costs and Claimant's Counter-Application for Security for Award.

F. Confidentiality

42. During the document production phase, Respondent raised some objections to Claimant's Requests on the basis of confidentiality.

43. Thereafter, on 20 October 2019, Claimant wrote to the Tribunal "in relation to the Tribunal's directives" in PO 6 and submitted a draft confidentiality order. On 28 October 2019, Respondent objected to Claimant's request, arguing that such order was unnecessary.

44. On 13 November 2019, the Tribunal issued **PO 8**, denying Claimant's request for the Tribunal to adopt a confidentiality order; the Tribunal did not find necessary, at that stage, to issue any additional orders, directions or instructions with respect to the protection of confidential information or documents beyond the order contained in para. 10 of PO 1.

45. On 18 November 2019, Respondent submitted an application for renewed consideration of the production of certain documents "reasonably believed to be held" by DTEK Energy LLC ["**DTEK Energy**"]. That same day, Claimant submitted an application seeking a "Confidential – Attorneys' Eyes Only" designation for a document produced within the document production exercise. On 25 November 2019, both Parties opposed to the other party request.

46. On 28 November 2019, the Tribunal issued **PO 9**, denying both Parties' requests.

G. Statement of Reply

47. On 26 November 2019, Claimant filed its Reply ["**C II**"], together with:

- The second witness statement of Mr. Eduard Sokolovskiy ["**Sokolovskiy WS II**"];
- The expert report of Mr. Vladimir Omelchenko ["**Omelchenko ER**"], and the second expert report of Dr. Irina Paliashvili ["**Paliashvili ER II**"];
- Fact exhibits **CE-276** through **CE-354**; and
- Legal authorities **CLA-77** through **CLA-118**.

H. Statement of Rejoinder

48. On 11 April 2020, Respondent filed its Statement of Rejoinder ["**R II**"], together with:

- The expert reports of Ms. Tatiana Kurokhtina ["**Kurokhtina ER**"], Professor Sergey Tyulenev ["**Tyulenev ER**"], Professor Anton Asoskov ["**Asoskov ER**"], Mr. Vladyslav Sokolovskyi ["**Sokolovskyi ER**"], Dr. Boaz Moselle and Mr. Julian Delamer from Compass Lexecon ["**Compass ER**"], Dr. Ilya Dolmatov ["**Dolmatov ER**"], and Professor Oleksandr Vygovskyy ["**Vygovskyy ER**"];
- Fact exhibits **RE-44** through **RE-165**; and
- Legal authorities **RLA-127** through **RLA-349**.

3. HEARING ARRANGEMENTS

49. Following the invitation of the Tribunal, the Parties informed the Tribunal of their respective preferences regarding the location of the hearing [the "**Hearing**"]. Having considered the Parties' submissions regarding the venue for the Hearing, the Tribunal decided to conduct the Hearing at the PCA's premises in the Peace Palace in The Hague, the Netherlands.

50. On 2 April 2020, in light of the global COVID-19 pandemic, the Parties made a joint proposal for the identification of "the earliest possible alternative dates" in the event "that the scheduled hearing cannot be maintained". By letter of 8 April 2020, the Tribunal provided its response to the Parties' joint proposal, urging the Parties "to exercise best efforts to maintain the hearing dates as currently scheduled, whether in person or online".

51. On 24 and 25 April 2020, and pursuant to Annex A to PO 5, Claimant and Respondent informed the list of witnesses and experts that they wanted to be called for cross-examination at the Hearing.

52. Having conferred with each other and being unable to reach a common view, the Parties sent the Tribunal their respective comments regarding the Hearing on 30 April 2020:

- Claimant's position was that if an in-person Hearing should prove impossible due to coronavirus-related restrictions, the Hearing should be conducted as scheduled by online video;

- Respondent objected to this matter being heard online due to "the complexity of the present case, numerous security, confidentiality and logistics concerns as well as serious due process considerations".

53. On 4 May 2020, the Tribunal issued **PO 10**, on the Hearing arrangements. The Tribunal decided that the Hearing dates would remain unchanged and that, if the situation relating to the COVID-19 pandemic remained, the Hearing would be conducted online, subject to possible minor adjustments. The Tribunal also invited the Parties to agree on a protocol for the holding of an online hearing. Finally, the Tribunal decided to hold a pre-hearing conference with the Parties on 29 May 2020.

4. DISCUSSIONS REGARDING THE REJOINDER

54. In parallel to the discussions regarding the Hearing, and by letter dated 24 April 2020, Claimant requested the Tribunal to strike from the record portions of Respondent's Rejoinder and the accompanying expert reports, on the basis that Respondent was trying to introduce new evidence and argumentations that could and should have been filed with the Statement of Defense.

55. By letter dated 30 April 2020, Respondent objected to Claimant's request, on the basis that it "would constitute a manifest violation of Respondent's fundamental right to present its case".

56. On 4 May 2020, the Tribunal issued **PO 11**, dismissing Claimant's request, but giving Claimant the possibility to submit arguments and evidence in rebuttal to those portions of the Rejoinder that it sought to exclude and/or to the accompanying expert reports.

57. On 6 May 2020, Claimant requested that the Tribunal clarify PO 11, noting that the two-week deadline for Claimant to respond to Respondent's Rejoinder denied Claimant an effective opportunity to respond, and provided Respondent with an improper advantage in the proceedings – to which Respondent objected on 11 May 2020.

58. On 13 May 2020, the Tribunal informed the Parties that, having considered their submissions, it had decided, *inter alia*, to allow Claimant to submit new evidence rather than file a new submission by 25 May 2020. The Tribunal further stated that if Respondent submitted an application pursuant to para. 25(3) of PO 11 and the Tribunal decided to grant it, the Tribunal would be open to grant Respondent up to three weeks.

59. On 18 May 2020, Respondent, *inter alia*, requested that the Tribunal order Claimant to provide "an index with its new documentary evidence" in accordance with the requirements set forth in section 3 of PO 2.

60. On 21 May 2020, Claimant objected to Respondent's letter dated 18 May 2020, requesting that the Tribunal leave to dispense with the hard copy filing contemplated by clause 3.10 of PO 2. Claimant agreed to provide an index for its electronic submission in the form provided by clause 3.10.2 of PO 2 if leave were granted.

61. On 22 May 2020, Respondent reiterated its request dated 18 May 2020, arguing that clause 3.2 of PO 2 was a "clear indication" of the supporting evidence in each submission, including with hyperlinks in the footnotes of the submission, is required.

62. On 22 May 2020, the Tribunal decided not to take action on Respondent's requests at that stage, but reserving the right to do so after the documents were submitted by Claimant.

63. Accordingly, on 25 May 2020, Claimant, *inter alia*, submitted:

- The Index of New Exhibits for Claimant's evidentiary submission;
- An updated Table of Exhibits;
- An expert report by Professor Andriy Danylenko ["**Danylenko ER**"];
- A workbook containing updated damages calculations;
- Several revised exhibits.

64. On 1 June 2020, Respondent asked for authorization to submit a sur-rebuttal, for which it would require three weeks. On the following day, Claimant, *inter alia*, requested that the Tribunal deny Respondent's application for a sur-rebuttal, and, if such application were granted, requested that it be limited.

65. On 4 June 2020, the Tribunal declined Respondent's request for permission to file a sur-rebuttal and invited Respondent to file a request "specifying the categories of evidence it seeks to submit" by 8 June 2020. The Tribunal indicated, that in case the new request would be granted, Respondent would submit the new sur-rebuttal evidence no later than 19 June 2020. The Tribunal also granted Respondent's request to call for examination Professor Oleksandr Vygovskyy, Ms. Tatiana Kurokhtina, and Professor Sergey Tyulenev; however, their direct examination would be limited to matters that were raised by Claimant on 25 May 2020.

66. Accordingly, on 8 June 2020, Respondent submitted information specifying the categories of evidence it sought to submit and how they were responsive to Claimant's recent submissions.

67. On 10 June 2020, Claimant argued that Respondent's request dated 8 June 2020 should be denied, "with the exception of two requests related to damages issues". Claimant requested that the Tribunal require Respondent to submit its sur-rebuttal documents no later than 15 June 2020 – to which Respondent objected.

68. On 12 June 2020, the Tribunal decided on each category of documents Respondent intended to submit as part of the sur-rebuttal. The Tribunal also ordered that Respondent submit the evidence within the scope ordered by the Tribunal by 19 June 2020.

5. HEARING ARRANGEMENTS II

69. Following the issuance of PO 11 on the hearing arrangements, the Parties exchanged several communications on the timing and modality of the Hearing.

70. The Parties had the opportunity to reiterate their positions at the pre-hearing conference held on 29 May 2020. Furthermore, the Parties discussed the allocation of time and interpretation at the Hearing. The Parties also agreed to the removal of Exhibit CE-551 from the record.

71. Following the pre-Hearing conference, by letter from the PCA dated 1 June 2020, the Tribunal presented two options to the Parties in relation to Hearing dates, and invited the Parties to comment, which they did on 5 June 2020:

- Respondent informed the Tribunal that neither alternative hearing timeframes proposed by the Tribunal would allow Respondent to fully present its case; Respondent suggested that the Tribunal "defer the hearing to a later date when it can be held in person";

- Claimant informed the Tribunal that it would prefer to hold an online Hearing and made further submissions regarding the associated logistics; Claimant also requested that the Tribunal clarify whether the appended legal authorities to Exhibit CE-551 would be struck from the record.

72. On 9 June 2020, the Tribunal issued **PO 12**, deciding, *inter alia*, that the Hearing would be held from 28 June to 5 July 2020. The Tribunal further decided that the legal authorities appended to Exhibit CE-551 would remain in the record.

6. RESIGNATION OF MR. ALEXANDROV

73. On 12 June 2020, the Presiding Arbitrator, Mr. Alexandrov, referred to an earlier disclosure made regarding his relationship with Claimant's appointed expert, Mr. Carlos Lapuerta. The Presiding Arbitrator informed the Parties that on 11 June 2020 an ICSID *ad hoc* Committee had annulled the award in the case of *Eiser Infrastructure Limited and Energía Solar Luxembourg SARL v. Kingdom of Spain*.

74. The Presiding Arbitrator also informed the Parties that in that case he acted as an arbitrator appointed by the claimants and Mr. Lapuerta acted as an expert for the claimants. According to the Mr. Alexandrov, the Committee concluded that:

> "[…] the tribunal was not properly constituted and there was a serious departure from a fundamental rule of procedure as a result of [Mr. Alexandrov's] relationship with Mr. Lapuerta".

75. Mr. Alexandrov asked the Parties to raise any issue arising out of the ICSID *ad hoc* Committee's decision no later than 19 June 2020.

76. On 15 June 2020, Respondent stated, *inter alia*, that Mr. Alexandrov should "resign or be removed". Respondent also raised several questions for the co-arbitrators to answer by 17 June 2020. Furthermore, on 16 June 2020, Respondent requested that the "upcoming hearing be adjourned and the proceedings stayed generally", and informed that it would not participate in any further Hearing preparation activities.

77. On 17 June 2020, Professor Pavić provided his answers to Respondent's questions raised in the letter dated 15 June 2020.

78. On that same day, Claimant objected to any further engagement of the Tribunal with Respondent's requests and noted that the individual members of the Tribunal should not act on Respondent's letter until Claimant had the opportunity to be heard.

79. Still on that same day, Claimant noted that Respondent had been aware of the fact that Claimant was working with Mr. Lapuerta and noted his previous interactions with Mr. Alexandrov. Claimant requested that the Tribunal "continue the hearing until [Respondent's] impending challenge has been heard and determined". Claimant informed that it did not consent to a stay of the proceedings as a whole.

80. On 18 June 2020, Mr. Rowley informed the Parties that his answers to Respondent's questions raised in the letter dated 15 June 2020 were the same as those provided by Professor Pavić in his e-mail of 17 June 2020.

81. On 18 June 2020, the Tribunal issued **PO 13**, deciding to postpone the Hearing, which had been scheduled for 28 June to 5 July 2020.

82. On that same day, Respondent reiterated its request for a stay of the proceedings – while Claimant requested that the Tribunal reject such request. Claimant also noted that if Respondent failed to submit its sur-rebuttal on 19 June 2020, the Tribunal should conclude that Respondent had waived the right to do so.

83. On 19 June 2020, the Tribunal confirmed all procedural orders that it had issued to date in these proceedings.

84. Without prejudice to its objections to the constitution of the Tribunal, on 20 June 2020, Respondent submitted its sur-rebuttal evidence pursuant to PO 11, together with an updated list of legal authorities and index of sur-rebuttal materials. Furthermore, Respondent formally objected to the Tribunal's decision of 12 June 2020 not to allow Respondent to file an expert report by a Ukrainian tax consultant.

85. On 20 June 2020, the Tribunal reiterated that all procedural orders that it had issued in the proceedings remained in place and that the proceedings were not suspended.

86. By letter dated 21 June 2020, the Presiding Arbitrator, Mr. Alexandrov, resigned.

7. CHALLENGE OF CO-ARBITRATORS AND APPOINTMENT OF PROFESSOR ARMESTO

87. On 25 June 2020, the co-arbitrators, Mr. Rowley and Professor Pavić, informed the Parties that they were in the process of selecting a new Presiding Arbitrator.

88. On that same day, Respondent separately requested that Professor Pavić and Mr. Rowley address certain issues arising in relation to PO 1 and consider the manner of Mr. Alexandrov's resignation by 29 June 2020. Respondent requested that the co-arbitrators avoid coordinating their answers with one another.

89. On 26 June 2020, Claimant objected to Respondent's letter, in particular to Respondent's request to disclose the Tribunal's internal deliberations and communications, to Respondent's "attempt to extend its deadline for a challenge beyond 29 June 2020", and to Respondent's "assertion that the process of selecting a new Presiding Arbitrator may not begin until 15 days after Mr. Alexandrov's letter of resignation".

90. On 27 June 2020, Professor Pavić informed the Parties that, having considered their letters, he was not aware of any circumstances that might require disclosure or warrant an amendment of his "unqualified Statement of Availability and Independence and Impartiality".

91. On 29 June 2020, Mr. Rowley informed the Parties that, having considered their letters, he remained independent and impartial and noted that the process of appointment of a new Presiding Arbitrator was underway.

92. On 29 June 2020, Mr. Rowley and Professor Pavić appointed Professor Fernández-Armesto as the new Presiding Arbitrator.

93. On the same day, Respondent submitted a Notice of Challenge against Mr. Rowley and Professor Pavić [the "**Challenge**"].

94. On 1 July 2020, Claimant objected to Respondent's Challenge.

95. On that same day, the PCA circulated the Declaration of Acceptance and Statement of Independence and Impartiality of Mr. Fernández-Armesto, his *curriculum vitae* and acceptance and disclosure letter dated 1 July 2020.

96. On 2 July 2020, Respondent objected to Claimant's letter regarding the Challenge.

97. On 4 July 2020, the co-arbitrators informed the Parties that they did not intend to resign in the face of Respondent's Challenge.

98. On that same day, Respondent expressed its disappointment with the co-arbitrators' decision "to rush the appointment of the new presiding arbitrator". Furthermore, Respondent requested that the members of the Tribunal answer several questions related to the appointment of Professor Fernández-Armesto, and particularly whether Mr. Alexandrov had had any role in the appointment. Respondent also requested the members of the Tribunal to confirm that "no further steps [would] be

taken in these proceedings until completion of the determination of the [C]hallenge".

99. By communication A1 dated 5 July 2020, the Tribunal invited Claimant to submit its comments to Respondent's letter of 4 July 2020.

100. On 6 July 2020, Respondent communicated the Challenge to Professor Reiner for decision in his capacity as Appointing Authority. However, on 7 July 2020, Professor Reiner resigned as Appointing Authority.

101. On 8 July 2020, Claimant submitted its comments to Respondent's letter of 4 July 2020 and commented on the appointment of the new Presiding Arbitrator and the next steps in this arbitration. On the following day, Claimant requested that the Secretary-General of the PCA designate a new Appointing Authority, on an expedited basis, to decide the pending Challenge.

102. On 10 July 2020, Respondent requested that the Secretary-General of the PCA apply certain criteria for selecting the Appointing Authority and requested that the name of any prospective candidate be communicated to the Parties for their comments prior to designation – to which Claimant objected, asking that the "usual procedure" for the designation of the Appointing Authority be followed.

103. On 14 July 2020, the PCA informed the Parties, *inter alia*, that:

- When asked to designate an Appointing Authority, the Secretary-General of the PCA does so by way of direct designation, without divulging the names of candidates beforehand; and

- The Parties' comments regarding the profile of the Appointing Authority to be designated, as well as any further comments received from the Parties prior to 17 July 2020, would be submitted for the consideration of the Secretary-General of the PCA prior to designation.

104. On that same day, the Presiding Arbitrator, Professor Fernández-Armesto, addressed the issues raised in Respondent's letter dated 4 July 2020. And on 16 July 2020, the co-arbitrators confirmed that Mr. Alexandrov had no role in suggesting or communicating with Professor Fernández-Armesto in relation to his appointment.

105. On 28 July 2020, the PCA informed the Parties that the Secretary-General of the PCA had designated Judge Geert J. M. Corstens as Appointing Authority in these proceedings.

106. On 7 October 2020, the Appointing Authority rejected the Challenge, after finding that[7]:

> "[…] the applicable Article 10 of the UNCITRAL Rules provides that only 'circumstances […] that give rise to justifiable doubts as to the arbitrator's

[7] Judge Geert J.M. Corstens' "Decision on the Respondent's Challenge to Professor Vladimir Pavić and Mr. J. William Rowley QC as Arbitrators", dated 7 October 2020, para. 45.

> impartiality or independence' may be grounds for challenges. That means that doubts must be justifiable to warrant disqualification of an arbitrator. Mere speculations do not suffice. In conclusion, I consider that there are no points raised by the Respondent that establish reasonable doubts as to the impartiality of the co-arbitrators".

8. CONSULTATIONS REGARDING FURTHER SUBMISSIONS AND HEARING

107. By communication A2, the Tribunal – without prejudice to the Challenge that remained pending at the time – invited the Parties to present their views on the duration and timing of the Hearing, the necessity of additional submissions by the Parties, if any, and the marshalling of additional evidence, if any. Accordingly, on 22 July 2020, each of the Parties presented its comments.

108. On 28 July 2020, the Tribunal transmitted to the Parties its communication A3, pursuant to which it decided (without prejudice to the pending Challenge) that:

- The Parties should submit a pre-Hearing summary ["**PH Summary**"], summarizing the facts and the law, along with a reference to all relevant evidence;

- Claimant would file its PH Summary on 25 November 2020, and Respondent on 24 March 2021;

- No further submissions of marshalling of evidence by either Party was allowed;

- Given the availability of the Parties and the members of the Tribunal, the weeks of 6 September and 13 September 2021 were reserved for a Hearing to be held in person or by virtual conference.

109. On 31 July 2020, Claimant requested that the Tribunal reconsider its decision to postpone the Hearing until September 2021, and to hold the Hearing as soon as possible. Furthermore, Claimant asked that the PH Summaries be filed simultaneously two months after the Tribunal's ruling on Claimant's request.

110. The Tribunal invited Respondent to submit its comments on Claimant's request for reconsideration – which Respondent did on 13 August 2020. On 20 August 2020, the Tribunal issued communication A5, rejecting Claimant's request and re-affirming its decision of 28 July 2020 (without prejudice to the pending Challenge).

A. Pre-Hearing Summaries

111. On 25 November 2020, Claimant submitted its PH Summary ["**CPreHS**"].

112. On 12 March 2021, Respondent requested that the Tribunal reconsider its decision of 12 June 2020 concerning Respondent's submission of sur-rebuttal evidence – to which Claimant objected on 30 March 2021.

113. On 24 March 2021, Respondent submitted its PH Summary ["**RPreHS**"], together with certain corrections to one of its expert reports.

B. Hearing arrangements III

114. On 15 July 2021, Respondent informed the Tribunal that the Parties had been able to agree on several matters relating to the Hearing and submitted its proposals for the areas of disagreement. On that same day, Claimant confirmed the areas of agreement and filed its proposals on the points of disagreement.

115. By communication A11 dated 23 July 2021, the Tribunal informed the Parties of its decision concerning the points of disagreement between the Parties regarding the Hearing, including the examination of Respondent's expert witnesses, closing oral submissions, and the option of holding the Hearing virtually should circumstances so require.

116. On 9 August 2021, the Parties informed the Tribunal of their agreement to hold the Hearing in person as scheduled.

117. Accordingly, on 13 August 2021, the Tribunal confirmed that the Hearing would be held in person in The Hague and invited the Parties to liaise and seek agreement on the remaining practicalities of the Hearing.

118. On 16 August 2021, Respondent requested that the Tribunal amend its decision in PO 12 on the timing for the direct examination/opening presentations of the experts at the Hearing, proposing that each witness be granted additional time to make their expert presentations. By letter of the same date, Claimant requested that the Tribunal amend its decision on the same matter, proposing instead that the Tribunal grant each Party the discretion to determine for itself the amount of time to spend on direct examination, and maintain the time limits set out in PO 12 in relation to the opening presentations.

119. By communication A15 dated 18 August 2021, the Tribunal issued its decision on the allocation of time for the direct examination of witnesses.

120. On 25 August 2021, Claimant notified the Tribunal that its fact witness, scheduled to appear at the Hearing, was unable to testify, and requested that another fact witness be called to testify in his stead. Respondent objected to this requested, after which Claimant filed a further response suggesting an alteration of the hearing schedule.

121. On 31 August 2021, the Tribunal decided to change the Hearing schedule, to accommodate the appearance of Claimant's witness.

122. Therefore, on 3 September 2021, Claimant shared a proposal for the updated hearing schedule, agreed between the Parties. The Tribunal adopted the Parties' proposed Hearing schedule.

9. HEARING

123. The Hearing on all issues in this matter took place from 6 to 15 September 2021 in the Peace Palace in The Hague, the Netherlands, and was also hosted on the Zoom platform to facilitate the remote attendance of some participants.

124. The following individuals attended the Hearing[8]:

Tribunal	
Prof. Juan Fernández-Armesto	Presiding Arbitrator
Mr. J. William Rowley QC	Arbitrator
Prof. Vladimir Pavić	Arbitrator
Assistant to the Tribunal	
Mr. Adam Jankowski	Armesto & Asociados
Registrar	
Ms. Helen Brown	PCA
Mr. Benjamin Craddock	PCA
Ms. Ruba Ghandour	PCA
Ms. Jinyoung Seok	PCA
Mr. Shota Toda	PCA
For Claimant	
Counsel	
Ms. Marney L. Cheek	Covington & Burling LLP
Mr. Nikhil V. Gore	Covington & Burling LLP
Mr. Volodymyr Shkilevych*	Covington & Burling LLP
Mr. Jonathan Gimblett	Covington & Burling LLP
Ms. Clovis Trevino	Covington & Burling LLP
Ms. Ariel Rosenbaum	Covington & Burling LLP
Ms Lisa Ann Johnson	Covington & Burling LLP
Mr. Minwoo Kim	Covington & Burling LLP
Mr. Alexander Gudko	Covington & Burling LLP
Mr. Timothy Aulet	Covington & Burling LLP
Ms. Amanda Tuninetti*	Covington & Burling LLP
Mr. Marco Ramos*	Covington & Burling LLP
Mr. Pavlo Byelousov	AEQUO Law Firm
Mr. Taras Syvak	AEQUO Law Firm
Ms. Ksenia Koriukalova*	AEQUO Law Firm
Claimant's representatives	
Mr. Aleksandr Kononenko	
Ms. Aleksandra Moskalenko	
Witness	
Mr. Igor Maslov	
Experts and assistants	
Prof. Andriy Danylenko	
Dr. Irina Paliashvili	
Prof. Peter B. Maggs*	
Prof. Anatole Boute	
Mr. Carlos Lapuerta	
Mr. Daniel Harris	

[8] Remote participants are indicated with an asterisk.

For Respondent
Counsel

Mr. Elliot Geisinger	Schellenberg Wittmer
Dr. Christopher Boog	Schellenberg Wittmer
Dr. Anna Kozmenko	Schellenberg Wittmer
Mr. Sebastiano Nessi	Schellenberg Wittmer
Mr. Simon Demaurex	Schellenberg Wittmer
Mr. Daniil Vlasenko	Schellenberg Wittmer
Ms. Vera Bykova	Schellenberg Wittmer
Mr. Alvin Tan	Schellenberg Wittmer

Respondent's Representatives
Mr. Mikhail Vinogradov*
Mr. Andrey Kondakov
Mr. Sergey Morozov
Mr. Oleg Afanasyev*
Ms. Zoya Usoltseva*
Mr. Konstantin Ksenofontov*

Experts
Ms. Tatiana Nikolaevna Kurokhtina
Prof. Sergey Vladimirovich Tyulenev
Mr. Vladyslav Sokolovskyi
Prof. Oleksandr Vygovskyy
Prof. Anton Vladimirovich Asoskov
Dr. Ilya Dolmatov
Dr. Boaz Moselle
Mr. Julian Delamer*
Mr. Vladimir Tsimaylo*

Technical assistance
Court Reporter
Mr. Trevor McGowan

Interpreters
Ms. Valerija Vinarskaja
Ms. Irina Morgan
Ms. Ludmila Lantsuta-Davis

125. The Parties produced the following exhibits at the Hearing:

H-1	Claimant's Opening Presentation
H-2	Respondent's Opening Presentation
H-3	Professor Danylenko's Presentation
H-4	Dr. Kurokhtina's Presentation
H-5	Claimant's First Demonstrative for Dr. Kurokhtina's Analysis
H-6	Claimant's Second Demonstrative for Dr. Kurokhtina's Analysis
H-7	Prof. Tyulenev's Presentation
H-8	Dr. Paliashvili's Presentation
H-9	Mr. Vladislav Sokolovskyi's Presentation
H-10	Prof. Vygovskyy's Main Presentation
H-11	Prof. Vygovskyy's Additional Presentation
H-12	Prof. Maggs's Presentation
H-13	Prof. Asoskov's Presentation
H-14	Claimant's Demonstrative with Article 1 of the Resolution of the State Council of the Republic of Crimea "On the Issues of Management of Property of the Republic of Crimea" (CE-80)

H-15	Prof. Boute's Presentation
H-16	Dr. Dolmatov's Presentation
H-17	Mr. Lapuerta's Presentation
H-18	List of workbooks and supporting exhibits that were prepared by Mr. Lapuerta and introduced into the record after his report
H-19	Dr. Moselle and Mr. Delamer's Presentation

126. The Hearing was recorded and transcribed, and the Parties and the Arbitral Tribunal were provided with the Hearing transcript ["**HT**"].

10. POST-HEARING SUBMISSIONS

127. At the end of the Hearing the Parties and the Arbitral Tribunal discussed the post-Hearing phase. The Parties and the Tribunal's agreements were reflected in **PO 14**.

128. The Parties sent their first post-Hearing briefs on 19 November 2021 ["**CPHB I**" and "**RPHB I**"].

129. Thereafter, the Tribunal asked the Parties for an additional clarification in their second post-Hearing Briefs. In particular, the Tribunal invited the Parties to[9]:

> "[…] provide additional briefing on whether there is or has been any law enforcement and/or parliamentary investigation into the privatization of the energy sector in Ukraine between 2012 and 2014, and especially with respect to the 'Akhmetov Group', or DTEK Krymenergo in particular".

130. By letters of 10 and 13 December 2021, Claimant and Respondent, respectively, requested leave to submit new evidence regarding this issue. The Parties only disagreed on the production of one category of evidence offered by Respondent, which Claimant considered unreliable and prejudicial for Claimant.

131. In its decision A23 the Tribunal admitted all the evidence proposed by the Parties into the record, finding that it would otherwise be pre-judging its decision on the evidence.

132. The Parties sent their second post-Hearing briefs on 17 December 2021 ["**CPHB II**" and "**RPHB II**"].

133. With its Second Post-Hearing Brief Respondent purported to introduce 49 new exhibits responsive to the Tribunal's communication A22. Thereafter, Claimant identified 21 out of 49 Respondent's new exhibits as being allegedly "non-responsive" and requested the Tribunal to decline their admission. Respondent, in turn, asked that Claimant's motion be denied. In communication A25 the Tribunal informed the Parties that it would make a decision on the admissibility of the 21 exhibits in its future award. The Tribunal's decision can be found in section VI.6.3.1A.c *infra*.

134. The Parties submitted their statements of costs on 21 January 2022 ["**C SofC**" and "**R SofC**"].

[9] Tribunal's communication A22, para. 3.

11. OTHER INCIDENTS AND CLOSING OF HEARINGS

A. Request for change of place of arbitration

135. On 23 August 2022, Respondent submitted a request to move the place of arbitration from The Hague (Netherlands) to Paris (France) or an alternative jurisdiction [Dubai (UAE), Cairo (Egypt) or Beirut (Lebanon)]. Claimant objected to this request, asking the Tribunal to maintain The Hague as the place of arbitration. Each of the Parties filed two further submissions on the issue.

136. By decision A30 dated 11 October 2022, the Tribunal decided to reject Respondent's request, after finding that:

- Arbitral practice shows that moving the arbitral seat is an *ultima ratio* measure, where there is no other way to guarantee the integrity of the arbitration, the enforceability of the award or the parties' due process rights;

- There was no evidence that the Dutch legal and judicial system was unable to guarantee Respondent's due process rights, in the form of appropriate legal representation before the Dutch Courts – and therefore no reason that would justify moving the place of arbitration.

B. *Naftogaz* final award

137. On 9 May 2023, the Tribunal invited the Parties to submit any further awards or judgments, including separate opinions, delivered after the last round of written submissions, which might be useful to the Tribunal before closing the proceedings and adjudicating the case.

138. On 24 and 25 May 2023, both Parties agreed that the final award in the *Naftogaz* case, together with the dissenting opinion, were relevant to the Tribunal's decisions in the present case. The Tribunal asked the PCA Registry for help to obtain NJSC Naftogaz's consent to the provision of the final award to the record.

139. On 27 June 2023, Claimant filed a copy of the *Naftogaz* final award[10] (together with a correction to the final award and a dissenting opinion), after Naftogaz initiated enforcement proceedings in the United States, which resulted in the final award becoming public.

C. Verbal Note

140. On 12 September 2023, Respondent addressed a letter to the Tribunal, seeking leave to submit a copy of the Verbal Note addressed by the Ministry of Foreign Affairs of the Russian Federation to the Ministry of Foreign Affairs of Ukraine on 21 August 2023 ["**Verbal Note**"].

141. Respondent argued that the Verbal Note was a "development [that] should be brought to the attention of the Tribunal", and that it "believes that the Verbal Note is self-evidencing, and no Parties' submissions are required […]". Claimant, in turn,

[10] **Doc. CLA-142**, *Naftogaz (Final Award)*.

objected to the admission of the Verbal Note into the record on the basis of relevance and because it is "an unsolicited substantive filing that is not provided for in the procedural calendar of this case".

142. On 26 September 2023, the Tribunal authorized Respondent to produce the Verbal Note, considering that it was a novel document, that could not previously have been marshalled by Russia. The Tribunal noted that it would advise the Parties if further submissions were necessary, after it had the opportunity to review the contents of the Verbal Note.

143. The Verbal Note reads as follows[11]:

> "Ministry of Foreign Affairs of the Russian Federation on behalf of the Russian Federation notifies of the following.
>
> The Agreement between the Government of the Russian Federation and the Cabinet of Ministers of Ukraine on the Encouragement and Mutual Protection of Investments of 27 November 1998, shall apply to legal relations arising out of investments made in accordance with the legislation of the Russian Federation in the territory of Donetsk People's Republic, Lugansk People's Republic, Zaporozhye region and Kherson region, including but not limited to for the purposes of gaining profits, by investor of the Contracting Party, from the date following the accession of the mentioned territories to the Russian Federation and constitution of new entities therein, provided investments of investors registered on the territories of new entities of the Russian Federation are protected in Ukraine.
>
> Further, the Russian Federation confirms that the Agreement shall apply similarly to the Republic of Crimea and federal city of Sevastopol".

144. On 23 October 2023, Respondent informed the Tribunal that it had received a Note of the Embassy of Ukraine in the Republic of Belarus dated 7 September 2023 in response to the Verbal Note. Respondent offered to submit this Note into the record, should the Tribunal deem it helpful, while Claimant argued it was too late for additional documents to be considered by the Tribunal. On 30 October 2023, the Tribunal confirmed that it was sufficiently briefed and saw no need to obtain the Note of the Embassy of Ukraine.

145. The Parties did not request, and, in view of this, the Tribunal did not consider necessary, to have further submissions on this issue.

* * *

146. On 30 October 2023, the Tribunal declared the proceedings closed, in accordance with Article 29(1) of the UNCITRAL Rules.

[11] Verbal Note submitted by Respondent on 26 September 2023, as per the Tribunal's instructions in communication A36.

12. DEPOSITS

147. By letter dated 1 November 2018, the PCA invited the Parties, on behalf of the Tribunal, to pay the sum of USD 400,000 (USD 200,000 from each Party) to establish the deposit on costs in accordance with Article 41(1) of the UNCITRAL Rules and paragraph 13(a) of PO 1 by 14 November 2018. On 26 November 2018, the PCA invited each Party to provide the remittance advice confirming payment of its share of the deposit.

148. By letter dated 12 December 2018, the PCA informed the Parties, on behalf of the Tribunal, that unless one or another of the Parties made the payment of the initial deposit by 17 December 2018, the Tribunal would proceed to suspend the proceedings.

149. On 17 December 2018, Claimant paid the sum of USD 400,000, representing its share and Respondent's share of the initial deposit (given that Respondent was initially not participating in the proceedings).

150. On 30 April 2019 (that is, after Respondent had indicated its intention to participate in the proceedings), Respondent requested an extension of the deadline set forth in PO 3 for the payment of Respondent's share of the initial deposit. On 1 May 2019, the Tribunal granted Respondent's request and invited it to make the requested payment by 20 May 2019.

151. On 20 May 2019, Respondent advised that "the necessary budgetary procedures ha[d] not been completed yet" and requested a further extension to make the required payment in the course of the week commencing 27 May 2019.

152. On 29 May 2019, Respondent paid the sum of USD 200,000, representing Respondent's share of the initial deposit.

153. On 6 August 2019, the PCA reimbursed USD 200,000 to Claimant, representing Claimant's original payment of the initial deposit on behalf of Respondent.

154. By letter dated 9 October 2019, the PCA invited the Parties, on behalf of the Tribunal, to make a supplementary deposit of USD 400,000 (USD 200,000 from each Party).

155. On 6 November 2019, Claimant paid the sum of USD 200,000, representing Claimant's share of the supplementary deposit requested on 9 October 2019.

156. On 31 December 2019, Respondent paid the sum of USD 200,000, representing Respondent's share of the supplementary deposit requested on 9 October 2019.

157. By letter dated 4 June 2020, the PCA invited the Parties, on behalf of the Tribunal, to make a supplementary deposit of USD 800,000 (USD 400,000 from each Party) by no later than 6 July 2020. On 5 June 2020, the PCA corrected the date of payment specified in its letter dated 4 June 2020 and invited the Parties to make the supplementary deposit by 19 June 2020.

158. On 5 June 2020, Respondent informed the Tribunal that it would not be "possible for Respondent to comply with the two-week deadline for the payment of its portion of the deposit" due to complex budgetary proceedings and the COVID-19 pandemic. Respondent requested that the Tribunal (i) extend the deadline for the deposit payment until 19 July 2020; and (ii) provide an approximate breakdown of fees and expenses included in the requested deposit payment.

159. On 8 June 2020, Claimant indicated that (i) it agreed that it would be helpful to see a breakdown of the fees and expenses included in the supplementary deposit payment; and, (ii) "[c]onsistent with the principle of equality of the parties", it expected that any new deadline granted to Respondent would also apply to Claimant.

160. On 9 June 2020, the Tribunal (i) granted Respondent an extension until 19 July 2020 for the payment of the supplementary deposit; (ii) invited Claimant to confirm that it would make the requested payment by 19 June 2020, noting, inter alia, that, if no payment was received by such date, the Tribunal would need to reschedule the Hearing (at the time scheduled for 28 June to 5 July 2020); and (iii) circulated an interim statement of account and a breakdown of estimated fees and expenses for the Parties' information.

161. On 12 June 2020, Claimant informed the PCA that the supplementary deposit of USD 400,000 might be completed "a day or two after the 19 June [2020] deadline, but in any event the funds [would] be received well in advance of the beginning of the [H]earing".

162. On 16 June 2020 – after Respondent argued that Mr. Alexandrov should resign in light of his new disclosure – Respondent informed the Tribunal that it would put on hold the payment of the supplementary deposit of USD 400,000.

163. By letter dated 18 June 2020, Claimant informed the Tribunal that in view of the Tribunal's decision to postpone the Hearing in PO 13, Claimant had suspended payment of the supplementary deposit of USD 400,000.

164. By letter dated 25 August 2020, the PCA invited the Parties, on behalf of the Tribunal, to make a supplementary deposit of USD 250,000 (USD 125,000 from each side) by 24 September 2020.

165. By letter dated 24 September 2020, Respondent requested a three-week extension of the deadline to make the supplementary deposit – which was granted by the Tribunal on 25 September 2020.

166. On 25 September 2020, Claimant paid the sum of USD 125,000, representing Claimant's share of the supplementary deposit requested on 25 August 2020.

167. On 12 October 2020, Respondent paid the sum of USD 125,000, representing Respondent's share of the supplementary deposit requested on 25 August 2020.

168. By letter dated 5 July 2021, the PCA invited the Parties, on behalf of the Tribunal, to make a supplementary deposit of USD 400,000 (USD 200,000 from each side) by 5 August 2021.

169. On 8 July 2021, Respondent requested (i) an interim statement of account; and (ii) an extension of the deadline to pay its share of the supplementary deposit until 5 October 2021.

170. On 22 July 2021, the Tribunal (i) circulated an interim statement of account; and (ii) extended the deadline for payment of the supplementary deposit to 5 October 2021.

171. On 8 October 2021, Claimant paid the sum of USD 200,000, representing Claimant's share of the supplementary deposit requested on 5 July 2021.

172. By letter dated 5 November 2021, the PCA noted that it had not yet received Respondent's share of the deposit requested in July 2021, but that it understood that this was purely due to a clerical error and that payment was anticipated to be made shortly. Respondent was further requested to advise the Tribunal and the PCA as to the date on which it expected to make payment of the outstanding amount. Separately, and both bearing in mind the expense associated with the Hearing and in order to permit the Tribunal to move forward with its deliberations and drafting, the PCA invited the Parties, on behalf of the Tribunal, to make an additional supplementary deposit of USD 500,000 (USD 250,000 from each side) by 6 December 2021.

173. On 10 November 2021, Respondent (i) confirmed that payment of its share of the supplementary deposit requested on 5 July 2021 was expected to be made on 12 November 2021; and (ii) requested an extension until 31 January 2022 to pay its share of the additional supplementary deposit requested on 5 November 2021.

174. On 16 November 2021, Respondent paid the sum of USD 200,000, representing Respondent's share of the supplementary deposit requested on 5 July 2021.

175. On 22 November 2021, the Tribunal (i) encouraged Respondent to make the supplementary deposit requested on 5 November 2021 as soon as practicable, and in any event by 31 January 2022; and (ii) requested Claimant to pay its share of the supplementary deposit by the deadline originally indicated (i.e., 6 December 2021) or sooner, should this be practicable, in order to avoid any disruption to the Tribunal's ongoing work.

176. On 30 November 2021, Claimant indicated that it was not possible for it to make the requested payment before the end of the calendar year due to "certain internal budgetary constraints", and requested to be permitted to pay its share of the supplementary deposit on the same terms as Respondent.

177. On 2 December 2021, the Tribunal granted Claimant's request to be permitted to pay its share of the supplementary deposit by 31 January 2022.

178. On 4 February 2022, Claimant paid the sum of USD 250,000, representing Claimant's share of the supplementary deposit requested on 5 November 2021.

179. On 10 February 2022, and further to a request for an update, Respondent informed that "a clerical error had occurred in the process of preparing the payment, which delayed the process", and that it was making its best efforts to effectuate the payment of its share of the supplementary deposit as soon as possible.

180. On 15 February 2022, the Tribunal requested Respondent to take steps to effect the deposit requested on 5 November 2021 as soon as possible. Respondent was further requested to indicate the date by which the transfer for the outstanding amounts should be expected. On 18 February 2022, Respondent indicated that it expected that the payment would be effectuated "in 2-3 weeks".

181. On 20 April 2022, the Tribunal noted that the PCA had not received Respondent's share of the supplementary deposit requested on 5 November 2021, and invited Claimant, pursuant to Article 41(4) of the UNCITRAL Rules, to make a substitute payment of Respondent's share (*i.e.*, USD 250,000) as soon as practicable, in order to avoid any disruption to the Tribunal's ongoing work on the preparation of its decision. The Tribunal clarified that this was not intended to relieve Respondent of its obligation to make payment of the requested supplementary deposit, and that it maintained its request for Respondent to do so as soon as possible.

182. On 6 May 2022, Respondent paid the sum of USD 250,000, representing Respondent's share of the supplementary deposit requested on 5 November 2021. Accordingly, on the same day, the Tribunal's invitation for Claimant to make a substitute payment of Respondent's share was rescinded.

183. By letter dated 14 August 2023, the PCA invited the Parties, on behalf of the Tribunal, to pay a final supplementary deposit of USD 430,000 (USD 215,000 from each side) by 13 September 2023.

184. On 18 August 2023, Claimant requested that a breakdown of expenses against income be provided supporting the request for a final supplementary deposit.

185. On 22 August 2023, the PCA, on behalf of the Tribunal, circulated an indicative accounting underpinning the request for a final supplementary deposit.

186. On 8 September 2023, the PCA invited Respondent, on behalf of the Tribunal, to make a deposit of EUR 210,784 (in lieu of USD 215,000), should Respondent wish to avail itself of the option to make the final supplementary deposit in euros, rather than in dollars.

187. On 12 September 2023, Claimant paid the sum of USD 215,000, representing Claimant's share of the final supplementary deposit requested on 14 August 2023.

188. On 25 September 2023, and further to a request for an update, Respondent informed that "internal procedures" had been initiated to make the supplementary deposit in the alternative euro amount, confirming that it remained "fully dedicated" to the

payment of its share of the deposit and noting that it anticipated that the payment process "may take up to 2 months".

189. On 4 October 2023, the PCA, on behalf of the Tribunal, advised that the Tribunal's award was substantially ready for issuance; noting that, should Claimant wish to avail itself of the option to make a substitute deposit of USD 215,000 in lieu of Respondent, the Tribunal would proceed to issue its award as soon as it was finalized.

190. On 31 October 2023, Claimant paid the sum of USD 215,000, representing Respondent's share of the final supplementary deposit requested on 14 August 2023.

IV. FACTUAL BACKGROUND

191. As of January 2015, Krymenergo operated the power distribution grid system[12] and distributed electricity[13] on the Crimean Peninsula (with the exception of the grid systems of the City of Sevastopol and Shelkino, which, starting from 1995 and 1996 respectively, were operated by separate entities).

192. Claimant serviced a territory of approximately 27,000 square kilometers, providing electricity to more than 780,000 consumers. Its operations in Crimea were organized into 23 district electric networks and two municipal electric networks[14]. These operations were supported by a number of assets in Crimea, including real property[15], equipment and movable property[16], intangible assets[17], such as licenses and contracts, and cash and securities[18].

193. Between 2006 and 2012, the "**DTEK Energy Group**", a group of companies beneficially owned by Mr. Rinat Akhmetov, purchased a total of 57.6% of the capital of Krymenergo[19].

194. On 27 February 2014, Russian military forces occupied the building of the State Council of Crimea (*i.e.*, the regional legislature) in Simferopol[20].

195. On 16 March 2014, an independence referendum was held[21], and the next day the State Council of Crimea enacted Resolution No. 1745-6/14, declaring the Republic of Crimea an independent state ["**Independence Resolution**"][22].

196. On 18 March 2014, the Russian Federation entered into the Treaty Between the Russian Federation and the Republic of Crimea on the Admission to the Russian Federation of the Republic of Crimea and the Formation of New Constituent Entities Within the Russian Federation ["**Annexation Treaty**"][23]. This incorporated Crimea and the Federal City of Sevastopol into the Russian Federation as two new subjects and extended the application of Russian law to the region[24].

197. On 21 March 2014, the Russian Federation adopted a Federal Constitutional Law "on the Admission of the Republic of Crimea to the Russian Federation, and the Formation of the New Constituent Entities with the Russian Federation – the Republic of the Crimea and the Federal City of Sevastopol" ["**Incorporation Law**"

[12] R II, para. 22; C I, para. 44.
[13] C I, para. 12; Sokolovskiy WS I, para. 19.
[14] C I, para. 18; Maslov WS, para. 20; **Doc. CE-1**, p. 74.
[15] Maslov WS, paras. 20-23; **Doc. CE-1**, pp. 2, 9, 67, 74; **Doc. CE-37**.
[16] Belyaev WS, paras. 11, 21.
[17] Belyaev WS, paras. 21-22; **Docs**. **CE-38**, **CE-39**, **CE-40** and **CE-1**, pp. 69-70.
[18] Belyaev WS, para. 21; **Docs**. **CE-41** and **CE-42**.
[19] **Docs**. **RE-68** and **CE-11**.
[20] C I, para. 25. See also **Doc. CE-43**, paras. 155-158 and **Doc. CE-44**.
[21] **Docs. CE-45** and **CE-46**.
[22] **Doc. CE-46**.
[23] **Doc. CE-48**; Maggs ER, para. 36.
[24] **Doc. CE-48**, Articles 2 and 9(1); Maggs ER, paras. 38, 43.

or "**Law No. 6-FKZ**"][25]. Both the Annexation Treaty (in its Article 6) and the Law No. 6-FKZ provided a transition period until 1 January 2015 for all rights and duties in the Republic of Crimea to be integrated into the Russian legal system.

198. In accordance with the Incorporation Law, the Russian Federation took further steps to integrate Crimea into the Russian state: Russia introduced the Ruble as the official currency in Crimea; the Ministry of Justice of the Russian Federation formed the Federal Bailiff Services of the Republic of Crimea, which was tasked with enforcing decisions of Crimea's new courts; and the Ministry of Internal Affairs of the Russian Federation established a regional operation in Crimea[26].

199. On 30 April 2014, the State Council of Crimea issued Resolution No. 2085-6/14, expropriating certain properties within the Republic of Crimea, including Ukrainian state-owned property and "abandoned properties" ["**Expropriation Resolution**"][27].

200. On 26 May 2014, Claimant restructured its corporate presence in Crimea, moving its corporate seat to Kyiv, Ukraine, and registering a branch office in Crimea [the "**Branch**"][28].

201. On 29 May 2014, the Russian tax authorities issued a certificate registering Claimant as a foreign entity doing business in Crimea[29].

202. On 11 August 2014, the Russian government issued a Decree on the regulation of electricity in Crimea, which, among other things, provided that only designated entities were permitted to distribute electricity in Crimea[30].

203. On 29 August 2014, the Russian authorities in Crimea designated Claimant's Branch as an authorized supplier of electricity in Crimea[31].

204. On 21 October 2014, the Russian authorities approved Claimant's investment program, committing to compensate Claimant for expenses incurred in a number of planned maintenance and upgrade projects[32]. On 27 October 2014 and 19 December 2014, the Russian authorities in Crimea set regulated tariffs for the supply of electricity by the Branch[33].

205. On 4 December 2014, Russia's Ministry of Justice issued a certificate of accreditation to the Branch[34].

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[25] **Doc. CE-49**; Maggs ER, paras. 43-44.
[26] **Doc. CE-49**; Maggs ER, paras. 56-58; **Docs. CE-50**, **CE-51**, **CE-52**.
[27] **Doc. CE-80**, Article 1.
[28] **Docs. CE-60**, **CE-61**, **CE-62**, **CE-63**, **CE-64**.
[29] **Doc. CE-66**.
[30] **Doc. CE-67**. See also, Belyaev WS, para. 16.
[31] **Doc. CE-68**.
[32] **Doc. CE-71**.
[33] **Docs. CE-69** and **CE-70**.
[34] Maggs ER, paras. 83-84.

206. On 21 January 2015, the State Council amended the Expropriation Resolution to add to the list of expropriated properties all of Claimant's tangible and intangible assets in Crimea ["**Amendment Resolution**"][35]. Also on 21 January 2015, the Crimean Council of Ministers adopted a regulation placing Krymenergo's movable and immovable property in Crimea under the control of a separate company known as Russian Krymenergo[36]. On the same day, employees of Russian Krymenergo, accompanied by uniformed security personnel, entered the Branch office[37].

[35] **Doc. CE-79**; Maggs ER, para. 92.
[36] C I, para 56; Maggs ER, paras. 94-95; **Doc. CE-81**.
[37] C I, para. 47; Sokolovskiy WS I, para. 32; Belyaev WS, para. 24.

V. REQUESTS FOR RELIEF

1. CLAIMANT'S REQUEST FOR RELIEF

207. Claimant seeks the following relief[38]:

> "As a result of the Russian Federation's breaches of the Treaty, DTEK Krymenergo has been completely deprived of its investment without payment of any compensation. For the reasons provided in this Statement of Claim, its Reply and this Pre-Hearing Summary, DTEK Krymenergo requests that this Tribunal:
>
> a. adjudge and declare that the Tribunal has jurisdiction to hear and adjudicate DTEK Krymenergo's claims against the Russian Federation;
>
> b. adjudge and declare that the Russian Federation has breached Articles 2, 3, and 5 of the BIT;
>
> c. award DTEK Krymenergo damages in the amount of not less than US$ 421,198,000, plus a gross-up for Ukrainian taxes on the award and pre- and post-award interest compounded at Russia's sovereign borrowing rate;
>
> d. award DTEK Krymenergo its costs and legal fees in accordance with Article 40 of the UNCITRAL Rules; and
>
> d. accord DTEK Krymenergo such other relief as it deems appropriate".

2. RESPONDENT'S REQUEST FOR RELIEF

208. Respondent seeks relief as follows[39]:

> "For all of the foregoing reasons, the Russian Federation respectfully requests that this Tribunal:
>
> (1) Dismiss Claimant's claims on the ground that the Tribunal lacks jurisdiction and/or Claimant's claims are inadmissible.
>
> (2) In the alternative, dismiss Claimant's claims on the merits in their entirety.
>
> (3) In the further alternative, find that Claimant is not entitled to the damages it seeks.
>
> (4) Order Claimant to pay all costs and expenses incurred by the Russian Federation in connection with this arbitration plus interest, to be quantified at the appropriate time upon the separate submissions of the Parties.

[38] CPreHS, para. 341; CPHB I, para. 202. See also C I, para. 177; C II, para. 152; CPHB II, para. 70.
[39] RPHB I, para. 298. See also RPreHS, para. 337; RPHB II, para. 87; R II, para. 1248; R I, paras. 404-406.

(5) Grant any further relief against Claimant that the Tribunal deems appropriate".

VI. JURISDICTION AND ADMISSIBILITY

209. Under Article 9, in connection with Articles 1(1), 1(2) and 1(4) of the BIT, the Tribunal has jurisdiction over Claimant's claims provided that the following requirements are met:

- Claimant must qualify as a Ukrainian "investor";
- There must be a dispute in connection with an "investment" between Claimant and Respondent;
- Claimant must have sent a written notice of dispute, accompanied by detailed comments to Respondent;
- Claimant and Respondent must have endeavored to settle the dispute through negotiations, if possible; and
- At least six months must have passed between the notice of the dispute and the commencement of the arbitration.

210. Russia raises four jurisdictional objections and one admissibility objection, which, Claimant submits, should all be dismissed. The Tribunal will address these objections in the subsequent sections (**VI.2** through **VI.6**). For each of these objections, the Tribunal will start by summarizing Respondent's position, followed by Claimant's position and then make its decision.

211. However, before doing so, the Tribunal must address certain preliminary matters (**VI.1**).

VI.1. PRELIMINARY MATTERS

1. THE BIT REMAINS IN FULL FORCE AND EFFECT

212. Notwithstanding the existence of an armed conflict between Ukraine and the Russian Federation, as of the date of this Award the BIT between Ukraine and the Russian Federation remains in full force and effect: the Treaty has not been declared invalid, it has not been terminated, nor has its operation been suspended[40].

213. This is consistent with the general principle of international law that the existence of an armed conflict does not *ipso facto* terminate or suspend the operation of treaties between the parties to the conflict[41].

214. A State intending to terminate or withdraw from a treaty to which it is a party, or to suspend the operation of that treaty as a consequence of an armed conflict, must notify the other party to the treaty[42]. To date, the Parties have not drawn the Tribunal's attention to any such notification either by the Russian Federation or by Ukraine.

2. THE SOVEREIGNTY OF CRIMEA IS NOT IN DISPUTE

215. Russia says that, in international law, a court or tribunal only has jurisdiction over a State to the extent that such State has expressly consented[43]. For this reason, a court or tribunal cannot exercise jurisdiction over a claim requiring the prior determination of a necessary predicate issue over which it lacks jurisdiction. Neither Russia nor Ukraine has consented to any BIT tribunal attempting any determination of Crimea's status – a necessary prerequisite to the adjudication of this dispute, but one which implies sovereignty and therefore is outside this Tribunal's jurisdiction, preventing it from exercising jurisdiction[44].

216. Claimant disagrees and avers that this case does not present any question pertaining to the sovereignty over Crimea[45].

217. The Tribunal, by majority (the President and Mr. Rowley), agrees with Claimant.

218. This case does not involve a decision regarding the sovereignty of Crimea – a question on which Ukraine and the Russian Federation hold opposing views and which squarely falls outside the remit of this BIT Tribunal. This Tribunal is not called upon to rule on the legal status of Crimea as between two sovereigns, but on a claim which derives directly from the BIT: whether the assets owned by Claimant

[40] The Verbal Note sent by the Russian Federation to Ukraine on 21 August 2023 does not affect the operation of the BIT; rather it confirms that, in the opinion of the Russian Federation, the Treaty remains in full force and effect.
[41] International Law Commission, *Draft Articles on the Effects of Armed Conflict on Treaties*, Article 3.
[42] International Law Commission, *Draft Articles on the Effects of Armed Conflict on Treaties*, Article 9(1).
[43] R I, para. 84.
[44] RPreHS, paras. 81, 126; RPHB I, paras. 3, 22-24.
[45] CPreHS, para. 99.

in Crimea and allegedly impaired by Russia were located, for purposes of the BIT (and only for those purposes), in the territory of the Russian Federation.

Case law

219. The case law confirms the Tribunal's conclusion: multiple investment tribunals have addressed investment treaty claims pertaining to Crimea, without making any determination concerning sovereignty[46].

220. Russia cites to an award under the United Nations Convention on the Law of the Sea ["**UNCLOS**"], in the dispute concerning coastal rights in the Black Sea, Sea of Azov and Kerch Strait (*Ukraine v. the Russian Federation*)[47], where the tribunal considered[48]:

> "[…] that the question as to which State is sovereign over Crimea, and thus a 'coastal State' within the meaning of several provisions of the Convention invoked by Ukraine, is a prerequisite to the decision of the Arbitral Tribunal on a significant part of the claims of Ukraine",

with the consequence that the arbitral tribunal lacked jurisdiction over certain of Ukraine's claims[49]:

> "[…] the Arbitral Tribunal concludes that pursuant to Article 288, paragraph 1, of the Convention, it lacks jurisdiction over the dispute as submitted by Ukraine to the extent that a ruling of the Arbitral Tribunal on the merits of Ukraine's claims necessarily requires it to decide, expressly or implicitly, on the sovereignty of either Party over Crimea".

221. The UNCLOS award is, however, inapposite, because in that case the tribunal was called upon to decide sovereign rights of Russia and Ukraine regarding coastal waters. This Tribunal, however, is not asked and does not have to make any findings on sovereignty; it need only determine whether the allegedly impaired investment is located, at the time of impairment, in the territory controlled by the Russian Federation.

222. Russia also invokes the International Court of Justice ["**ICJ**"] decision in *Monetary Gold*[50], which found that international tribunals cannot exercise jurisdiction if a non-party State's legal interest[51]:

> "[…] would not only be affected by a decision but would form the very subject-matter of the decision".

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[46] **Doc. CLA-106**, *Naftogaz (Partial Award)*, para. 161; **Doc. CLA-3**, *Belbek*, para. 158; **Doc. CLA-8**, *Stabil*, para. 128; **Doc. CLA-4**, *Ukrnafta*, para. 132
[47] **Doc. RLA-129**, *Coastal State rights (Ukraine v. Russian Federation)*.
[48] **Doc. RLA-129**, *Coastal State rights (Ukraine v. Russian Federation)*, para. 154.
[49] **Doc. RLA-129**, *Coastal State rights (Ukraine v. Russian Federation)*, para. 197.
[50] **Doc. RLA-49**, *Monetary Gold*.
[51] **Doc. RLA-49**, *Monetary Gold*, p. 32.

223. In that case, the ICJ found that it did not have jurisdiction, in the absence of the consent by and participation of Albania, to adjudicate the submissions made by Italy, because[52]:

> "[w]here, as in the present case, the vital issue to be settled concerns the international responsibility of a third State [Albania], the Court cannot, without the consent of that third State, give a decision on that issue binding upon any State, either the third State, or any of the parties before it".

224. These principles, however, are irrelevant for the present case. The present dispute is between a Ukrainian corporation and the Russian Federation and only relates to the alleged impairment of assets owned by that Ukrainian corporation in the territory of the Russian Federation, in violation of the provisions of the BIT. It does not affect a "vital issue" concerning "the international responsibility" of Ukraine.

[52] **Doc. RLA-49**, *Monetary Gold*, p. 33.

VI.2. FIRST JURISDICTIONAL OBJECTION: WAS THE INVESTMENT MADE IN THE "TERRITORY" OF THE RUSSIAN FEDERATION?

225. Article 1(4) of the BIT provides the following definition of "Territory":

> "Article 1: Definitions
>
> […]
>
> (4) 'Territory' shall denote the territory of the Russian Federation or the territory of Ukraine (**as well as**)/[**and also**] their respective exclusive economic zone and the continental shelf as defined in conformity with international law". [Claimant's translation in round[53], Respondent's in square brackets[54]; emphasis by the Tribunal]

226. The Parties' linguistic experts agree that the Russian conjunction *a takzhe* and its Ukrainian equivalent *a takozh* in Article 1(4) of the BIT have the same meaning, *i.e.*, "and also" or "as well as", which can be used interchangeably[55].

1. RESPONDENT'S POSITION

227. Respondent's primary argument is that the BIT is not applicable to Crimea since there is a territorial dispute between the Russian Federation and Ukraine regarding the status of Crimea.

228. Respondent denies that the term "territory" as used in the BIT has essentially a geographic meaning encompassing areas over which a State exercises effective control; in Russia's submission, the term is limited to "sovereign territory". The Tribunal could only decide that Crimea is Russian territory on the basis that Russia enjoys there all sovereign rights, powers and functions. If Crimea is Russian territory, it is not Ukrainian territory, and the BIT only contemplates that a place lies in the territory of Russia or in the territory of Ukraine. It follows that if Russia has sovereignty, Ukraine does not, and if Russia has sovereign rights, Ukraine does not[56].

229. Respondent advances four reasons to support its position that "territory" means "sovereign territory"[57]:

1.1 ORDINARY MEANING

230. Russia says that under international law the ordinary meaning of "territory of" a State is limited to sovereign territory. Article 29 of the Vienna Convention on the

[53] **Doc. CLA-1**.
[54] **Doc. RLA-127**.
[55] Kurokhtina ER, para. 38; Tyulenev ER, para. 19; Danylenko ER, paras. 37-38.
[56] RPreHS, para. 85.
[57] RPHB I, para. 11.

Law of Treaties ["**VCLT**"] confirms that the term "entire territory" refers to the sovereign territory[58]. Dictionaries are of limited use in ascertaining ordinary meaning, but the definitions of territory relied on by Claimant denote sovereign territory[59].

231. The language of Article 1(4) of the BIT leads to the same conclusion[60]:

- The formulation "the territory of" gives rise to a strong presumption that it only means sovereign territory of the State at issue;

- The use of the genitive preposition "of", and the possessive adjective "its" throughout the BIT are indicative of the meaning "sovereign territory";

- The BIT uses the disjunctive conjunction "or" ("the territory of the Russian Federation *or* the territory of the Ukraine"), because the two notions are mutually exclusive: an area cannot be both the territory of Russia and Ukraine at the same time; and

- The exclusive economic zones and the continental shelf do not form part of the State's sovereign territory; when the Contracting Parties wished to extend the definition of territory beyond sovereign territory, they did so explicitly.

232. The term "the territory of" is not a generic term. Where this formulation is used in international law, there is a very strong presumption that it means "sovereign territory"[61].

1.2 CONTEXT

233. The BIT's broader provisions evidence the meaning of "the territory of" as only its sovereign territory. Pursuant to Article 1(5) of the BIT, each Contracting Party has competence to legislate on its territory to the exclusion of the other Contracting Party[62]. Other powers ascribed by the BIT are also quintessentially sovereign, e.g.[63]:

- Power to exploit natural resources – Article 1(1)(d);

- Power to limit the activity of foreign investors – Article 3(2);

- Power to conclude treaties with other sovereign States over the territory – Article 3(3);

- Power to expropriate – Article 5(1); and

[58] RPHB I, para. 12.
[59] RPHB I, para. 13.
[60] RPHB I, para. 14.
[61] RPHB II, paras. 2, 4.
[62] RPreHS, para. 107.
[63] RPreHS, para. 108.

- Power to tax – Article 7(1).

1.3 OBJECT AND PURPOSE

234. The BIT's object and purpose confirm that the BIT cannot operate as per its terms in relation to Crimea[64].

235. Respondent submits that when two States conclude a BIT, they are necessarily in agreement on what constitutes their respective territories and which of them is sovereign over that territory – failing which there will be a substantive disagreement between the Contracting Parties[65].

236. In the present case there is a fundamental disagreement between the Russian Federation and Ukraine over the status of Crimea:

- Russia says that Crimea is Russian sovereign territory, Crimea-based legal entities are Russian, Russian law applies and the legality of investments is determined by Russian law[66];

- While Ukraine defends that Crimea is Ukrainian sovereign territory, Crimea-based legal entities are Ukrainian, the Russian Federation is merely an occupier of Crimea, Russia has no power to legislate in Crimea, the actions of Russian State entities in Crimea are null and void, Ukraine has sovereign power to legislate over Crimean territory (and does so) and its courts still have jurisdiction over issues arising in Crimea[67].

237. It follows that the BIT cannot apply to Crimea in the current situation, where there is no agreement between the Contracting Parties as to the territorial status of Crimea. Without mutual sovereign recognition, it is impossible to know[68]:

- Whether an investment made in Crimea was made in the territory of the Russian Federation or of Ukraine;

- Whether an investor based in Crimea is Russian or Ukrainian;

- Whose law governs the investment; and

- Whether actions of State entities in Crimea are to be judged against Russian or Ukrainian law.

[64] RPHB I, para. 16.
[65] RPHB I, para. 19.
[66] RPHB I, para. 20.
[67] RPHB I, para. 21.
[68] RPHB I, para. 22.

1.4 GOOD FAITH

238. Finally, Russia says that unreasonable or absurd results in interpretation are incompatible with a good faith interpretation[69]. The interpretation that "territory of" refers to territory under effective control leads to manifestly absurd and unreasonable results: the Russian Federation would owe to Ukrainian nationals based, for example, in Kyiv, the BIT's benefits for investments made in Crimea, while Ukraine would owe no BIT protection to Russian nationals based in Crimea having made investments in Kyiv[70]. The result would be the creation of unilateral obligations for Russia, and the very negation of the aims of the BIT, namely mutual economic development[71].

239. It cannot be that Russia consented to arbitrate in situations where there is no mirror obligation incumbent in Ukraine. The obligations of a Contracting Party abate where it is clear that the counterparty will not perform its part[72].

2. CLAIMANT'S POSITION

240. Claimant says that Article 1(4) of the BIT provides a broad definition of territory, which covers areas within a Contracting Party's effective control or jurisdiction. Claimant recalls that in its Opening Statement, Respondent admitted that[73]:

> "[t]he Russian Federation's position about Crimea is that Crimea is Russian sovereign territory".

241. Claimant adds that if Russia believes that Crimea is part of its sovereign territory, it stands to follow that Russia exercises effective jurisdiction and control over Crimea[74]. Claimant adds that after the annexation of Crimea, Ukraine has issued a declaration to several of its treaties acknowledging that it does not currently exercise effective control over Crimea and that the Russian Federation has assumed effective control[75].

2.1 ORDINARY MEANING

242. Claimant submits that the ordinary meaning of territory in Article 1(4) of the BIT is apparent from Russian, Ukrainian and English dictionaries and extends to areas under a Contracting Party's effective control and jurisdiction[76].

243. The Russian Federation and Ukraine's treaty practice shows that where each Contracting Party has intended to limit the definition of territory, each has done so explicitly. When, in its pre-2014 practice, Ukraine intended to define territory as

[69] RPHB I, para. 33.
[70] RPHB I, para. 31.
[71] RPHB I, para. 32.
[72] RPHB II, para. 13.
[73] HT, Day 1, p. 153.
[74] CPHB I, para. 60.
[75] CPHB I, paras. 66-67.
[76] CPHB I, para. 63.

encompassing sovereign territory in investment treaties, it explicitly did so, as seen in BITs with Egypt and Denmark[77]. Meaningfully, the Contracting Parties chose not to reference sovereignty in the Ukraine-Russia BIT[78]. Ukraine deferred to Russia's preferred practice of leaving references to territory open-ended. Where States could have but chose not to adopt a restrictive definition of a treaty term, a narrow interpretation should not be imposed[79].

244. Claimant acknowledges that Crimea was not part of Russia in 1998, when the Treaty was signed, but that does not mean that Crimea cannot be Russian territory under the Treaty today. It is inherent in the generic term "territory" that its content might change over time[80]. Since the ordinary meaning encompasses the entire area within a State's jurisdiction and control, Crimea has been part of either the territory of Ukraine or the Russian Federation for the purposes of the BIT for the BIT's entire duration[81].

245. Claimant adds that Ukraine's post-2014 treaty practice further confirms that Crimea is under the jurisdiction and effective control of the Russian Federation[82], while in BITs negotiated post-annexation, Russia has continued to use substantially similar definitions[83].

2.2 CONTEXT

246. Claimant says that the context of the term territory in Article 1(4) of the BIT also makes clear that it only refers to areas under the effective control or jurisdiction of a Contracting Party. "Territory" includes "exclusive economic zone(s)" and the "continental shelf", areas over which the Contracting States are not sovereign but hold certain sovereign rights[84].

2.3 OBJECT AND PURPOSE

247. In Claimant's submission, the object and purpose of the BIT reinforces the conclusion that "territory" of the Russian Federation includes Crimea for purposes of the BIT. Since the purpose of the BIT, as explained in the preamble, is to create and maintain favorable conditions for mutual investments and create favorable conditions for the expansion of economic cooperation, such purpose would not be served if the Contracting Parties could, while claiming an area as under their jurisdiction, simultaneously disclaim obligations under the BIT over that same territory[85].

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[77] CPHB I, para. 64.
[78] CPHB I, para. 65, referring to **Doc. CLA-4**, *Ukrnafta (Award on Jurisdiction)*, para. 147 and **Doc. CLA-8**, *Stabil (Award on Jurisdiction)*, para. 143.
[79] CPHB I, para. 65.
[80] CPHB I, paras. 71-72, referring to **Doc. CLA-101**, *Aegean Continental Shelf (Greece v. Turkey)* and **Doc. RLA-13**, *Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*.
[81] CPHB I, para. 74.
[82] CPHB I, para. 67, referring to **Doc. CLA-127**, BIT between Ukraine and the OPEC Fund.
[83] CPHB I, para. 68.
[84] CPHB I, para. 69.
[85] CPHB I, para. 70.

2.4 GOOD FAITH

248. Claimant invokes Article 26 of the VCLT to say that Russia's position violates the requirement of good faith and consistency recognized by international law: it is incompatible with good faith for Russia to aver that it has annexed Crimea, yet that its actions in Crimea are not subject to the BIT[86].

2.5 SUPPLEMENTARY MEAN OF INTERPRETATION

249. Claimant says that there is no need to resort to supplementary means of interpretation as the ordinary meaning of the word "territory" is unambiguous – it refers to the occupied territory of a Contracting State. In any event, the supplementary means of interpretation do not prove otherwise. The *travaux préparatoires* show that Ukraine proposed, while discussing the BIT, three definitions of territory which included the word "sovereignty" – like it did in its BITs with other States. But ultimately, the Contracting Parties chose not to include the word sovereignty in the final draft[87].

3. TRIBUNAL'S ANALYSIS

250. This first jurisdictional objection refers to the delimitation of the term "territory", as used in Article 1(4) of the BIT (the text of which has been provided at the beginning of this section) – and which is then used in Articles 2 through 9 and in Article 12 of the BIT.

251. Respondent's argument is two-pronged:

- First, Respondent says that Article 1(4) refers to the "sovereign territory" of the Russian Federation; and

- Then Respondent adds that there is a fundamental dispute between the Russian Federation and Ukraine over the status of Crimea: both say that Crimea forms part of their sovereign territory; this being so, the BIT cannot apply to Crimea, because without mutual recognition it is impossible to know in which territory the investment is made, whether a Crimean investor is Russian or Ukrainian, which laws govern the investment and whether actions of State entities in Crimea are to be judged against Russian or Ukrainian law[88].

252. Claimant disagrees, submitting that the term "territory" refers to territory which is under the effective control of the Russian Federation or of Ukraine and that, at the time when Russia adopted the impugned measures, Crimea was under the control of the Russian Federation.

253. The Tribunal, by majority (the President and Mr. Rowley), considers Claimant's analysis to be correct: the "territory of the Russian Federation" includes all territory which, at the time of the alleged breach of the Treaty, is under the control of the

[86] CPHB I, para. 70.
[87] CPreHS, paras. 95-96.
[88] RPHB I, para. 22.

Russian Federation; there is no dispute that since 2014 Crimea is under the control of the Russian Federation – and the alleged breach occurred in 2015.

3.1 THE PROPER INTERPRETATION OF THE TERM "TERRITORY OF THE RUSSIAN FEDERATION"

254. Under the general rule of treaty interpretation set forth in Article 31 of the VCLT, the Tribunal must be guided "in good faith" by the "ordinary meaning" of the terms, "in their context" and "in light of [the treaty's] object and purpose".

255. All these criteria support the interpretation proposed by Claimant.

A. Ordinary meaning

256. The ordinary meaning of the term "territory" encompasses the entire area within a State's possession or control, over which a government exercises *de facto* jurisdictional powers – irrespective of the question of sovereignty. Black's Law Dictionary, in its 10th edition, confirms this definition by describing territory as[89]:

> "[a] geographical area included within a particular government's jurisdiction; the portion of the earth's surface that is in a state's exclusive possession and control".

257. The treaty practice of both the Russian Federation and Ukraine shows that where each Contracting Party has intended to limit the definition of territory, each has done so explicitly:

- When Ukraine, in its pre-2014 treaty practice, intended to define territory as encompassing "sovereign territory", it explicitly did so, as shown in its BITs with Egypt[90], Lithuania[91], Netherlands[92], Slovak Republic[93], Sweden[94] and Denmark[95], all of which define the "territory" of each Contracting Party as "the territory under its sovereignty";

- Russia's practice was different: it preferred not to tie the term territory to the concept of sovereignty and to leave references to territory open-ended[96].

258. Russia and Ukraine thus had different preferences as regards the definition of territory to be used in their respective BITs. Article 1(4) of the Russia-Ukraine BIT

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[89] **Doc. CE-126**. The Oxford English Dictionary defines the notion of "territory" in a similar fashion: "[t]he extent of the land belonging to or under the jurisdiction of a ruler, state, or group of people" (**Doc. CE-125**, p. 2).
[90] **Doc. CLA-6**, Article 1(4).
[91] **Doc. CLA-91**, Article 1(4).
[92] **Doc. CLA-92**, Article 1(c).
[93] **Doc. CLA-93**, Article 1(4).
[94] **Doc. CLA-94**, Article 1(5).
[95] **Doc. CLA-7**, Article 1(4).
[96] See BITs between URSS/Russian Federation and Lithuania (**Doc. CLA-48**), Netherlands (**Doc. CLA-95**), Slovak Republic (**Doc. CLA-96**) and Sweden (**Doc. CLA-97**).

does not include any reference to "sovereignty"; in accepting this wording, Ukraine deferred to Russia's preferred practice of leaving references to territory open-ended.

259. There is an additional argument: Russia's practice of not referring to "sovereign territory" continued even after the incorporation of Crimea into the Russian Federation. The BIT signed between the Russian Federation and the Kingdom of Bahrein on 29 April 2014 defines "territory of a Contracting Party" as[97]:

> "[…] in case of the Russian Federation, the territory of the Russian Federation as well as its exclusive economic zone and continental shelf as they are defined in the UN Convention on the Law of the Sea".

260. Consequently, under this BIT, Russia extends investment protection to Bahraini investors in Crimea – there is no carve-out provision, stating that investments in Crimea do not enjoy protection, because of any predicate sovereignty issue over the territory.

Russia's counterargument

261. Russia says that the use of the genitive preposition "of", and the possessive adjective "its" throughout the BIT are indicative of the meaning "sovereign territory"[98].

262. The argument is a *non sequitur*: "of" and "its" can refer either to sovereign territory, or to territory under effective control (e.g., when Article 2 says that "[e]ach Contracting Party will encourage investors of the other Contracting Party to make investments in its territory", the defined term "territory" can mean "sovereign territory" or "territory under effective control" – the definition in Article 1 leaves both options available).

263. Respondent adds that the BIT uses the disjunctive conjunction "or" ("the territory of the Russian Federation or the territory of the Ukraine"), because the two notions are mutually exclusive: an area cannot be both the territory of Russia and Ukraine at the same time[99].

264. Again, the argument is not persuasive: it is true, as Russia says, that an area cannot be at the same time protected territory of Russia and of Ukraine; but under the interpretation favored by Claimant and the Tribunal, Crimea only forms part of the territory of the Russian Federation – not of Ukraine (because Ukraine does not exercise control over that territory). Consequently, an investment made in Crimea has been made in the territory of Russia, is ruled by Russian law and the action of State entities in Crimea are to be judged against Russian law.

265. Respondent has also raised the argument that the "contemporaneous meaning" of territory must prevail, with the implication that, since Crimea was not part of Russia

[97] **Doc. CLA-129**, Article 1(d)(i).
[98] RPHB I, para. 14.
[99] RPHB I, para. 14.

in 1998, when the Treaty was signed, Crimea cannot be Russian territory under the Treaty today[100].

266. The Tribunal disagrees: there is no indication that the Contracting Parties, when they signed the BIT, wished to restrict its geographic scope to the territories which, at that time, were under their respective control. To the contrary: the fact that the Contracting Parties did not include a reference to sovereignty is a clear indication that they wished that investments in new territories, which might in the future come under their control, also benefit from Treaty protection. In the Tribunal's opinion, what is relevant is the territory which the Contracting Parties had under their effective control as of the date when the alleged breach of the Treaty occurred.

B. Context

267. The context also supports the interpretation that the term "territory" in Article 1(4) of the BIT refers to areas under the effective control of a Contracting Party. Article 1(4) does not only mention the "territory of the Contracting Parties", but it also includes, within the scope of the Treaty, two other areas:

- The "respective exclusive economic zone", and

- The "continental shelf".

268. Under international law, States do not exercise sovereignty over their "exclusive economic zones" and "continental shelves", but only hold certain sovereign rights with regard thereto[101]. The inclusion of these non-sovereign areas within the definition of "territory" reinforces the conclusion that no connection between protected land area and sovereignty should be required.

269. Russia says that the powers ascribed by the BIT to the Contracting Parties in their respective territories (competence to legislate, to exploit natural resources, to conclude treaties with other sovereigns, to expropriate, to tax, etc.) somehow support its position that territory can only refer to sovereign territory[102].

270. Again, the Tribunal is unpersuaded: the Russian Federation is *de facto* exercising each of these powers in Crimea – with the consequence that Russia's argument in fact provides support to the Tribunal's preferred interpretation (without prejudice to the discussion on which State is sovereign over this territory, which, as discussed above, is not for this Tribunal to adjudicate).

C. Object and purpose

271. The object and purpose of the BIT also support the conclusion that the "territory" of the Russian Federation includes Crimea. As explained in the Preamble, the purpose of the BIT is "to create and maintain favorable conditions for mutual investments". That purpose would not be served if a Contracting Party could, while

[100] RPreHS, para. 88.
[101] RPHB I, para. 14.
[102] RpreHS, paras. 108-109.

claiming an area under its control and sovereignty, simultaneously disclaim obligations under the BIT over that same territory.

272. Respondent submits that when two States conclude a BIT, they are necessarily in agreement on what constitutes their respective territories and which of them is sovereign over that territory – failing which there will be a substantive disagreement between the Contracting Parties[103].

273. The Tribunal agrees that, when the BIT was signed, Russia and Ukraine likely agreed on their respective areas of sovereignty. It is also clear that by now there is a disagreement between both powers whether Crimea is under the sovereignty of one or the other. But the existence of this disagreement does not affect the object and purpose of the BIT: to provide, in the totality of the territory under the control of one Contracting Party, protection to investments by investors from the other Contracting Party.

D. Good faith

274. Article 31(1) of the VCLT requires treaties to be interpreted "in good faith". Article 26 adds that treaties "must be performed by [the parties] in good faith".

275. The principle of good faith in the interpretation and performance of the BIT does not advance Russia's position.

The position of the Russian Federation

276. Russian legislation affirms that Crimea forms part of Russia's sovereign territory, having been incorporated in March 2014: upon the execution of the Annexation Treaty on 18 March 2014[104] and the decision of the Russian Constitutional Court dated 19 March 2014 that the Annexation Treaty complies with the Russian Constitution[105], a Federal Constitutional Law (approved by the State Duma on 20 March 2014 and by the Federation Council on 21 March 2014) admitted Crimea and Sevastopol to the Russian Federation[106].

277. In the course of these proceedings, the Russian Federation has explicitly reaffirmed that, in its view, Crimea forms part of its sovereign territory. During the Hearing, the Russian Federation averred that[107]:

> "The Russian Federation's position about Crimea is that Crimea is Russian sovereign territory, that legal entities based in Crimea are Russian, their capacity to do business in Ukraine is determined by Russian law, the conditions for lawful foreign investments in Crimea are determined by Russian law".

[103] RPHB I, para. 19.
[104] **Doc. CE-48**.
[105] **Doc. AA-3**.
[106] **Doc. CE-49**.
[107] HT, Day 1, p. 153 (Geisinger).

278. Russia repeated this position in the PHB[108].

The position of Ukraine

279. Ukraine, while denying that Crimea forms part of Russia's sovereign territory, has acknowledged in international instruments that, since 2014, Crimea is "temporarily occupied" by the Russian Federation; for example, the agreement for the protection of investments between Ukraine and the OPEC Fund for International Development, signed in 2017, includes the following footnote[109]:

> "Taking into account that the Autonomous Republic of Crimea and the City of Sevastopol, which are indispensable parts of [Ukraine], are temporarily occupied, provisions of this Agreement do not apply to these temporarily occupied territories unless full jurisdiction of [Ukraine] over these territories is restored".

Discussion

280. The Russian Federation, Ukraine (and Claimant) thus agree that, since 2014, Crimea forms part of the territory which Russia controls – this factual circumstance is accepted by both States. The disagreement refers to the question of sovereignty, since Russia and Ukraine both aver that Crimea forms part of their respective areas of sovereignty.

281. When the VCLT requires that treaties be interpreted in good faith, it implies that constructions which lead to contradictory positions must be rejected.

282. There is an unsurmountable contradiction in Russia's posture:

- On the one hand, the Russian Federation claims that Crimea has been incorporated into and now forms part of its sovereign territory; but,

- On the other hand, Russia says that, notwithstanding this incorporation, its actions in that territory escape the jurisdictional scope of the BIT, which is restricted to sovereign territory.

283. The interpretation advanced by Russia clearly leads to a contradiction: in Russia's submission, even though Article 1(4) of the BIT supposedly refers to sovereign territory, and Crimea forms part of Russia's sovereign territory, investments in Crimea are not protected under the Treaty. This position must be rejected, as contrary to good faith.

Russia's additional argument

284. Russia says that the interpretation supported by the Tribunal leads to manifestly absurd and unreasonable results: the Russian Federation would, for example, owe the BIT's benefits to Ukrainian nationals based in Kyiv, which have made

[108] RPHB I, para. 20.
[109] **Doc. CLA-127**. See also the BIT between Ukraine and Turkey, signed 2017, Article 1, **Doc. CLA-128**.

investments in Crimea, while Ukraine would owe no BIT protection to Russian nationals based in Crimea having made investments in Kyiv[110]. The result would be the creation of unilateral obligations for Russia and the very negation of the aims of the BIT, namely mutual economic development[111].

285. Respondent's argument is purely hypothetical: Russia has not drawn the Tribunal's attention to any precedent where a Russian investor, domiciled in Crimea and owner of an investment in Ukraine, was denied protection under the Treaty. It is not for this Tribunal to speculate whether, in that situation, the Russian investor would or not enjoy Treaty protection.

3.2 THE RELEVANT DATE FOR THE DETERMINATION OF THE TERRITORY

286. The Parties discuss not only the proper construction of the term "territory of the Russian Federation", but also the relevant time when the investment had to comply with this jurisdictional requirement.

287. Russia says that the relevant date to establish whether a territory forms part of the geographical scope of protection is the date when the Treaty was signed. Once signed, the territory under protection cannot change[112] – with the implication that, since in this case Crimea was not part of the territory of the Russian Federation at the time when the BIT was entered into, Ukrainian investments in Crimea would not enjoy protection.

288. In line with the reasoning set forth above regarding the Respondent's argument about the "contemporaneous meaning" of territory, the Tribunal disagrees. The relevant time to establish the precise extension of "the territory of the Russian Federation" is the date when Russia adopted the impugned measures – *i.e.*, January 2015[113]. The precise extension of the territory in 1998, when the BIT was executed, is irrelevant. The geographic scope of a State's territory is by its very nature changeable and there is no evidence that the Contracting Parties wanted to freeze their respective territories as of the time when the Treaty entered into force.

289. There is an additional reason: assume that, by 2015, Russia had lost control over certain territories, which are now occupied by another power. These lost territories cannot form part of the "territory of the Russian Federation", for the simple reason that the measures in that territory are not being adopted by Russia (but rather by the occupying power) and, consequently, Russia cannot have any international responsibility with regard to that territory.

290. The same principle holds true for the contrary situation: if occupied and controlled territories are incorporated into the Russian Federation, and it is the Russian Federation which adopts measures in these territories, the latter must form part, for purposes of Article 1(4) of the BIT, of the "territory of the Russian Federation".

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[110] RPHB I, para. 31.
[111] RPHB I, para. 32.
[112] R I, paras. 145-146, 167.
[113] The extension of the territory had not changed by the time when Claimant initiated these proceedings by filing the Request for Arbitration in February 2018.

3.3 CONCLUSION

291. The First Jurisdictional Objection is dismissed for two reasons – the first reason is adopted by majority, and the second unanimously (so that, in the end, the First Jurisdictional Objection is dismissed unanimously).

292. First, the Tribunal, by majority (the President and Mr. Rowley), concludes that the proper interpretation of Article 1(4) of the BIT is that "territory of the Russian Federation" refers to the geographical area which, at the relevant date (which is the date of the impugned measures)[114], was under the control of the Russian Federation; and there is no dispute that, at the relevant date in this case (the year 2015), Crimea was a territory under the control of the Russian Federation. There is a dispute between Ukraine and the Russian Federation regarding which of the two powers held (and still holds) sovereignty over Crimea – but this dispute does not taint the conclusion that, for purposes of the BIT, Crimea forms part of the territory which is entitled to receive protection.

293. Second, even if the term "territory" in Article 1(4) of the BIT is properly to be interpreted referring to "sovereign territory" (an interpretation considered incorrect by the Tribunal, with the dissenting opinion of one of its members), Respondent's jurisdictional objection would still have to be rejected for a separate reason (and the rejection for this cause is supported by the Tribunal in its entirety).

294. In putting forward this First Jurisdictional Objection, Respondent has run afoul of the principle of good faith, one of the founding principles of law in general, and international law in particular. Respondent has publicly and repeatedly declared, including in this arbitration, that its firmly held position is that Crimea forms part of its sovereign territory. At the same time, Respondent denies that Crimea is its sovereign territory for the purposes of the BIT. For a treaty to be performed in good faith, a State has to maintain towards a given factual or legal situation an attitude consistent with its prior public proclamations and statements (*allegans contraria non est audiendus*)[115]. Respondent is thus estopped from arguing that the territory it unambiguously declares to be part of its sovereign territory, should not be regarded as protected territory under the BIT, when an investor claims protection for its investments in that very territory.

295. In the present case, Russia not only publicly declared and treated Crimea as its sovereign territory at all times after annexation, but also[116]:

- Requested Claimant to restructure its corporate presence in Crimea via the Branch and registered it as a foreign entity;

- Issued a tax certificate for its operation;

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[114] The situation had not changed by the date of the Request for Arbitration.
[115] **Doc. CLA-107**, B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, pp. 141-142; **Doc. CLA-12**, *Temple of Preah Vihear* (Separate Opinion), p. 39 ("[A] State party to an international litigation is bound by its previous acts or attitude when they are in contradiction with its claims in litigation").
[116] See section IV *supra*.

- Designated the Branch as an authorized supplier of electricity in Crimea; and

- Approved the Branch's investment program and accredited it.

296. Upon expiration of the transitional period for full integration of the rights and duties in Crimea into the Russian legal system (as set forth in the Annexation Treaty), Claimant's assets were expropriated. It follows that the impugned measures did not predate Russia's statements with respect to sovereignty, but were undertaken after such statements had been made and after Crimea was, as per the Annexation Treaty, fully integrated into the Russian legal system.

3.4 CASE LAW

297. All arbitral and judicial decisions which have analyzed the concept of territory in the BIT have come to the same conclusion as the Tribunal, by majority.

298. Various arbitral awards have found that Crimea is under effective control of the Russian Federation; among them are *Privatbank*[117], *Belbek*[118], *Ukrnafta*[119], *Everest*[120], *Stabil*[121], and *Naftogaz*[122]. All these cases concern claims by Ukrainian investors who alleged that the Russian Federation had impaired their assets in Crimea.

299. A number of Dutch and Swiss Courts have come to the same conclusion:

- The Hague Court of Appeal has dismissed requests presented by the Russian Federation to set aside the abovementioned arbitral awards in *Privatbank*[123], *Belbek*[124], *Naftogaz*[125], and *Everest*[126], finding that the arbitral tribunals had properly applied the concept of territory and that Crimea must be considered part of Russia's territory;

- The Swiss Supreme Court also dismissed requests by Russia for the set aside of the awards in *Ukrnafta*[127] and *Stabil*[128], confirming that the Crimean Peninsula must be regarded as Russian territory.

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[117] **Doc. CLA-2**, *Privatbank*.
[118] **Doc. CLA-3**, *Belbek*.
[119] **Doc. CLA-4**, *Ukrnafta (Award on Jurisdiction)*.
[120] **Doc. CLA-5**, *Everest*.
[121] **Doc. CLA-8**, *Stabil (Award on Jurisdiction)*.
[122] **Doc. CLA-106**, *Naftogaz (Partial Award)*.
[123] **Doc. CLA-141**, *PrivatBank (Appeal)*.
[124] **Doc. CLA-139**, *Belbek (Appeal)*.
[125] **Doc. CLA-137**, *Naftogaz (Appeal)*.
[126] **Doc. CLA-140**, *Everest (Appeal)*.
[127] **Doc. CLA-122**, *Ukrnafta (Appeal)*, para. 4.2 (p. 12 of pdf).
[128] **Doc. CLA-123**, *Stabil (Appeal)*, para. 4.2 (p. 14 of pdf).

VI.3. SECOND JURISDICTIONAL OBJECTION: DOES THE INVESTMENT MEET THE TEMPORAL REQUIREMENTS?

300. Article 12 of the BIT provides as follows:

> "Application of the Agreement - This Agreement shall apply to all investments (**made**)/[**carried out**] by investors of one Contracting Party in the territory of the other Contracting Party, on or after January 1, 1992" [Claimant's translation in round[129], Respondent's in square brackets[130]]

1. RESPONDENT'S POSITION

1.1 THE PROPER INTERPRETATION OF ARTICLE 12

301. Respondent submits that Claimant's alleged investments were (at least in a substantive portion) made before 1 January 1992 and, as such, they are not protected under Article 12 of the BIT[131], with the consequence that the Tribunal should "decline jurisdiction in its entirety, or, in the alternative, in part"[132].

302. Russia avers that, in accordance with its ordinary meaning, the BIT only applies to investments which have been "carried out" (by a positive action) on or after 1 January 1992. This positive action must have been taken "by the investor of one Contracting Party on the territory of the other Contracting Party" (*i.e.*, cross-border) on or after that date[133]. Respondent submits that it is critical that an investment was "carried out" or "made" as of 1 January 1992, rather than that it merely "existed"[134]. According to Respondent, the Contracting Parties chose 1 January 1992 because they aimed to cover only "new investments carried out after that date," and this fact is clearly reflected in the English, Russian and Ukrainian version of Article 12 of the BIT by using the words "carried out" or "made" instead of "exists", "expands" or "divests"[135].

303. Respondent refers to Article 28 of the VLCT, arguing that a treaty does not protect the investments made prior to its entry into force, unless the parties had a different intention[136]. Respondent submits that "the Contracting Parties knew that investments carried out prior to January 2000 [the date the BIT entered into force] would not be covered by the Treaty's protections", unless the parties had a different intention[137].

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[129] **Doc. CLA-1**.
[130] **Doc. RLA-127**.
[131] R I, paras. 232-241; R II, paras. 493-548.
[132] R I, para. 235.
[133] RPHB I, para. 38.
[134] R II, para. 506.
[135] R II, paras. 508-509, referring to **Doc. RLA-221**, *Ruby*, paras. 163-166.
[136] VCLT, Article 28: "Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party".
[137] R II, para. 504.

304. The alleged investments at issue are assets held by Claimant in Crimea, the bulk of which were inherited from Soviet-era state-owned entities and thus pre-date 1992. Respondent submits that, although Claimant had plans "to renew, modernize and expand the grid", these plans were never carried out[138]. These investments cannot have been "made" after 1 January 1992 and thus fall outside the scope of the BIT. At most, only those investments that Claimant made after 1 January 1992 could fall within the scope of the BIT. But Claimant has never even tried to make, let alone prove, this case[139].

305. Russia rejects that the investments were "made" for purposes of Article 12 BIT in 2014, when Crimea was incorporated into the Russian Federation. The mere fact of holding an existing investment flies in the face of the plain language of Article 12. Investments must be "carried out", not "held" or "maintained". Further, an investment could not have been made through a change of territorial status of its location, with no action from the investor, because Article 12 refers to "investments carried out by the investors". This plain language interpretation is confirmed by the purpose of the provision, which was to exclude Soviet-era legacy investments[140].

306. The *travaux préparatoires* confirm this interpretation[141].

307. Russia adds a further requirement: it says that Article 12 requires that the investments must have been cross-border from the outset[142]. It is insufficient that a domestic investment later came to exist in the territory of the other Contracting State in order to fall within the BIT's remit – otherwise Article 12 loses its *effet utile*[143].

1.2 THE INCORPORATION OF KRYMENERGO

308. The Russian Federation submits that the corporatization of Krymenergo as a joint stock company (previously defined as "JSC") in 1995 did not have the effect of transferring ownership of the assets from the Ukrainian State to that company – the State simply transferred its assets from one pocket into another[144]. The corporatization is a process of universal succession, and not an exchange for consideration. Krymenergo received, via legal succession, the same type of limited property rights which belonged to "State Enterprise Krymenergo", *i.e.*, the right of economic authority, not the right of ownership[145]. Two letters issued by the Ministry of Justice of Ukraine confirm that State property contributed to the charter capital of a corporatized entity remains State property[146].

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[138] R I, para. 239, referring to Maslov WS, paras. 10-11.
[139] RPHB I, para. 39.
[140] RPHB I, paras. 47-49.
[141] RPreHS, paras. 146-147.
[142] RPHB I, para. 50.
[143] RPreHS, para. 145(b).
[144] RPHB I, paras. 51-53.
[145] RPHB I, para. 284.
[146] RPHB II, para. 15, by reference to **Doc. AV-24** and **Doc. CE-499**.

309. Furthermore, Respondent argues that Krymenergo's minority privatization in 1997 had no impact on the transfer of property rights and did not result in the transfer of State property used by Krymenergo into private ownership. The sale of a minority shareholding to a private investor does not lead to a change of the legal regime of the State property held by that entity[147].

310. As a result of complete privatization, Krymenergo became the full owner of its assets in 2012. Russia says that Krymenergo did not acquire any new property within the process of privatization, nor did it issue new shares for their subsequent sale to the private investor. In fact, Krymenergo played no active role, but rather remained the passive object of the privatization[148]. The formal change of legal regime of the assets held by Krymenergo from State ownership into private ownership happened due to the change of ownership of the company's majority shareholding, not due to the purchase by Krymenergo of the assets[149].

2. CLAIMANT'S POSITION

2.1 THE PROPER INTERPRETATION OF ARTICLE 12

311. Claimant contends that its investments fall within the temporal scope of the BIT, because Krymenergo's investments were "made" in the territory of the Russian Federation on 18 March 2014, the date when Russia assumed effective control over Crimea and when the assets were "invested […] in the territory of the other Contracting Party" in the sense of Article 1(1) of the BIT. The Russian Federation took a unilateral and affirmative action – the annexation of Crimea through the enactment of the Incorporation Law[150]. Claimant notes that this happened unquestionably after 1 January 1992[151].

312. Claimant avers that Article 12's reference to the defined term "investments" must be interpreted in context, by looking at the definition of "investments" set out in Article 1(1) of the BIT. Read together, the two articles provide that the assets in question are "made" for the purposes of Article 12 when those investments fulfill the requirements under Article 1(1). Krymenergo's assets met this requirement – and thus were "made for the purposes of complying with Article 12 of the Treaty" on 18 March 2014, the date of Russia's annexation of Crimea[152]. Invoking the testimony of its linguistic expert, Professor Danylenko, Claimant avers that the words "investment made" convey a resultative meaning and do not require any active action, contrary to what Russia argues[153].

[147] RPHB I, para. 290.
[148] RPHB I, para. 294.
[149] RPHB I, para. 295; RPHB II, para. 18.
[150] CPHB I, paras. 93-94, by reference to **Doc. CE-49**.
[151] CPHB I, para. 88.
[152] CPHB I, para. 91.
[153] CPHB I, para. 92.

2.2 THE INCORPORATION OF KRYMENERGO

313. In the alternative, even if the Tribunal were to find that Krymenergo's investments were not made on 18 March 2014 (Claimant's primary position), Claimant's assets would still fall within the temporal scope of the BIT. Krymenergo was created as a new corporate entity through corporatization in 1995 and, thus, could not have made the investment before that date[154].

314. Before corporatization in 1995, the "State Enterprise Krymenergo" did not own its assets, but only operated assets owned by the State[155]. But since its incorporation in 1995, Claimant has owned the assets, rather than operated them on the basis of economic or operational management, and consequently Article 22(5) of the Commercial Code was not applicable[156].

315. Invoking the testimony of its legal expert, Dr. Paliashvili, Claimant says that Krymenergo attained its legal personality in 1995 and, at this point, the assets transferred into the charter capital of Krymenergo became its property[157]. The State contributed the assets to the JSC and, in consideration, the company issued 100% of its shares to the State. The contribution was one of property in return for ownership. There is no evidence in the record to suggest that the State transferred any economic rights of use or management into the charter capital of Krymenergo[158]. A special corporatization commission determined the value of the assets, which were transferred as an "integral property complex" (a complex including all types of property utilized for business activity), and of the corresponding shares delivered in consideration. The Ministry of Energy and Electrification issued Order No. 127[159] that established Krymenergo, approved the valuation prepared by the commission and adopted Krymenergo's charter[160].

316. With the support of Dr. Paliahsvili's opinion, Claimant avers that the assets came into the ownership of Krymenergo as of the moment it was founded as a JSC[161]. The **Law on Ownership**[162] governed ownership relations at the time of corporatization in 1995 and contained a clear, imperative rule "that assets contributed by the founder into the charter capital of a joint stock company are property of this joint stock company"[163]. In particular Article 26(1) of the Law on Ownership provides that "[t]he object of ownership right of the company, which is a legal entity, are the money and property contributions of its participants"[164].

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[154] CPHB I, para. 95.
[155] CPHB I, para. 112.
[156] CPHB I, paras. 108, 114.
[157] CPHB I, para. 96.
[158] CPHB I, para. 114.
[159] **Doc. CE-576**.
[160] CPHB I, para. 115.
[161] CPHB I, para. 96.
[162] **Doc. CE-518 Rev**.
[163] CPHB I, para. 109, citing to HT, Day 3, p. 26, l. 24 – p. 27, l. 1 (Paliashvili).
[164] CPHB I, para. 109, citing to HT, Day 3, p. 30, ll. 3-7 (Paliashvili); **Doc. CE-518Rev**.

Article 25(1), in turn, says that a JSC owns the "property acquired at the costs of selling its shares"[165].

317. Therefore, Claimant submits that the Ukrainian laws in force in 1995 lead to a clear and unambiguous conclusion that the entirety of assets contributed by the State into the charter capital of Krymenergo in 1995 were in its ownership as of the moment it was founded as a JSC, whereas the State became the owner of the shares[166].

318. Claimant argues that following the establishment of Krymenergo in 1995, the assets contributed to its charter capital were accounted for on the balance sheet of the newly incorporated JSC. The template charter for JSCs created through corporatization confirms that the company owns the contributions of its founders, and that the property of the company is reflected in its balance sheet[167]. The privatization legislation provides for no changes in the accounting treatment of the assets of a JSC in which the shares were privatized. Therefore, the privatizations had no impact on the accounting treatment of Claimant's assets[168].

319. Claimant rejects Russia's position, based on the expert opinion of Professor Vygovskyy, that the assets became property of Krymenergo upon privatization; but even under Russia's and Professor Vygovskyy's theory of ownership, the assets were rightfully owned by Claimant by 2012 at the latest[169].

320. Claimant adds that the laws in effect in 1997 and 2012 are only relevant for the privatization process and have no bearing on the status of property acquired through corporatization in 1995[170].

3. TRIBUNAL'S ANALYSIS

321. The relevant provisions of the BIT are Articles 1(1) and 12, which read as follows:

> "Article 1: Definitions - (1) The term "investments" means any kind of tangible and intangible assets which are **(invested)/[put in]** by an investor of a Contracting Party in the territory of the other Contracting Party in accordance with its legislation […]"
>
> "Article 12: Application of the Agreement - This Agreement shall apply to all investments **(made)/[carried out]** by investors of one Contracting Party in the territory of the other Contracting Party, on or after January 1, 1992"
>
> [Claimant's translation in round[171], Respondent's in square brackets[172]; emphasis by the Tribunal].

[165] CPHB I, para. 109, citing to **Doc. CE-518Rev**.
[166] CPHB I, para. 111.
[167] CPHB I, para. 116, by reference to **Doc. AV-23**, sections 3.4 and 3.5.
[168] CPHB I, para. 122.
[169] CPHB I, para. 105.
[170] CPHB I, para. 119.
[171] **Doc. CLA-1**.
[172] **Doc. RLA-127**.

322. In the previous section the Tribunal, by majority, has already concluded that the "territory" of the Russian Federation refers to the geographical area which, at the relevant date (*i.e.*, in 2015, the date of the impugned measures) was under its control; and there is no dispute that, at the relevant date, Crimea was part of the territory under the control of the Russian Federation.

323. In this second objection, the Parties discuss the temporal application of the BIT to assets acquired before 1 January 1992.

324. When Russia adopted the impugned measures in 2015, Krymenergo owned certain assets in Crimea, for the distribution of electricity within that territory; a significant portion of these assets had been built, constructed or acquired during Soviet times, *i.e.*, before 1 January 1992. Claimant has provided a detailed breakdown as of 2013 (*i.e.*, three years before the alleged impairment)[173] of assets which had come into operation before 1992 ["**Soviet Assets**"].

325. Against this factual background, Russia says that, at least with regard to these Soviet Assets, the Tribunal lacks jurisdiction, because these investments do not meet the requirement under Article 12 of the BIT: the investment was not made (or carried out, in the translation preferred by Respondent) on or after 1 January 1992.

326. Claimant counters with two lines of reasoning:

- As a first argument, Krymenergo submits that its investments were "made" in the territory of the Russian Federation as of 18 March 2014, the date when Russia assumed control over Crimea;

- Subsidiarily, Claimant argues that it "made" the investment in 1995, when the Ukrainian State transferred certain assets (including the pre-1992 Soviet Assets) to the newly created JSC Krymenergo as a capital contribution; in consideration for the share capital assigned to the State, Krymenergo acquired ownership over these assets – and thus "made" the investment in 1995, as required by Article 12.

327. The Tribunal will first establish the proper construction of Article 12 of the BIT and, on the basis of this interpretation, will dismiss Claimant's first argument (**3.1.**). Thereafter, the Tribunal will analyze Claimant's subsidiary argument (**3.2.**) and conclude that Krymenergo in fact acquired all its Crimean assets (including the pre-1992 Soviet Assets) after January 1992 – with the consequence, in the view of the Tribunal, by majority (the President and Mr. Rowley), that the investment was made (or carried out) by a Ukrainian investor in the territory of the Russian Federation after 1 January 1992, as required by Article 12 of the BIT. Thereafter, Russia's additional arguments will be dismissed (**3.3.**), leading to an overall conclusion (**3.4.**) and a summary of case law (**3.5.**).

[173] CPHB I, para. 167; **Docs. CE-30**, **CE-31**; C II, para. 145; CPreHS, para. 276.

3.1 DISMISSAL OF CLAIMANT'S FIRST ARGUMENT

328. Respondent says that the BIT only applies to investments which have been "carried out" (Respondent's preferred translation) or "made" (the translation proposed by Claimant) after 1992[174]. Claimant, on the contrary, says that the investment is "made" when the assets fulfill the requirements under Article 1(1) of the BIT – which, in this case, happened in 2014, when Russia annexed Crimea[175].

329. For the reasons set out below, the Tribunal rejects Claimant's case for an investment date in 2014.

330. Under the general rule of treaty interpretation set forth in Article 31 of the VCLT, the Tribunal must again be guided "in good faith" by the "ordinary meaning" of the terms, "in their context" and "in light of [the treaty's] object and purpose". All these criteria support the interpretation proposed by Respondent.

A. Ordinary meaning

331. The ordinary meaning of Article 12 of the BIT supports Respondent's position: it limits the "application" of the Treaty to "all investments made" (or "carried out") by protected investors "in the territory of the other Contracting State", "on or after January 1, 1992". The words chosen by the Contracting Parties show that, to comply with the requirement of Article 12, it is not sufficient that an investor simply *holds* or *maintains* an investment; an action by the investor, performed after 1 January 1992, is required.

332. What does this action entail? How does an investor "make" (or "carry out") an investment?

333. The answer is to be found in Article 1(1) of the BIT:

> "1. The term "investments" means any kind of tangible or intangible assets which are (**invested**)/[**put in**] by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with its legislation, including:
>
> a) Movable and immovable property, as well as any other related property rights; […]"
>
> [Claimant's translation in round[176], Respondent's in square brackets[177]; emphasis by the Tribunal]

334. Article 1(1) of the BIT defines "investments" as "any kind of tangible and intangible assets"; and the first category of assets mentioned is "movable and

[174] RPHB I, para. 38.
[175] CPHB I, para. 91.
[176] **Doc. CLA-1**.
[177] **Doc. RLA-127**.

immovable property, as well any other related property rights" – and this is the category of assets for which Claimant is claiming protection.

335. There is a strong relationship between "investment" and "property": an investor "makes" or "carries out" an investment in movable or immovable property when it *acquires ownership* over the asset in question. The relationship between the person (the investor) and the asset (the investment) must be one of ownership[178] – the protection afforded by the BIT is for the benefit of the owner of the investment, and the compensation awarded for a breach of the Treaty is equal to the impairment suffered by the investor's property rights[179].

336. The requirement set forth in Article 12 of the BIT thus implies that the investor, to fall within the temporal scope of the Treaty, must have acquired ownership of the investment for which protection is being sought after 1 January 1992.

B. Context

337. Article 12 of the BIT must be interpreted in the context of Article 1(1). It is meaningful that both provisions use markedly different terminology.

338. Article 1(1) uses the term "assets which are invested" (or in Respondent's preferred translation, "assets which are put in") in the territory of a Contracting Party. As the Respondent's linguistic experts have explained, the verbal form used is the present tense, denoting a situation which is not linked to a particular time period[180]. Article 12, on the other hand, uses a perfective passive past participle, translated into English as "investments made" or "carried out", a tense which expresses that an action has already taken place and has been completed[181].

339. The use of different verbal forms reinforces the conclusion that Article 12 requires that an action be performed: for the protection to arise, the investor must have "made" or "carried out" the investment post-1992.

C. Object and purpose

340. Under Article 28 of the VCLT, treaties do not have retroactive application before their date of entry into force, "[u]nless a different intention [of the Contracting Parties] appears from the treaty or is otherwise established". The BIT entered into force in January 2000, and consequently, under the general principles of international law, investments carried out before that date are not covered, unless the Contracting Parties agreed otherwise.

341. The purpose of Article 12, however, was precisely to extend the temporal reach of the Treaty backwards, to the time span between the date when it entered into force (in 2000) and the end of the Soviet era (which for practical purposes can be deemed to have ended as of 1 January 1992). The Contracting Parties decided not to extend

[178] Or possibly some other *ius in rem* – a discussion which is irrelevant for the present case; where the investment consists of a contract, the investment is made when the investor enters into the contract.
[179] See Articles 5 and 9 of the BIT.
[180] Kurokhtina ER, para. 13.
[181] Kurokhtina ER, para. 28.

the temporal scope of protection to investments made during the Soviet era, a time when Ukraine and Russia were part of the same State – the Union of Soviet Socialist Republics ["**USSR**" or the "**Soviet Union**"].

342. The *travaux préparatoires*, which Article 32 of the VCLT permits being taken into consideration as supplementary means of interpretation, confirm the Tribunal's conclusion. It was Ukraine which attempted to include a broader temporal scope, expanding protection to investments carried out before and after the entering into force of the BIT[182]. Russia, concerned about the ramifications of such an extension, proposed to limit protection to investments carried out post-1992, when the USSR had ceased to exist. And Ukraine eventually agreed.

343. For instance, in the negotiations regarding the BIT with Azerbaijan, Russia explained its insistence on a 1 January 1992 back-stop to avoid[183]:

> "[…] adverse consequences for Russia, associated, *inter alia*, with possible claims against Russia as a successor State of the USSR".

D. Conclusion

344. Summing up, the Tribunal finds that the proper interpretation of Article 12 of the BIT implies that investments, to be protected, must have been "made" or "carried out" by the investor post-1992; and investments are "made" or "carried out" when the investor acquires ownership (or some other *ius in rem* over such assets).

345. The necessary consequence is that Claimant's primary argument is dismissed: to meet the Article 12 requirement Claimant must prove that it acquired ownership over its purported investment post-1992.

346. Claimant's argument, that it made (or carried out) the investment in 2014, when the Russian Federation incorporated Crimea to the territory under its control, is a *non sequitur*. Russia's decision to annex Crimea did not result in Krymenergo acquiring any assets. Whatever assets Krymenergo owned before the annexation of Crimea by the Russian Federation were not acquired by reason of the annexation. They simply continued to be owned by Krymenergo after the annexation.

347. To benefit from Treaty protection, Krymenergo must prove that (in accordance with applicable law) it acquired its Crimean assets after 1 January 1992 – a question which will be analyzed in the next sub-section.

3.2 KRYMENERGO'S ACQUISITION OF ITS ASSETS

348. The next issue which the Tribunal must address is how Krymenergo acquired its assets in Crimea (including its Soviet era assets), and whether this occurred before or after 1 January 1992.

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[182] Draft BITs of 1994, 1997 and 1998, Article 12 or 13; **Doc. RE-150**, **Doc. RE-151** and **Doc. RE-152**.
[183] **Doc. RE-153**.

A. Proven facts

349. The Soviet Assets owned by Krymenergo in Crimea are, to a great extent, power lines and high-voltage substations built by the State between 1960 and 1990, when Ukraine was still part of the USSR. Originally, the ownership of these assets belonged to the Soviet Union[184]. Following the collapse of the USSR and Ukraine's independence in 1991, former property of the Soviet Union located in the territory of Ukraine became the property of Ukraine[185]. Ukraine decided to entrust the right of economic authority over the State-owned electricity distribution assets located in Crimea to a State agency called "Krymenergo Industrial Energy Association" – but ownership of the assets remained with the Ukrainian State[186].

350. In 1995, Ukraine took a further step: it decided to corporatize the electricity distribution assets in Crimea. For that purpose, Ukraine created a new JSC with separate legal personality – Krymenergo, a Joint Stock Corporation under Ukrainian law which is the Claimant in the present arbitration. Upon its incorporation, the existing Association was dissolved, and the Ukrainian State contributed the electricity distribution assets located in Crimea – including the pre-1992 Soviet Assets – to the newly created Krymenergo, receiving in exchange 100% of its share capital[187].

351. In the course of the succeeding years, the name of Krymenergo was changed several times, including in 2012, when the name "Public Joint Stock Company DTEK Krymenergo" was assumed, and more recently, when it restyled itself as Join Stock Company (JSC) DTEK Krymenergo[188]. But, as Claimant's legal expert Dr. Paliashvili has affirmed[189],

> "[…] none of the above name changes signified any material change in the company's legal status; since 1995 DTEK Krymenergo [defined in this arbitration as Krymenergo] has been an independent legal entity, incorporated in the format of a joint stock company".

352. Although the legal personality of Krymenergo continues unaltered since 1995, over time the shareholding in the company has significantly changed:

- In the beginning, the Ukrainian State held 100% of the share capital;
- In 1997, 30% was privatized, while 70% of shares remained State-owned[190];
- In 2006, an additional 10% stake in the company was privatized[191];

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[184] Lapuerta ER, para. 40.
[185] **Doc. RE-59**.
[186] **Doc. AV-16** (Commercial Code of Ukraine); **Doc. AV-26** (Resolution of the Cabinet Ministers of Ukraine).
[187] Paliashvili ER I, para. 37.
[188] **Doc. CE-14**.
[189] Paliashvili ER I, para. 38.
[190] **Doc. RE-63**.
[191] **Doc. RE-67**.

- Between 2006 and 2012, DTEK B.V. purchased 12.49% of the company's shares[192]; and

- In 2012, the State organized an auction for the sale of a 45% stake in Claimant, which was won by DTEK Holdings[193] and, thus, the DTEK Energy Group increased its stake in Krymenergo to 57.49%, acquiring control over the company, and privatizing the company by removing it from State control[194].

B. Discussion

353. The Parties discuss the precise timing when Krymenergo acquired the right of ownership over the Soviet Assets.

354. Claimant says that this occurred in 1995: at that time the State subscribed 100% of the share capital of Krymenergo and, as capital contribution, the State transferred to the corporation the right of ownership over the Soviet Assets[195].

355. Respondent says that in 1995 the Ukrainian State only contributed the right of economic authority over the Soviet Assets[196] and that the minority privatization in 1997 had no impact on the transfer of property rights and did not result in the transfer of State property used by Krymenergo into private ownership[197]. But Russia does acknowledge that Krymenergo became full owner of its assets, including the Soviet Assets, upon its full privatization, which occurred in 2012[198].

356. It follows that the discussion as regards the acquisition of the Soviet Assets is moot.

357. Russia does not dispute that, at least in 2012, upon full privatization, Krymenergo acquired ownership rights over the Soviet Assets. Whether the acquisition of ownership rights occurred in 1995 (Claimant's thesis) or in 2012 (as acknowledged by Russia) is irrelevant for the discussion at hand. *Quod erat demonstrandum* is that the acquisition occurred after 1 January 1992 – and that is true, both under the theory of Claimant and that of Respondent.

358. In sum, the Tribunal finds that Krymenergo acquired the Soviet Assets after 1992 – and these assets thus comply with the temporal requirement established in Article 12 of the BIT.

3.3 Dismissal of Russia's additional arguments

359. Russia submits two additional arguments.

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[192] **Doc. RE-68**.
[193] **Doc. CE-333**.
[194] **Doc. CE-11**.
[195] CPHB I, paras. 110, 114; **Doc. CE-13**.
[196] RPHB I, paras. 51-53.
[197] RPHB I, paras. 53, 289.
[198] RPHB I, para. 54.

360. First, Russia says that Article 12 of the BIT requires that the investments must have been cross-border from the outset[199]; it is insufficient that a domestic investment, in order to fall within the BIT's remit, comes to exist in the territory of the other Contracting State at a later stage – otherwise Article 12 would not have been necessary[200].

361. The Tribunal, by majority (the President and Mr. Rowley), disagrees. Russia is conflating two different temporal moments.

362. Under Article 12 of the BIT, the investor must have acquired ownership over the assets, for which protection is claimed, after 1 January 1992. If the acquisition meets this temporal hurdle, Article 1(1) of the Treaty requires that such assets "are invested" or "are put in" in "the territory of the other Contracting State" – and the relevant date for meeting this second requirement is that of the impugned measure adopted by the "other Contracting State" (not the date when the investment had been acquired by the investor – see section VI.2.3.2 *supra*).

363. Contrary to Russia's argument, Articles 1(1) and 12 of the BIT are both necessary and have an *effet utile*:

- The first rule extends protection to all assets which (at the time of the impugned measure) are invested in the territory of the other Contracting Party, while

- The second excludes pre-1992 assets, acquired during the Soviet era, when both Ukraine and Russia formed part of the USSR, and includes post-1992 assets, acquired between that date and the date when the BIT came into force (in the year 2000).

364. Second, Russia adds a further requirement: it says that Krymenergo did not play any active role in the acquisition of ownership[201].

365. The Tribunal disagrees.

366. Russia's argument is contradicted by the facts. Krymenergo's role in 1995, when it was incorporated, was anything but passive: it took the corporate decision to issue shares and to deliver these shares for subscription by the State. In exchange, as capital contribution for the new shares, the State transferred and Krymenergo acquired certain rights over the Soviet Assets (be it ownership rights, as defended by Claimant, be it the right of economic authority, as submitted by Respondent – the transfer of both types of rights requires the consent of the acquirer).

367. In terms of active participation, an acquisition through capital contribution is not less demanding than an acquisition by way of a share purchase agreement.

[199] RPHB I, para. 50.
[200] RPreHS, para. 145(b).
[201] RPHB I, para. 295; RPHB II, para. 18.

3.4 OVERALL CONCLUSION

368. The Tribunal has unanimously concluded that the proper interpretation of Article 12 of the BIT implies that investments, to be protected, must have been "made" or "carried out" by the investor post-1992; and investments are "made" or "carried out" when the investor acquires ownership (or some other *ius in rem* over such assets). This conclusion has led to the dismissal of Claimant's primary argument that it made (or carried out) the investment in 2014, when the Russian Federation incorporated Crimea to the territory under its control.

369. In the Tribunal's unanimous opinion, to benefit from Treaty protection, Krymenergo must have acquired its Crimean assets, including the Soviet Assets, after 1 January 1992. There is no dispute that Krymenergo meets this test. Claimant says that it acquired ownership over the Soviet Assets (and other Crimean assets) in 1995, while Russia acknowledges that this happened in 2012. In any case, both Parties agree that the acquisition occurred after 1 January 1992; the requirement of Article 12 of the Treaty is thus satisfied.

Russia's additional arguments

370. Russia makes two additional arguments, which the Tribunal dismisses, the first by majority and the second unanimously:

- First, the Tribunal, by majority (the President and Mr. Rowley), and contrary to Russia's submission, considers that Article 12 does not impose the requirement that the cross-border element of the investment must be met at the time the investment was made;

- Second, the Tribunal unanimously dismisses Russia's allegation that Krymenergo did not play an active role in the acquisition of its assets.

371. The necessary overall consequence is that the Tribunal, by majority, dismisses Respondent's Second Jurisdictional Exception.

3.5 CASE LAW

372. Several arbitral and judicial decisions, which have analyzed the *ratione temporis* jurisdiction under the BIT and the concept of making an investment, have come to the same conclusion as the Tribunal.

373. In the *Naftogaz* arbitration, the tribunal issued a partial award finding that it had jurisdiction to adjudicate claimant's claim regarding an alleged expropriation in Crimea[202]. In the set aside decision, the Hague Court of Appeal partially set aside the award[203], arguing that, under Article 12 of the BIT, the arbitral tribunal lacked jurisdiction with regard to investments made before 1 January 1992. Thereafter, the arbitral tribunal issued its final award, acknowledging that its jurisdiction only

[202] **Doc. CLA-106**, *Naftogaz (Partial Award)*, para. 274.
[203] **Doc. CLA-137**, *Naftogaz (Appeal)*, para. 5.15.

extended to post-1992 investments[204]. In the circumstances of that case, the arbitral tribunal found that Naftogaz's investments had indeed been made after 1992 and fell within the tribunal's jurisdiction. In reaching this conclusion, the tribunal took into account the creation date of the companies in 1998[205].

374. The Paris Court of Appeal reached a similar conclusion in the *Oschadbank* appeal decision on the application to stay the enforcement of the award[206]: the Court considered that the tribunal did not have jurisdiction *ratione temporis*, since claimant had made the investments in Crimea before 1 January 1992.

375. Respondent has also invoked the precedents in *Gold Reserve*[207] and *PAO Tatneft*[208] to support its argument about the term to "make" (or "carry out") in Article 12 of the BIT as "owning" an investment.

376. *Gold Reserve* is a case before the English Court, in which it reached a decision on exequatur and denied respondent's request. A Canadian company had acquired some mining concessions and mining rights in Venezuela from a US company through a share swap and further made contributions amounting to USD 300 M. The English Court found for the claimant and declared that, because of the contribution, there was indeed an investment; in that context the Court said that making an investment "includes the exchange of resources, usually capital resources, in return for an interest in an asset"[209]. Venezuela raised a subsidiary argument: that the share swap between the investor and a third party did not qualify as an investment. In an *obiter* the Court agreed.

377. The *Gold Reserve* judgment can be distinguished on the facts.

378. In the present case, the investor acquired the ownership over the allegedly impaired assets, and thus made the investment, through a capital contribution, in which a shareholder contributed these assets and in exchange the corporation issued shares – there is no allegation that the shareholder of Krymenergo carried out any share swap of Krymenergo's shares.

379. Furthermore, the factual matrix of the present case fits into the definition of making an investment proposed by the judgment: "making" an investment "includes the exchange of resources, usually capital resources, in return for an interest in an asset"[210] – and in the present case, Krymenergo has indeed received an interest in an asset (the ownership over the Soviet Assets situated in Crimea) in exchange for a capital resource (the subscription of the shares by the shareholder).

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[204] **Doc. CLA-142**, *Naftogaz (Final Award)*, para. 6 (p. 17 of pdf).
[205] **Doc. CLA-142**, *Naftogaz (Final Award)*, paras. 316, 330.
[206] **Doc. RLA-414**, *Oschadbank (Appeal)*, para. 93.
[207] R II, para. 533, by reference to **Doc. RLA-229**, *Gold Reserve*, para. 35.
[208] R II, para. 535, by reference to **Doc. RLA-230**, *PAO Tatneft*, para. 80.
[209] **Doc. RLA-229**, *Gold Reserve*, para. 35.
[210] **Doc. RLA-229**, *Gold Reserve*, para. 35.

380. *PAO Tatneft*[211] also does not support Respondent's position. It is a case before an English Court, which denied the set aside request. Claimant was the shareholder of a Ukrainian oil company and subsequently acquired additional shares, reaching majority control. The English Court found that there was an investment given the significant sums claimant expended to acquire the shareholding that gave it majority control[212]. The Court reiterated the conclusion that making an investment "includes the exchange of resources, usually capital resources, in return for an interest in an asset"[213]. The case is inapposite for the same reasons as *Gold Reserve*.

[211] **Doc. RLA-230**, *PAO Tatneft*.
[212] **Doc. RLA-230**, *PAO Tatneft*, para. 80.
[213] **Doc. RLA-230**, *PAO Tatneft*, para. 77.

VI.4. THIRD JURISDICTIONAL OBJECTION: DID THE INVESTOR MAKE AN INVESTMENT UNDER ARTICLE 1(1)?

1. RESPONDENT'S POSITION

381. Respondent says that the plain language of Article 1(1) of the BIT defining investments requires an active cross-border investment at its inception in conformity with the host State's legislation[214]. The requirements of Article 1(1) (activity, cross-border and legality) must be met cumulatively and concurrently at the inception of the investment[215].

382. First, the Contracting Parties chose an active verb "put in" ("invested" in Claimant's translation), rather than a passive verb such a "hold" or "own". This distinction is reflected in the English, Russian and Ukrainian language versions of the BIT and indicates that the investor must actually do something with the assets listed rather than passively holding them in the territory of the other Contracting Party to be protected[216]. Respondent relies on the opinion of its language expert Dr. Kurokhtina to support its position[217]. The words "put in" also contain an inherent chronology referring to a specific point in time, namely when the investment is first put in. This can only happen once[218].

383. Second, Article 1(1) links this action of putting in with the "territory of the other Contracting Party". It is insufficient that an investment merely exists, or that assets are held or maintained in that territory. The purported investor actually needs to invest actively or put in the assets in the territory of the other Contracting Party[219].

384. Third, the legality requirement in Article 1(1) further supports this point. The legality of making an investment can only be assessed if, at the requisite time, it is put into that territory, otherwise that law will not apply[220].

385. Fourth, Respondent says that an interpretation which protects domestic investments that later passively came to be located in another State undermines the rationale of an investment treaty, and the object and purpose of the BIT as mutual economic expansion and development.

386. Fifth, the Contracting Parties could not have anticipated an interpretation which would either protect domestic investments or result in the creation of unilateral obligations.

387. In conclusion, Respondent avers that Claimant does not have a protected investment under Article 1(1) because it put no assets into Russia in compliance with its

[214] RPreHS, paras. 150-151; RPHB I, para. 60.
[215] RPHB I, para. 71.
[216] RPHB I, para. 61.
[217] RPHB I, paras. 62-67.
[218] RPHB I, para. 67.
[219] RPHB I, para. 68.
[220] RPHB I, para. 70.

legislation, nor could it have done so prior to 2014, as it could only make domestic investments in Crimea that would have been subject to Ukrainian law. Even if Claimant's alleged investment is assessed in 2014 (*quod non*), Claimant still has no investment because there was no active investment in Russia[221].

2. CLAIMANT'S POSITION

388. Claimant disagrees with Respondent's third jurisdictional objection.

389. First, Claimant says that a linguistic analysis of Article 1(1) of the BIT does not support the alleged active investment requirement. Relying on the linguistic experts of both Parties, Claimant argues that the words used in Article 1(1) are in the passive voice and do not convey any active action[222].

390. Second, Claimant submits that the investment does not have to be made originally in the Russian Federation. Investments made in a domestic setting can later become an investment in the territory of another Contracting State as a result of territorial change and, thus, qualify for protection under the Treaty[223]. By the time of the expropriation, there was a physical, financial and legal border between Ukraine and Crimea[224]. Under Russian law, Krymenergo's investment in Crimea was treated as cross-border under the Special Investment Regime for occupied Crimea[225].

391. Claimant also highlights that relevant case law does not support Respondent's position[226].

392. Third, Claimant contends that there is no simultaneity requirement in the wording of Article 1(1). Claimant adds that the linguistic analysis does not prove such requirement[227].

3. TRIBUNAL'S ANALYSIS

393. In the two previous jurisdictional objections, the Tribunal, by majority, has already found that:

- The proper interpretation of Article 1(4) of the BIT is that "territory of the Russian Federation" refers to the geographical area which, as of the date of the impugned measures, was under its effective control; and there is no dispute that, as of 2015, Crimea was a territory under the control of the Russian Federation;

- The proper interpretation of Article 12 of the BIT implies that investments, to be protected, must have been "made" (or "carried out") by the investor post-1992; and investments in "movable or immovable property, as well any

[221] RPHB I, para. 74.
[222] CPHB I, paras. 46-48.
[223] CPHB I, para. 50.
[224] CPHB I, para. 53.
[225] CPHB I, para. 54.
[226] CPHB I, paras. 51-52.
[227] CPHB I, para. 58; CPHB II, para. 14.

other related property rights" are "made" (or "carried out") when the investor acquires ownership; in the present case, both Parties agree that the acquisition occurred after 1 January 1992, Claimant saying in 1995, while Russia acknowledges that this happened in 2012.

394. In this third objection, Respondent submits that Krymenergo's assets do not qualify as an "investment" under Article 1(1) of the BIT, because Claimant did not comply with the active investment requirement, the cross-border requirement and the legality requirement at the time when the investment was made.

395. In its relevant part, Article 1(1) of the BIT reads as follows:

> "1. The term "investments" means any kind of tangible or intangible assets which are (**invested**)/[**put in**] by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with its legislation, including:
>
> a) Movable and immovable property, as well as any other related property rights; […]"
>
> [Claimant's translation in round[228], Respondent's in square brackets[229]; emphasis by the Tribunal]

396. Russia reads four requirements into Article 1(1):

- That the investor must have performed an activity,
- That the investment must be cross-border,
- That the investment must comply with the legislation of the host State, and
- That the previous three requirements must be met cumulatively and concurrently at the inception of the investment[230].

397. The Tribunal agrees that the first three requirements must be met; but the Tribunal disagrees with Respondent that these three requirements must be met concurrently at the inception of the investment.

398. First, the wording of Article 1(1), interpreted in light of the VCLT, contradicts Russia's argument: there is no wording signaling that the three requirements must be met at the same time, and thus Russia's attempt to create an additional jurisdictional hurdle for an investment claim under the BIT must fail.

399. Second, as regards the activity requirement, in the previous jurisdictional objection the Tribunal has already found that an investment in "movable and immovable property, as well as any other related property rights" is made (or carried out) when the investor acquires ownership over the assets and that, in this case, this occurred either in 1995 (Claimant's submission) or at the latest in 2012 (Respondent's

[228] **Doc. CLA-1**.
[229] **Doc. RLA-127**.
[230] RPHB I, para. 71.

position) – both Parties accept that Krymenergo is the owner of the assets located in Crimea, which allegedly were expropriated by the Russian Federation.

400. The activity requirement has thus, in the view of the Tribunal, by majority, been complied with (respecting the temporal requirement of Article 12, as already established in the previous Jurisdictional Objection).

401. Third, the Tribunal agrees with Russia that the investment, when it was made, was domestic: at that time, Crimea was still a part of Ukraine. But an investment made in a domestic setting can later become an investment in the territory of another Contracting State as a result of territorial change and start qualifying for protection under the Treaty at that point in time.

402. This is indeed what happened: Crimea fell under the effective control of Russia in 2014, when it was annexed by the Russian Federation. Upon incorporation of Crimea into Russia, the investment became cross-border because, as Dr. Paliashvili explained at the Hearing[231]:

> "[…] following the occupation, the border was erected between mainland Crimea and Ukraine: there was a physical border with checkpoints and there was a virtual border. Because occupied Crimea, for example […] became the ruble zone, and Ukraine is still the Ukrainian currency hryvnia zone. So the transfers, money transfers, they became cross-border; the goods transfers became cross-border".

403. The moment when the cross-border requirement must be met is when the impugned measures are adopted by the host State, when the assets owned by a protected investor from the other Contracting Party are impaired, and when the protection granted by the BIT to foreign investment becomes effective.

404. This is because the purpose of the BIT is to protect cross-border investment from improper measures of the host State. There is no reason to deprive an asset from protection only because it was made in a territory which initially did not form part of the other Contracting State and which, thereafter, was annexed and incorporated into such State. A measure, adopted by the host State against an investment owned by an investor from the other Contracting State, cannot be excused simply because the protected investment is situated in a territory annexed by such State while the BIT was in force.

405. Lastly, as regards the legality requirement, until 2014 the investment was domestic and as such was subject to Ukrainian law; but, upon the incorporation of Crimea into the Russian Federation, Russian law became the law of the land in Crimea and the investment had to comply with Russian legislation.

406. In this case, the Tribunal finds that there is no evidence that, upon incorporation of Crimea into the Russian Federation, Krymenergo failed to comply with Russian legislation – on the contrary (see sections VI.5 and VI.6 *infra*).

[231] HT, Day 3, p. 17, ll. 3-10.

407. In sum, the Tribunal agrees with Respondent that, under Article 1(1) of the BIT, investments must meet three requirements (activity, cross-border and compliance with local legislation). But the Tribunal disagrees with Respondent's additional contention that the three requirements must be met concurrently at the inception of the investment.

Case law

408. Two cases have analyzed the concurrency requirement at the inception of the investment and have come to the same conclusion as the Tribunal.

409. In *Clorox*[232], the tribunal found that, when it obtained the shares of a local cleaning company through a share transfer, claimant did not make an active investment. Nevertheless, the tribunal noted that for there to be an investment, the treaty did not require a money contribution (or an "action of investing") *at the time* of acquisition of the property of the assets. The tribunal found that even though an investment does require a transfer of value, which generally occurs at the time the asset is acquired, such transfer of value can also be deferred in time – *i.e.*, after the initial date of acquisition of the assets[233]. The tribunal also concluded that making an investment did not require the movement of capital across international borders[234].

410. *Garcia Armas*[235] is an investment case that was brought before the Paris Court of Appeal after Venezuela filed a request to set aside the award – which was denied. In that case, claimants, who were Venezuelan nationals, had made a domestic investment in Venezuela and later acquired the Spanish nationality. After claimants acquired the second nationality, Venezuela adopted certain measures to take over their investment.

411. Venezuela argued that the assets were not protected by the treaty between Spain and Venezuela because the investment had initially been domestic. The Paris Court of Appeal found that the assets were protected thanks to the second nationality of the investors and concluded that the relevant date to determine if the assets were protected was the date when the State adopted the disputed measures and not when the investment was made[236].

412. These cases confirm the Tribunal's conclusion above that – contrary to Russia's submissions in this arbitration – the three requirements (activity, cross-border and compliance with local legislation) do not have to be met cumulatively and concurrently at the inception of the investment.

[232] **Doc. CLA-114**, *Clorox Spain*.
[233] **Doc. CLA-114**, *Clorox Spain*, para. 824.
[234] **Doc. CLA-114**, *Clorox Spain*, para. 802.
[235] **Doc. RLA-89**, *García Armas (Appeal I)*.
[236] **Doc. RLA-89**, *García Armas (Appeal I)*, p. 9 of pdf.

VI.5. FOURTH JURISDICTIONAL OBJECTION: DOES CLAIMANT MEET THE DEFINITION OF INVESTOR?

413. The term "investor of a Contracting Party" is defined in relevant part in Article 1(2) of the BIT as follows:

> "b) any legal entity constituted in accordance with the legislation in force in the territory of that Contracting Party, provided that the said legal entity is competent in accordance with legislation of the Contracting Party to make investments in the territory of the other Contracting Party" [Claimant's translation[237]]
>
> "b) any 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" [Respondent's translation[238]].

1. RESPONDENT'S POSITION

414. According to Respondent, Claimant does not meet the definition of an investor under Article 1(2)(b) of the BIT[239].

415. First, Respondent considers that it is clear from the plain wording of Article 1(2) that the pertinent time to assess the investor's competency is when the investment is initially made[240]. According to Respondent, the present tense is used (*i.e.*, "is legally capable") because it is at the time of the making of the investment when the investor must have capacity to make that specific investment[241]. Additionally, Respondent considers that Article 1(2) uses an active verb (*i.e.*, "to carry out investments"), which, in its view, cannot be interpreted as "hold" or "maintain"[242].

416. Furthermore, Respondent submits, relying on *Cem Cengiz*[243], *García Armas*[244], and *SVP*[245], that at the time of the investment the investor must be foreign[246] and there must be a cross-border characteristic. In the present case, Claimant was a domestic investor when the investment was made and there was no cross-border characteristic, with the consequence that the Tribunal lacks jurisdiction *ratione personae*[247].

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[237] **Doc. CLA-1**.
[238] **Doc. RLA-127**.
[239] R I, paras. 193-208; R II, paras. 702-753.
[240] RPreHS, paras. 161-162.
[241] RPreHS, para. 163.
[242] RPreHS, para. 163.
[243] **Doc. RLA-88**, *Cem Cengiz*, paras. 56, 152.
[244] **Doc. RLA-89**, *García Armas (Appeal I)*, p. 8; **Doc. RLA-412**, *García Armas (Appeal II)*, para. 56.
[245] **Doc. RLA-411**, *SVP*, para. 420.
[246] RPreHS, para. 164.
[247] RPreHS, para. 165.

417. Second, in Respondent's view, it is not enough that Claimant had the general ability under Ukrainian law to make investments in Russia, but it must have been *legally capable* to make the alleged specific investments in Russia[248]. Respondent explains that Ukraine's Law on Investment Activity merely recognizes general ability to invest; in relation to investments made by Ukrainians on territory outside Ukraine ["**Outbound Investments**"], Ukraine had in place a system of regulatory approvals, comprising customs approvals, currency requirements, export licenses and other forms of license, which depended on the specific nature and location of the investment[249]. Relying on Dr. Paliashvili's testimony[250], Respondent says that Claimant should have obtained the licenses required to make Outbound Investments, something it failed to do, as the assets were acquired when Crimea was part of Ukraine[251]. Thus, Claimant cannot be a protected investor under Article 1(2)[252].

418. Third, Respondent submits that even if Claimant's competency could be assessed in 2014 (*quod non*), it would still fail to meet the requirements under Article 1(2)[253]. Respondent states that the restrictions imposed by Ukrainian law in 2014 made it virtually impossible for Ukrainians to make or even hold investments in Crimea[254]. In particular, Respondent refers to the "**NBU Resolution No. 699**"[255], which, according to its view, prohibited all investment into Crimea which took the form of money transfers[256]. Respondent takes issue with Dr. Paliashvili's testimony at the Hearing, where she stated that Ukraine would recognize a legal entity which has registered its head office or is otherwise based in Crimea, if registration is done outside of the Crimean Peninsula[257]. Russia considers that a Russian State body creating Crimean-based legal entities or branches would still be applying Russian law on the territory of Crimea, *i.e.*, exercising sovereign powers with legal effect in Crimea, which Ukraine does not accept[258].

419. Moreover, Respondent disputes Claimant's argument, based on Mr. Sokolovskyi's statement at the Hearing, that Resolution No. 148 authorized Claimant to conduct business in post-2014 Crimea. Respondent claims that Mr. Sokolovskyi merely confirmed that, even though Claimant was authorized to "perform day-to-day operations in Crimea, *i.e.*, to sell electricity to customers", the resolution "did not regulate the questions of investment activity let alone authoriz[e] Claimant to make investments in Crimea"[259].

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[248] RPHB I, paras. 79-80.
[249] RPreHS, paras. 166-167.
[250] RPHB I, para. 77, referring to HT, Day 3, p. 41, l. 6 to p. 42, l. 2.
[251] RPreHS, para. 166.
[252] RPreHS, para. 167.
[253] RPreHS, para. 168.
[254] RPHB I, para. 82.
[255] **Doc. VS-18**.
[256] RPHB I, para. 82, and RPHB II, paras. 22-25.
[257] RPHB II, para. 25.
[258] RPHB II, para. 25.
[259] RPHB II, para 26, referring to Sokolovskyi ER, para. 77.

2. CLAIMANT'S POSITION

420. Claimant claims to be a Ukrainian investor who qualified for protection under the BIT at all relevant times, as[260]:

- It is a legal entity duly incorporated in Ukraine – a requirement not contested by Respondent; and

- It is competent to make investments in the territory of the Russian Federation under Ukrainian law and allowed to invest and maintain its business in Crimea.

421. First, Claimant submits that Article 1(2)(b) of the BIT does not contain a temporal requirement that would require the Tribunal to assess Claimant's competence to make investments in the territory of Russia at the initial acquisition of each asset[261]. In support of its argument, Claimant refers to the *Naftogaz* decision[262] and other Crimea-related cases where the competence of the investor was assessed at the time of the alleged treaty breach[263].

422. Claimant states that Dr. Paliashvili confirmed at the Hearing that Krymenergo satisfied this requirement, as it was competent under Ukrainian law to make external investments outside Ukraine, including Russia and occupied Crimea, at all relevant times[264].

423. Furthermore, Claimant says that under the BIT it is not required to qualify as foreign when it acquired the assets[265]. The fact that the assets were acquired when Crimea was not occupied by Russia is irrelevant[266]. In any case, Claimant considers that Russia cannot now claim that Krymenergo is not a foreign investor for the purposes of the BIT, when it has treated Krymenergo as such for Russian law purposes[267].

424. Second, Claimant contends that under Ukrainian law it has always been competent to invest in the Russian Federation, which is sufficient to establish that it is an investor within the meaning of the BIT[268]. Claimant submits that there is no basis for Respondent's assertions that Article 1(2) of the BIT requires that Claimant shows that it was competent under Ukrainian law to invest in a specific geographic location and to make foreign investments in Crimea[269]. According to Claimant, this interpretation is supported by the ordinary meaning of the phrase "competent […]

[260] C I, paras. 71-73, referring to **Doc. CLA-1**, Articles 9(1)-(2); **Doc. CE-19**; Paliashvili ER I, sections V.A, V.B., V.B.2; CPHB I, paras. 30-31. See also HT, Day 3, p. 7, l. 13 to p. 9, l. 25.
[261] C II, paras. 76-79; CPreHS, para. 117.
[262] **Doc. CLA-106**, *Naftogaz (Partial Award)*, para. 143.
[263] CPreHS, para. 117; CPHB I, para. 41.
[264] CPreHS, paras. 117-118; CPHB I, paras. 32-34.
[265] CPreHS, para. 117; CPHB I, para. 41.
[266] CPreHS, para. 118.
[267] CPreHS, para. 128.
[268] CPreHS, paras. 106-108.
[269] C II, paras. 54-55; CPreHS, paras. 107-108; CPHB I, para. 36.

to make investments" and that Respondent's argument fails both as a matter of treaty interpretation and of Ukrainian law[270].

425. Contrary to Russia's assertions, Claimant further avers that there is no separate legal regime in Ukraine governing Outbound Investments[271]. Dr. Paliashvili's testified at the Hearing that the Law on Investment Activity grants Ukrainian investors competency to make external investments; Ukraine has never adopted a separate special law on Outbound Investments, nor has it otherwise established a separate legal regime for Outbound Investments[272]. Also relying on Dr. Paliashvili's testimony, Claimant contends that cross-border technical regulations which could have applied to an external investment are irrelevant to determine an investor's competency[273].

426. Third, Claimant contends that it was not at any time required to obtain an NBU license or a Ministry of Economy license to invest in Crimea[274]. Claimant denies Russia's assertions that the Special Investment Regime prohibited or significantly limited the capacity of Ukrainian legal entities from investing and doing business in Crimea. NBU Resolution No. 699, which was abolished on 27 April 2020:

- Only applied to money transfers, and thus did not restrict or bar Ukrainian companies from maintaining existing investments in Crimea;

- Did not apply retroactively to Claimant's existing investment in Crimea; and

- Was irrelevant, because no transfer of funds was made by Claimant after the Resolution was adopted.

427. Furthermore, relying on Dr. Paliashvili's report[275], Claimant rejects that its operation through a local Branch in Crimea contravened Ukrainian law[276]. To the contrary, Ukrainian Government Resolution No. 148, authorized Claimant to perform day-to-day operations in Crimea (*i.e.*, to continue its electricity supply and distribution business under the circumstances of foreign occupation)[277].

3. TRIBUNAL'S ANALYSIS

428. The Tribunal must determine whether Krymenergo is a qualified investor under the BIT. Article 1(2) BIT is the relevant provision, and it defines the term investor as follows:

> "2. The term "investor of a Contracting Party" means:

[270] CPHB I, paras. 37-38.
[271] CPHB I, para. 38.
[272] CPHB I, para. 38.
[273] CPHB I, para. 38, referring to HT, Day 3, p. 15, ll. 17-20 (Paliashvili).
[274] CPHB I, para. 39.
[275] Paliashvili ER I, paras. 9, 11, 41-44.
[276] CPreHS, para. 125.
[277] CPreHS, para. 128; Sokolovskiy ER, para. 77; CPHB I, para. 34.

> a) […]
>
> b) any legal entity constituted in accordance with the legislation in force in the territory of that Contracting Party, provided that the said legal entity is competent in accordance with legislation of that Contracting Party to make investments in the territory of the other Contracting Party" [Claimant's translation[278]]

429. This provision sets forth two conditions that Krymenergo must satisfy to deserve protection under the BIT:

- It must be constituted in accordance with the legislation in force in the territory of Ukraine; and

- It must be competent in accordance with the legislation of Ukraine to make investments in the territory of Russia.

430. Russia does not take issue with the first condition; but as regards the second requirement, it says that Krymenergo's competency must be gauged at the inception of the investment [the "**Temporal Requirement**"] and that Krymenergo must be competent to carry out the specific investment in the territory of Crimea [the "**Competency Requirement**"].

431. The Tribunal will first establish the relevant proven facts to decide upon this jurisdictional objection (**3.1**), will then analyze the Temporal Requirement (**3.2**), and thereafter will discuss the Competency Requirement: whether the investor must be authorized to carry out investments in Russia in general, or if the authorization must specifically relate to the territory of Crimea (**3.3**).

3.1 PROVEN FACTS

432. It is not contested that since 1995 Krymenergo has been an independent legal entity, incorporated in the form of a JSC (with some of its stock capital subsequently changing ownership)[279], which carried out its business activities in Crimea, in accordance with the general investment regime for domestic investments under Ukrainian law. These business activities continued after Russia's annexation of Crimea.

Ukrainian law after the annexation

433. After the Russian occupation of Crimea, Ukraine issued a Special Investment Regime (Law 1207 and Law 1636), regulating Ukrainian investments in Crimea[280]. The Special Regime recognized that investments in Crimea were now under the control of Russia and guaranteed the preservation of ownership and other property rights[281]. Based on Law 1207, on 7 May 2014 the Ukrainian Cabinet of Ministers

[278] **Doc. CLA-1**.
[279] Paliashvili ER I, para. 38.
[280] **Docs. CE-121** and **CE-259**.
[281] Paliashvili ER II, paras. 14 and 21.

issued Resolution No. 148 "On the Specifics of Regulating Relations in the Sphere of Electric Power in the Occupied Territory of the Autonomous Republic of Crimea and the City of Sevastopol" [the "**CMU Resolution on Electric Power**"][282], which authorized Ukrainian entities engaged in electricity supply and distribution in Crimea, including Krymenergo, to continue their operations[283].

Russian law after the annexation

434. After the annexation of Crimea, Krymenergo's investment became subject to Russian legislation. In response to a request from the Russian Ministry of Energy, on 26 May 2014, Krymenergo restructured its corporate presence in Crimea, moving its corporate seat to Kyiv and registering a branch office in Crimea (previously defined as the "Branch")[284]. After this restructuring, Krymenergo was a company incorporated under Ukrainian law, headquartered in Kyiv, operating through a Branch without legal personality established in Crimea.

435. On 29 May 2014, shortly after the establishment of the Branch, the Russian tax authorities issued a certificate registering Krymenergo as a foreign entity doing business in Crimea[285]. On 30 May 2014, the Uniform State Register of Enterprises and Organizations of Ukraine confirmed the registration of the Branch[286]; and, on 4 December 2014, the Russian Ministry of Justice issued a certificate of accreditation to the Branch[287].

3.2 THE TEMPORAL REQUIREMENT

436. In the previous section[288], it was found that Claimant acquired its assets in Crimea while Crimea was part of Ukraine, and that these assets came under the protection of the BIT in 2014, as a result of the territorial change caused by Crimea's annexation.

437. Under Article 1(2) of the BIT the investor must be "competent in accordance with legislation of that Contracting Party to make investments in the territory of the other Contracting Party". The Parties discuss whether the relevant date to assess this requirement is the date of the initial investment (Respondent's position), or the date of the alleged violations of the BIT (Claimant's position).

438. The Tribunal has already concluded in the Third Jurisdictional Objection that the cross-border requirement must be met at the time when the impugned measures are adopted by the host State. The same principle must be applied to the requirement that the investor must be competent under Article 1(2) of the BIT. The Tribunal finds no reason to make that assessment when the assets were acquired, as this would automatically deprive the assets from protection, only because the

[282] **Doc. CE-72**.
[283] Paliashvili ER I, para. 60.
[284] **Doc. CE-268**; Paliashvili ER I, paras. 41-43.
[285] **Doc. CE-66**.
[286] **Doc. CE-64**; Paliashvili ER I, paras. 43-44.
[287] **Doc. CE-63**.
[288] See section VI.4 *supra*.

investment was made in a territory which initially did not form part of the other Contracting State, and which thereafter was annexed and incorporated into such State.

Case law

439. The Tribunal's conclusion is reinforced by the fact that case law in related cases[289] – although not binding on this Tribunal – also decided that the competency requirement must be ascertained at the time when the impugned measures were adopted by Russia.

440. The *Belbek*[290] and *Privatbank*[291] tribunals found that the definition of investor provided for in Article 1(2) of the BIT did not include a Temporal Requirement, such as to require an investor to be a citizen of a given contracting party at the point at which the initial investment was made[292]:

> "More telling is the definition of the term 'investor of a Contracting Party' in Article 1(2) of the Treaty which, both as regards natural persons having the citizenship of the state of a Contracting Party and as regards legal entities constituted in accordance with the legislation in force in the territory of a Contracting Party, contains no temporal requirement at all, such as would require an investor to be a citizen of a given Contracting Party, or an entity constituted in accordance with the laws of a given Contracting Party, at the point at which the initial investment was made". [Emphasis added by the Tribunal]

441. Similarly, the *Naftogaz* tribunal, which examined an analogous case under the same BIT, concluded that the jurisdictional facts were to be ascertained as of the date of the alleged breach and as of the date of the commencement of the arbitration, but not as of the date of the initial investment[293]:

> "[…] in the majority view, orthodox principles of treaty interpretation require the jurisdictional facts to be ascertained as of the date of the alleged breach, not the date of the initial investment, plus the date of the initiation of proceedings". [Emphasis added by the Tribunal]

442. The case law on which Respondent relies also reinforces the Tribunal's view.

443. For instance, contrary to Respondent's averments, the tribunal in *Cem Cengiz* concluded that the claimant in that dispute was not a covered investor because on the date he made the investment, "and at all times until the alleged breach of the BIT occurred", he had the nationality of the respondent State[294]:

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[289] **Doc. CLA-106**, *Naftogaz (Partial Award)*, para. 165; **Doc. CLA-3**, *Belbek*, para. 241; and **Doc. CLA-2**, *Privatbank*, para. 228.
[290] **Doc. CLA-3**, *Belbek*, para. 241.
[291] **Doc. CLA-2**, *Privatbank*, para. 228.
[292] **Doc. CLA-3**, *Belbek*, para. 241.
[293] **Doc. CLA-106**, *Naftogaz (Partial Award)*, para. 165.
[294] **Doc. RLA-88**, *Cem Cengiz*, para. 152.

> "In the view of the Tribunal, on the evidence that is available to it, the Claimant is not a covered Investor as he is not an "Investor of another Contracting Party," because on the date he made his investment, and at all times until the alleged interference occurred, he was an investor of the Republic of Turkey". [Emphasis added]

444. The *SVP* tribunal had to apply a different BIT and it emphasized that this issue is not a matter of general principle, but rather depends upon the specific wording of each treaty[295]. More importantly, it expressly mentioned that Crimean cases were not comparable to the case the tribunal was adjudicating[296]:

> "Claimant claims that the Crimean cases, filed pursuant to the Ukraine-Russia BIT, confirm his reasoning that treaties can extend protection conferred to investments if the "nationality" of the investment changes. However, the Crimean cases do not appear, from the publicly available information, to be comparable to the case at hand. For the majority of the Tribunal, the matter in dispute in Crimea evolved from domestic disputes to international ones by virtue of a territorial change and, more importantly, the issue in the Crimean cases is not the nationality of the investor but the status of the investments". [Emphasis added]

3.3 THE COMPETENCY REQUIREMENT

445. Article 1(2) of the BIT requires that, at the date of the impugned measures, Krymenergo is competent in accordance with the legislation of Ukraine to make investments in the territory of the other Contracting Party.

446. The Parties discuss whether the "territory of the other Contracting Party" refers to Russia in general (Claimant's position)[297] or to Crimea in particular (Respondent's position)[298]. The discussion is moot because in 2015, at the time of the impugned measures, under Ukrainian law, Krymenergo was authorized both to invest in Russia in general and in Crimea in particular.

447. First, there is no dispute about Krymenergo's competency to invest in Russia, as Respondent does not seem to dispute this point[299]. Additionally, Ukraine's Law on Investment Activity[300] generally grants Ukrainian investors legal competency to make external investments. In Dr. Paliashvili's words[301]:

> "[A]ny legal entity (with minor exceptions not applicable to DTEK Krymenergo) can be an investor or a participant in investment activity. All investors, irrespective of their ownership and type of business entity, have equal right to carry out investment activity. To make an investment in any object (except where the investment is specifically prohibited or restricted) is

[295] **Doc. RLA-411**, *SVP*, para. 435.
[296] **Doc. RLA-411**, *SVP*, para. 440.
[297] CPreHS, para. 106; CPHB I, para. 31.
[298] RPHB I, paras. 81-87.
[299] R II, para. 706.
[300] **Doc. CE-269**, Article 7.1 and 7.5 *inter alia*.
[301] Paliashvili ER I, para. 46.

> an inalienable right of the investor. An investor has the right to possess, use, and dispose of investment objects and investment results".

448. Second, after the Russian occupation of Crimea, Ukraine approved a Special Investment Regime (Law 1207 and Law 1636), recognizing that investments in Crimea were under the control of Russia and ensuring that investors such as Krymenergo could maintain and operate their investments in Crimea as a matter of Ukrainian law[302]. The Special Investment Regime did not subject Ukrainian investors in occupied Crimea, such as Krymenergo, to any additional or new requirements with regards to their investments[303]. As Dr. Paliashvili's notes[304]:

> "[T]he Special Investment Regime did not subject Ukrainian investors to the special requirement of obtaining an individual NBU License for cross-border investments".

449. Third, the special procedures introduced by the Special Investment Regime included the CMU Resolution on Electric Power, relating to the electric sector, which allowed Krymenergo to continue its business in the occupied territory[305].

450. Fourth, on 30 May 2014, the Branch created by Krymenergo in Crimea, in response to a request from the Russian Ministry of Energy, was duly registered in Ukraine by the Uniform State Register of Enterprises and Organizations of Ukraine[306] (fact also acknowledged by the Russian authorities)[307]. Likewise, Respondent's expert, Mr. Sokolovskyi, admitted at the Hearing when he was asked whether Krymenergo's Branch in Crimea was formally created in compliance with Ukrainian law that[308]:

> "Yes, it's true: the branch has been created according to the law of Ukraine".

451. Therefore, the Tribunal concludes that Krymenergo meets the definition of investor for the purposes of Article 1(2) of the BIT, since, as of the date of the alleged breach of the BIT, Krymenergo was competent in accordance with the legislation of Ukraine to invest and maintain its investment in Russia in general and in Crimea in particular.

* * *

452. In view of the above, the Tribunal concludes that Krymenergo is a qualified investor under the BIT and dismisses Respondent's Fourth Jurisdictional Objection.

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[302] Paliashvili ER I, para. 55.
[303] Paliashvili ER I, para. 56.
[304] Paliashvili ER I, para. 56.
[305] **Doc. CE-72**. See also Paliashvili ER I, para. 60.
[306] **Doc. CE-64**; Paliashvili ER I, paras. 43-44.
[307] **Doc. CE-66** and **Doc. CE-63**.
[308] HT, Day 3, p. 97, ll. 16-20 (Sokolovskyi).

VI.6. ADMISSIBILITY OBJECTION: IS THERE EVIDENCE OF FRAUD AND CORRUPTION?

453. Respondent has one final objection: Russia argues that Claimant's claims are not admissible because Claimant's ultimate beneficial owner, Mr. Rinat Akhmetov, acquired Claimant through fraud and corruption[309]. According to Respondent, this is a sufficient basis for the Tribunal to render Claimant's claim inadmissible or, otherwise, to deny jurisdiction[310].

454. Claimant, on the other hand, argues that there is no basis for Respondent's allegations of fraud and corruption. Claimant asserts that its investment was made in conformity with the law. Claimant additionally argues that allegations of corruption, fraud, and illegality must be established by means of a "clear and convincing" evidence and argues that Respondent does not come close to meeting this standard[311].

455. The Tribunal will briefly lay out the positions of Respondent (**1.**) and Claimant (**2.**) before providing its analysis (**3.**).

1. RESPONDENT'S POSITION

456. Respondent submits that Mr. Akhmetov's energy empire, the "**DTEK Energy Group**", corruptly acquired its additional 45% stake in (and thus also control over) Claimant (**1.1**) which, pursuant to international public policy, renders Claimant's claim inadmissible. Alternatively, Respondent says that the Tribunal lacks jurisdiction because the alleged corruption has stained Claimant's investment, which therefore was not carried out in accordance with the BIT (**1.2**)[312].

1.1 CLAIMANT WAS ACQUIRED THROUGH FRAUD AND CORRUPTION

457. According to Respondent, the ultimate owner of Claimant, Mr. Akhmetov, is known to be associated with criminal organizations[313], "ha[s] a very dubious reputation" and "built his business empire through fraud and corruption"[314]. Respondent cites to periodicals accusing Mr. Akhmetov of benefitting from corruption[315], and points to his connections to Ukraine's political elite, including the former president of Ukraine, Mr. Viktor Yanukovych[316].

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[309] RPreHS, paras. 13-26; R II, paras. 67-127.
[310] R II, para. 700.
[311] CPreHS, paras. 163-164; referring to **Doc. CLA-35**, *Siag*, paras. 325-326; **Doc. RLA-104**, *EDF*, paras. 221, 232.
[312] R I, para. 243.
[313] RPreHS, para. 13; **Doc. RE-77**, p. 387; **Doc. RE-78**, p. 62; **Doc. RE-79**, p. 189; **Doc. RE-80**, p. 88; **Doc. RE-81**, p. 10; **Doc. RE-82**, pp. 102-105; **Doc. RE-83**; **Doc. RE-84**, p. 331.
[314] R I, para. 248.
[315] **Doc. RE-86**; **Doc. RE-87**.
[316] R II, paras. 78-82; **Doc. RE-80**, p. 88; **Doc. RE-85**, p. 197.

458. Furthermore, Respondent submits that the privatization of the Ukrainian energy complex, including Claimant, involved large scale corruption and was undertaken for the benefit of oligarchs close to the government at the time[317]. According to Respondent, the privatization process of the Ukrainian energy complex was opaque and enabled the improper influencing of public officials[318]. Respondent argues that the privatization auctions, including the one involving the 45% stake over Claimant, were biased towards certain buyers and showed many signs of systemic corruption[319].

459. Respondent argues that the legal conditions, limiting who could participate in the Krymenergo auction (and other energy company auctions), restricted competition so that only a select few oligarchs, including Mr. Akhmetov, could participate[320]. Respondent concludes that the privatization auction in 2012 was "clearly rigged"[321].

1.2 ILLEGALITY RENDERS THE CLAIM INADMISSIBLE

460. Respondent argues that Claimant's claim should be rendered inadmissible because, as a matter of international public policy, a person involved in illegal activity cannot claim for an investment that derives from an illegal act[322]. Alternatively, Respondent also argues that Claimant's investment fails to meet the conditions for jurisdiction under Article 1(1) of the BIT, which requires investments to be made "in conformity with the latter's state legislation"[323].

461. Respondent argues that international public policy dictates that the Tribunal must use its discretion not to admit this claim, because of the illegal act of Claimant's shareholders. The Tribunal cannot be seen to promote and encourage illegality by ignoring the fraud that led to the procurement of Claimant and thus the making of the investment. It should rule this claim inadmissible as a result.

462. Alternatively, Respondent asserts that it did not agree to arbitrate with a Ukrainian investor under the BIT in relation to an investment tainted with fraud and illegality. The investment was not carried out in accordance with the BIT, thus stripping the Tribunal of jurisdiction[324].

463. Respondent argues that in a situation as this, where Claimant's alleged investment is tainted by illegality and fraud, the Tribunal should not distinguish between Mr. Akhmetov, DTEK Holdings, Claimant, and their investment[325].

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[317] RPreHS, para. 16; **Doc. RE-89**; **Doc. RE-90**.
[318] RPreHS, paras. 17, 40; Sokolovskyi ER, paras. 82-89; **Doc. RE-92**.
[319] RPreHS, para. 16; **Doc. RE-92**.
[320] **Doc. RE-94**; Sokolovskyi ER, para. 99.
[321] R I, paras. 248-251, referring to **Doc. RE-20**; **Doc. RE-21**; **Doc. RE-22**; **Doc. RE-23**; **Doc. RE-24**; **Doc. RE-25**; **Doc. RE-26**; **Doc. RE-27**; **Doc. RE-28**; **Doc. RE-29**.
[322] R II, paras. 693-694, referring to **Doc. RLA-247**, *Inceysa Vallisoletana*, para. 248.
[323] R II, para. 695.
[324] R II, para. 699.
[325] R II, para. 698.

2. CLAIMANT'S POSITION

2.1 CLAIMANT'S INVESTMENT WAS LAWFULLY MADE

464. Claimant asserts that its "assets were admitted as investments in Russia under the [Incorporation] Treaty and the accompanying Federal Law on Accession"[326]. Claimant further submits that it received certification in December 2014 as a Branch of a foreign legal entity accredited in the territory of the Russian Federation[327]. Claimant notes that it converted to a Branch in order to comply with the Russian legislation, although admission of assets as investments had already been accomplished by the Annexation Treaty and accompanying legislation[328]. Therefore, according to Claimant, its investments meet the requirement of Article 1(1) of the BIT as they were made "in conformity with [the host State's] legislation"[329].

465. Finally, Claimant argues that Respondent's allegations of illegality address conduct by entities other than Claimant and, thus, have no legal relevance[330].

2.2 RESPONDENT HAS NOT PROVIDED SUFFICIENT EVIDENCE IN SUPPORT OF ITS ALLEGATIONS OF ILLEGALITY

466. Claimant submits that the burden of proof with respect to corruption allegations is on the party alleging corruption[331] and argues that Respondent provides no support for the accusations of corruption against its majority shareholder[332]. Claimant notes that Respondent refers to press statements in support of its allegations and asserts that these cannot sustain corruption allegations[333]. Respondent's allegations with respect to the ultimate beneficial owner are baseless, as the owner never participated in Claimant's management; nor has Respondent raised any specific issues regarding Claimant's misconduct[334].

467. Claimant asserts that Respondent's allegations in any case are false[335]:

- First, exhibits show that there was competition and the price paid was over the initial bidding price[336];

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[326] C I, para. 94, referring to Maggs ER, para. 77.
[327] **Doc. CE-63**.
[328] C I, para. 95, referring to Maggs ER, paras. 79-80; **Doc. CE-63**; **Doc. CE-66**.
[329] C I, para. 96.
[330] C II, paras. 86-87.
[331] C II, para. 86, referring to **Doc. CLA-115**, *ECE Projektmanagement*, para. 4.873 ("The burden of proof is undoubtedly on the party alleging corruption"); **Doc. RLA-104**, *EDF*, para. 221.
[332] C II, paras. 88-93.
[333] C II, para. 88, referring to **Doc. RE-20**; **Doc. RE-21**; **Doc. CLA-116**, *Jan Oostergetel*, para. 303 ("Mere insinuations cannot meet the burden of proof which rests on Claimants [to prove corruption]").
[334] C II, para. 87.
[335] C II, paras. 89-90, referring to R I, para. 251; Pavliashvili ER II, paras. 31-33; **Doc. CE-279**; **Doc. CE-281**.
[336] **Doc. CE-536**; **Doc. CE-538**.

- Second, the preparation for the auction and the auction itself were in compliance with the Ukrainian legislation[337].

468. Claimant argues that considering the evidence on the record – which reveals an unchallenged, competitive, and public auction – Respondent's allegations based on unreliable press reports cannot support a finding of illegality, either with regard to DTEK Krymenergo or its shareholder. Notwithstanding several changes in government, with regard to the privatization of Krymenergo in 2012 no civil or criminal complaints or investigations have been initiated against the State Property Fund of Ukraine, DTEK Holdings, Krymenergo or their officials[338]. Moreover, Claimant asserts that the Government of Ukraine praised the results of the auction and the price paid for the 45% stake in Krymenergo[339].

469. Claimant argues that Respondent has no evidence to support its accusation that the privatization auction of Krymenergo was tainted by corruption. Claimant notes that Respondent relies on a handful of publications and articles, including many from obscure sources, the majority of which describe other privatization auctions in 2012[340].

3. TRIBUNAL'S ANALYSIS

470. DTEK Energy Group is the trade name of a group of companies operating in the electricity and related sectors[341]. In 2012, the parent company of the group was a Dutch company then called DTEK Holdings B.V., which later changed its name to DTEK Energy B.V ["**DTEK B.V.**"]. One of its 100% subsidiaries was a Cypriot company known as DTEK Holdings Limited ["**DTEK Holdings**"].

471. DTEK Energy Group belongs to Mr. Rinat Akhmetov, a Ukrainian national who has often been described as an "oligarch" and the wealthiest person in Ukraine[342]. Mr. Akhmetov owns the DTEK Energy Group through his company PJSC System Capital Management [or "**SCM**"][343].

The privatization of the energy sector

472. In the post-Soviet era there was a broad privatization of the energy sector, which saw controlling stakes in a number of the largest energy companies sold to private parties. Mr. Akhmetov's DTEK Energy Group was an active participant in these privatizations[344].

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[337] CPreHS, para. 167; Pavliashvili ER II, para. 33.
[338] Pavliashvili ER II, para. 40.
[339] C II, para. 92, referring to Doc. **CE-282**.
[340] CPreHS, para. 166, referring to **Doc. CLA-116**, *Jan Oostergetel*, para. 303.
[341] C I, para. 2.
[342] See section VI.6.3.1B *infra*.
[343] **Doc. CE-15**, p. 18; **Doc. CE-16**; **Doc. CE-17**; **Doc. CE-18**.
[344] R II, Appendix 2; see section VI.6.3.1C *infra*.

The Krymenergo Auction

473. On 4 May 2012, an auction was organized for the sale of a 45% stake in Claimant [the so-called "**Krymenergo Auction**"]. The Krymenergo Auction was won by DTEK Holdings[345], after which DTEK Holdings entered into a "Sale and Purchase Agreement of the Share Package of Krymenergo PJSC" with the State Property Fund ["**SPF**"][346]. Through this acquisition, DTEK Energy Group increased its stake in Krymenergo to 57.49%, thus acquiring control of the company[347].

474. Krymenergo's current share ownership is as follows[348]:

- DTEK Energy Group (through DTEK Energy B.V. and DTEK Holdings) owns a total shareholding of 57.49%,
- The SPF of Ukraine owns a shareholding of 25%,
- Svarog Asset Management LLC, a Ukrainian asset management fund, owns a shareholding of 12.37%, and
- The remaining 5.14% of the shares are owned by a number of private individuals, none of whom owns more than a 1% stake.

3.1 ALLEGATIONS MADE AND EVIDENCE SUBMITTED

475. Respondent has made numerous allegations and submitted extensive evidence which allegedly supports its claim that Mr. Akhmetov and his DTEK Energy Group acted with corruption and malfeasance with regard to the privatization of Krymenergo. These allegations and evidence relate to Mr. Akhmetov (**B.**), to the Krymenergo Auction (**C.**) and to investigations involving the DTEK Energy Group (**D.**). In most cases, Claimant has made submissions and submitted evidence to counter Respondent's allegation.

476. Before analyzing these allegations and the available evidence, the Tribunal must solve a related procedural incident (**A.**).

A. Decision on the admissibility of 21 Exhibits

477. In communication A22, the Tribunal invited the Parties to[349]:

> "[…] provide additional briefing on whether there is or has been any law enforcement and/or parliamentary investigation into the privatization of the energy sector in Ukraine between 2012 and 2014, and especially with respect to the 'Akhmetov Group', or DTEK Krymenergo in particular".

[345] **Doc. CE-333**.
[346] **Doc. CE-281**.
[347] **Doc. CE-11**, p. 214.
[348] Request for Arbitration, fn. 4.
[349] Tribunal's communication A22, para. 3.

478. By letters of 10 and 13 December 2021, Claimant and Respondent, respectively, requested leave to submit new evidence regarding this issue[350]. In particular:

- Claimant sought leave to submit into the case record two publicly available documents[351]:
  - A report of the "Parliamentary Ad Hoc Committee on Privatization", and
  - A judgment of a Ukrainian court dismissing the challenge of Ukraine's Prosecutor's Office to the privatization of an entity by the Akhmetov Group.
- Respondent sought leave to file the following new, publicly available documents[352]:
  - Documents produced by the "Special Control Commission on Privatisation of Ukraine", and
  - "Relevant and informative press coverage".

479. The Parties only disagreed on the production of the "relevant and informative press coverage" offered by Respondent, which Claimant considered unreliable and prejudicial for Claimant[353].

480. In its decision A23 the Tribunal admitted all the evidence proposed by the Parties into the record, finding that it would otherwise be pre-judging its decision on the evidence[354]. The Tribunal noted that the concerns on the reliability of the sources would be addressed by the Tribunal when assigning the appropriate weight to the different categories of evidence in its future award[355]. Accordingly, the Parties filed the additional evidence with their Second Post-Hearing Briefs.

481. With its Second Post-Hearing Brief, Respondent purported to introduce 49 new exhibits responsive to the Tribunal's communication A22. Thereafter, Claimant identified 21 out of 49 Respondent's new exhibits as being allegedly "non-responsive" and requested the Tribunal to decline their admission[356]. Respondent, in turn, asked that Claimant's motion be denied[357]. In communication A25 the Tribunal informed the Parties that it would make a decision on the admissibility of the 21 exhibits [the "**21 Exhibits**"] in its future award[358].

[350] Tribunal's communication A23, para. 1.
[351] Tribunal's communication A23, para. 5.
[352] Tribunal's communication A23, para. 6.
[353] Tribunal's communication A23, paras. 12-13.
[354] Tribunal's communication A23, paras. 15, 18.
[355] Tribunal's communication A23, paras. 15-17.
[356] Claimant's letter of 13 January 2022, p. 3.
[357] Respondent's letter of 19 January 2022, p. 4.
[358] Tribunal's communication A25.

a. Claimant's position

482. According to Claimant, Russia has introduced in the Second Post-Hearing Brief 21 new Exhibits – Docs. RE-199 to RE-209 and RE-236 to RE-245 – that do not meet the Tribunal's criteria for the introduction of new evidence and should therefore be excluded from the record[359]. Claimant explains that[360]:

> "Ten exhibits do not even refer to law enforcement and/or parliamentary investigations or to privatization of the energy sector between 2012 and 2014, and while others do refer to the privatization of the energy sector, they are neither law enforcement nor parliamentary documents but unreliable and tendentious third-party commentary".

483. Claimant avers that Russia seeks to use these exhibits, covering general issues of privatization, in a "speculative manner to make unsupported allegations"[361].

484. Therefore, Claimant requests the Tribunal to decline the admission into the record of the 21 Exhibits identified as non-responsive[362].

b. Respondent's position

485. Russia counters that the 21 Exhibits clearly fall within the ambit of the Tribunal's directions because they are "directly relevant to the investigations into the privatization of the energy sector" in Ukraine between 2012 and 2014 regarding the "Akhmetov Group"[363].

486. Respondent considers Claimant's objections to be wrong and sorely misguided. It organizes its response by categorizing the 21 Exhibits into different groups[364]:

- According to Respondent, Exhibits RE-208 and RE-209 are relevant to the issue of illegality because they contain interviews discussing the activities of the Privatization Commission with the Head of the Privatization Commission and with the witness invited to testify before it;

- Exhibits RE-236 to RE-242 concern the issue of whether the Ukrainian judges who rendered a decision favorable to Mr. Akhmetov's privatizations were corrupt; this category is within the ambit of the Tribunal's directions as it addresses claims of corruption that already form part of the arbitration[365];

- Exhibit RE-201 is an authoritative research paper that discusses the unlawful privatizations and mentions Mr. Akhmetov and his business 21 times; it thus

[359] Claimant's letter of 13 January 2022, p. 1.
[360] Claimant's letter of 13 January 2022, pp. 1-2.
[361] Claimant's letter of 13 January 2022, p. 2.
[362] Claimant's letter of 13 January 2022, p. 3.
[363] Respondent's letter of 19 January 2022, p. 2.
[364] Respondent's letter of 19 January 2022, pp. 2-3.
[365] Tribunal's communication A23, para. 16.

addresses "law enforcement and/or parliamentary investigation into the privatization of the energy sector in Ukraine"[366]; and

- As to Exhibits RE-199, RE-200, RE-202 to RE-207, and RE-243 to RE-245, Respondent notes that Claimant's only reason for excluding these documents is that "they are neither law enforcement nor parliamentary documents"[367]; yet, Respondent recalls that the Tribunal "admitted not only official law enforcement or parliamentary documents, but also relevant and informative press coverage"[368].

487. Therefore, Respondent requests the Tribunal to reject Claimant's motion to not admit into the record the 21 Exhibits and to rule that Claimant shall bear all costs related to the exchanges following the Tribunal's communication A22[369].

c. Decision of the Tribunal

488. As the Tribunal will explain in further detail in section 3.2 *infra*, any allegation of corruption must be given serious consideration by an arbitral tribunal – to the point where a tribunal may have a duty to investigate *sua sponte*. In the present case, in communication A22 the Tribunal asked the Parties to provide additional briefing regarding investigations into the privatization of the Ukrainian energy sector and with regards to the DTEK Energy Group.

489. Claimant has asked the Tribunal to declare that the 21 Exhibits are inadmissible because they do not refer to law enforcement and/or parliamentary investigations or to privatization of the energy sector between 2012 and 2014.

490. Claimant's objection, however, misses the point of the Tribunal's fact-finding exercise. The Tribunal is concerned with obtaining any evidence upon which Respondent relies in support of the allegations of corruption it asserts in this arbitration. Only then can the Tribunal be satisfied that it has given appropriate consideration to the serious accusations made by Respondent.

491. Therefore, the Tribunal admits the 21 Exhibits, without prejudice to the weight that will apportion to such evidence in the following sections.

B. Allegations and evidence concerning Mr. Akhmetov

492. Respondent's allegations include claims with regard to Mr. Akhmetov's:

- Alleged political connections (**a.**),
- Alleged ties to criminal activity (**b.**), and

[366] Claimant's letter of 13 January 2022, fn. 6.
[367] Claimant's letter of 13 January 2022, p. 2.
[368] Respondent's letter of 19 January 2022, p. 3. See also Tribunal's communication A23, para. 18.
[369] Respondent's letter of 19 January 2022, p. 4

- Apparent dominance of the energy sector in Ukraine, including his broad success in the privatization auctions (**c.**).

a. Mr. Akhmetov's alleged political connections

(i) Respondent's position

493. Russia alleges that Claimant's ultimate beneficial owner, Mr. Rinat Akhmetov, is one of Ukraine's most notorious oligarchs, who built his business through fraud and corruption, thanks to his close personal connections to political decision-makers in Ukraine[370].

494. According to Respondent, Mr. Akhmetov corruptly benefited from his association with Ukraine's political elite, having accumulated substantial wealth through privatizations of State property rigged in his favor[371] – including in his acquisition of Claimant.

495. In particular, Respondent submits that Mr. Akhmetov enjoyed close personal ties to Mr. Viktor Yanukovych, beginning when Mr. Yanukovych was the governor of Donetsk in 1997 and through his time as Prime Minister and then President of Ukraine[372]. Respondent notes that Mr. Akhmetov built his energy empire precisely during the presidency of Mr. Yanukovych, whose government organized the sale of the state's shareholdings in the energy companies in 2012, including Krymenergo[373].

(ii) Claimant's position

496. Claimant does not address Respondent's allegations with respect to Mr. Akhmetov's alleged political connections, other than to say that they are not relevant to the issue of whether Claimant's investment was lawfully made.

(iii) Evidence submitted

497. It is not disputed between the Parties that Mr. Akhmetov is the ultimate beneficial shareholder of a controlling stake in Claimant[374]. Mr. Akhmetov has repeatedly been described as an "oligarch"[375].

498. In September 2012, the Centre for Eastern Studies (or "**OSW**" for its Polish name *Ośrodek Studiów Wschodnich*), a Polish public institution established in 1990 and financed by the Polish State budget, published a comprehensive study on "The Oligarchic Democracy – the influence of business groups on Ukrainian politics"[376].

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[370] R I, paras. 248 *et seq*.; R II, paras. 67-68; RPreHS, para. 14. See also RPHB I, para. 100; RPHB II, paras. 39-42; HT, Day 1, p. 178, ll. 14-21.
[371] R I, paras. 248 *et seq*.; R II, paras. 78-82.
[372] R II, para. 87.
[373] R II, paras. 78-82.
[374] C I, para. 8; R I, para. 247; R II, para. 67.
[375] See, e.g., **Doc. RE-206**.
[376] **Doc. RE-80**.

Although this is a comprehensive study from a respected think tank, it contains two important caveats[377]:

> "This work is based on commonly available materials (mainly on the Internet). Considering the fact that publication of sponsored texts – which are often aimed at discrediting political opponents and business competitors – is widespread in the Ukrainian media, despite the author's best efforts and critical approach, in many cases it has been difficult to verify the credibility of the facts presented below.
>
> It is often impossible to clearly assess the assets owned by individual oligarchs, and percentage differences between the data published in various rankings of Ukraine's richest people reach double digits. This is due to the problems with assessing the value of particular assets owned by the oligarchs".

499. The study explains that the "oligarchic system" (described as the links between the "newly formed big business and the political class") emerged shortly after Ukraine re-gained independence in 1991 and became firmly established in the second half of the 1990s during the presidency of Mr. Leonid Kuchma[378]. In the final years of the Soviet Union, the Communist *nomenklatura* began amassing capital and purchasing industrial plants at low prices as part of privatizations. The study contends that "the first business groups (usually branded as clans) began to emerge during the period of the country's political and economic transformation"[379].

500. The study identifies one of these business groups as the "Donetsk clan", whose business base was metallurgy and in which Mr. Akhmetov eventually became "the most important oligarch"[380]. The study explains that Mr. Akhmetov was born in 1966 in the city of Donetsk, close to the Russian border, and that his significance in the region started to grow after 1995, when he became a shareholder of the Donetsk-based Dongorbank. Mr. Akhmetov then went on to become a business leader in the Donbas region by taking over companies and plants, particularly in the metallurgical industry[381].

501. The study indicates that Mr. Akhmetov was Ukraine's richest person in 2011 and that in 2012 he was classified as no. 39 in the Forbes global ranking of billionaires[382]. In 2012, his main sectors of business activity were metallurgy, media, banking, transport, conventional power engineering, insurance, and retail trade[383].

502. In turn, Mr. Viktor Yanukovych, who was governor of the Donetsk Oblast between 1997 and 2002, then Prime Minister of Ukraine between 2002 and 2005, and finally

[377] **Doc. RE-80**, p. 11.
[378] **Doc. RE-80**, pp. 9, 13.
[379] **Doc. RE-80**, p. 13.
[380] **Doc. RE-80**, p. 14.
[381] **Doc. RE-80**, pp. 88-89.
[382] **Doc. RE-80**, pp. 84, 86.
[383] **Doc. RE-80**, p. 8.

President of Ukraine from 2010 to 2014, is identified in the OSW study as "the main political representative of th[e] [Donetsk] clan"[384].

503. At the end of Mr. Kuchma's presidency, individual businessmen gained influence and increasingly "legalized" their fortunes, concentrating their assets in groups[385]. This is said to be the case of Mr. Akhmetov's SCM (System Capital Management)[386], Ukraine's largest corporation, founded in 2000[387] – which, according to Claimant, owns DTEK Energy B.V. and DTEK Holdings, the two companies that hold stakes in Claimant[388]. The study asserts that under Mr. Kuchma's rule, politicians became clients of big business and represented its interests in parliament and government[389].

504. According to the study, during the years of 2005 to 2010, Mr. Akhmetov's association to Mr. Yanukovych was not always favorable to his business interests. The study submits that this led Mr. Akhmetov to become the most influential element of the opposition, by contributing to the Party of Regions[390]. Not only the business circles linked to Mr. Akhmetov became the principal financial base of the Party of Regions, but Mr. Akhmetov himself became a member of Parliament. The study claims that almost half of the members of Parliament had ties to Mr. Akhmetov[391].

505. When Mr. Yanukovych won the 2010 presidential elections, he was partially endorsed by the Party of Regions[392]. According to the study, by the end of 2011, most members of the Ukrainian government were linked to the Donetsk clan, which was the predominant group within the Party of Regions. The study explains that Mr. Akhmetov's interests in the government were represented by several ministers, including the deputy prime minister and minister of infrastructure, and the deputy prime minister and healthcare minister[393].

506. The study submits that Mr. Yanukovych subjugated his coalition partners and marginalized the opposition almost completely. This enabled him to favor the "Family", a group of people in his entourage, including his own family, who were able to gain enormous influence in Ukraine[394]. According to the study, Mr. Yanukovych's rule "turned out to be […] beneficial for Ukraine's richest businessman", Mr. Akhmetov[395].

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[384] **Doc. RE-80**, p. 14.
[385] **Doc. RE-80**, p. 17.
[386] **Doc. RE-80**, p. 17.
[387] **Doc. RE-80**, p. 89.
[388] C I, para. 8; **Doc. CE-18**.
[389] **Doc. RE-80**, p. 19.
[390] **Doc. RE-80**, pp. 25-26.
[391] **Doc. RE-80**, pp. 26-27.
[392] **Doc. RE-80**, p. 37.
[393] **Doc. RE-80**, p. 38.
[394] **Doc. RE-80**, p. 40.
[395] **Doc. RE-80**, p. 53.

507. The study is from 2012; in 2014, Mr. Yanukovych was ousted from office in the so-called "Revolution of Dignity" or the "Maidan Revolution" and, in 2019, he was sentenced *in absentia* to 13 years in prison for high treason.

508. Russia submitted an additional "commentary" published by the OSW in February 2015. This commentary notes that, although Akhmetov's influence diminished after Yanukovych's presidency, he successfully diversified his business interests outside of the Donetsk region, including in the power, telecommunication, and agriculture sectors. The commentary also suggests that the fact that the government has not called into question Mr. Akhmetov's privatization of State assets since 2010 indicates that Mr. Akhmetov "sealed a deal with Kyiv"[396].

Other evidence

509. The account detailed in the OSW study is backed by several other contemporaneous pieces of evidence, which include academic books and newspaper articles.

510. For instance, Russia has brought into the record an excerpt from the 2012 book *Organized Crime, Political Transitions and State Formation in Post-Soviet Eurasia* by Dr. Alexander Kupatadze, a Senior Lecturer at the Russia Institute in King's College London[397]. This book also refers to Mr. Akhmetov's links to the Party of Regions and to Mr. Yanukovych. It supports the view that Mr. Akhmetov and Mr. Yanukovych were both "informal leaders" of the Donetsk clan[398], where Mr. Akhmetov "looked after business", while Mr. Yanukovych "looked after politics"[399]. According to Dr. Alexander Kupatadze, Mr. Akhmetov was the main financier of the Party of Regions and his capital holdings increased threefold during Mr. Yanukovych's governorship of Donetsk[400].

511. Russia has also introduced into the record a 2014 study by Mr. Matthew Rojansky, the Director of the Kennan Institute at the Woodrow Wilson International Center for Scholars, a United States non-partisan policy forum[401]. In this study, entitled "Corporate Raiding in Ukraine: Causes, Methods and Consequences", Mr. Rojansky explains that "corporate raiding" in Ukraine is the illegal or improper transfer of valuable assets, or value generated from those assets, generally by means of improper coercive action, or failure to act, on the part of corrupt State authorities[402]. Mr. Rojansky explains that corporate raiding in Ukraine can trace its origins to the late Soviet-era, but that this phenomenon grew with the post-1991 privatization, with straightforwardly criminal acts, made possible by the general lawlessness of the time.

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[396] **Doc. RE-200**, p. 3.
[397] **Doc. RE-82**.
[398] **Doc. RE-82**, p. 104.
[399] **Doc. RE-82**, p. 103.
[400] **Doc. RE-82**, p. 104.
[401] **Doc. RE-22**.
[402] **Doc. RE-22**, p. 420.

512. Mr. Rojansky goes on to contend that, during Mr. Yanukovych's administration, raidings still took place although they did not involve overtly criminal activity[403]. Mr. Rojansky argues that Ukraine's most prominent oligarchs benefitted from this corporate raiding, including Mr. Akhmetov, who is described as Ukraine's wealthiest oligarch and "has also been accused of acquiring valuable assets at discount prices by playing the role of 'white knight' in association with raiders"[404].

513. Russia has also filed a one-page excerpt of a 2015 book called *Ukraine – Democratization, Corruption and the New Russian Imperialism* by Professor Taras Kuzio, a British academic specialized in Ukrainian studies[405]. Albeit in less detail, Professor Kuzio asserts that the Party of Regions:

> "[…] was organized by Yanukovych and Akhmetov to unite political and economic structures in Eastern Ukraine with smaller subgroups […]".

514. Similarly, Russia has submitted a two-page excerpt from the 2015 book *The Gates of Europe: A History of Ukraine* by Professor Serhii Plokhy, the Mykhailo Hrushevsky professor of Ukrainian history at Harvard University, where he also serves as the director of the Harvard Ukrainian Research Institute. Professor Plokhy's account coincides with the OSW study, by explaining that the "oligarchization" of the Ukrainian economy corresponded to the post-Soviet Ukrainian privatization under former president Mr. Kuchma. Professor Plokhy also notes that in the 1990s one of the new "men of steel" was Mr. Akhmetov, who is described as "the leader of the Donetsk group"[406].

515. Russia has additionally submitted a research paper published in July 2021 by Chatham House, the Royal Institute of International Affairs. The research paper, titled "Ukraine's system of crony capitalism", makes note of Mr. Akhmetov's ties with the 2019 Ukrainian government, stating that[407]:

> "It is widely believed in Kyiv that Akhmetov's direct influence on the government has increased since the 2019 elections, even if he controls far fewer votes in parliament. Prime Minister Denys Shmyhal previously held a senior position at Akhmetov's energy company DTEK, while Olha Buslavets, the acting energy minister from April–November 2020, had a professional background in Donetsk's coal industry, which is dominated by Akhmetov. She denied reports of having ties to DTEK".

b. Mr. Akhmetov's alleged ties to criminal activity

(i) Respondent's position

516. Respondent alleges that Mr. Akhmetov is also well-known for his involvement and close connections with criminal structures and fraud schemes[408]. Respondent

[403] **Doc. RE-22**, p. 422.
[404] **Doc. RE-22**, p. 427.
[405] **Doc. RE-85**.
[406] **Doc. RE-84**, p. 331.
[407] **Doc. RE-201**, p. 11.
[408] R II, para. 67; RPreHS, para. 13.

submits that violence has long been a feature of economic activity in the Donetsk region where Mr. Akhmetov started his business empire, and that Mr. Akhmetov built his fortune through crime, violence and corruption[409].

517. Respondent argues that Mr. Akhmetov has links to criminal activities since 1986 and that his significance in the Donbas region grew after the assassinations of several businessmen, whose assets Mr. Akhmetov subsequently acquired. According to Respondent, media reports connect these assassinations to Mr. Akhmetov[410].

518. Respondent additionally submits that Mr. Akhmetov was associated with and took over the leadership of a criminal group known as "Lux" ("*Lyuksovska hrupa*"), which has allegedly been implicated in the murders of dozens of businessmen. Respondent submits that Mr. Akhmetov became the "heir" to these businessmen's assets[411].

519. Respondent claims that these assassinations attracted the attention of Ukraine's General Prosecutor's Office, which identified 50 contract-killings, the beneficiary of which reportedly may have been Mr. Akhmetov. According to Respondent, these cases were never solved as political authorities influenced by Mr. Akhmetov allegedly interfered in the investigations[412].

(ii) Claimant's position

520. Claimant does not address Respondent's allegations.

(iii) Evidence submitted

521. Respondent has submitted several pieces of evidence in support of its allegations of ties between Mr. Akhmetov and criminal activities.

522. Several academic studies and newspaper articles point out that Mr. Akhmetov's activities were largely unknown until approximately 1985[413]. According to one source – a book by Mr. Hans van Zon on *The rise of conglomerates in Ukraine* – Mr. Akhmetov and his brother were involved in criminal activities as early as 1986, particularly in a robbery that led to the death of three people, although no criminal proceedings were ever started against them[414].

523. An article by Professor Kuzio (a British academic specialized in Ukrainian studies) goes on to say that in 1988 Mr. Akhmetov was questioned for being a member of an organized crime group in the Donetsk region; and that in 1999 the Ministry of

[409] R II, paras. 68, 72; RPreHS, para. 13.
[410] R II, paras. 69-71.
[411] R II, para. 74.
[412] R II, para. 75.
[413] **Doc. RE-77**, p. 387; **Doc. RE-78**, p. 61; **Doc. RE-80**, p. 88.
[414] **Doc. RE-77**, p. 387. This same excerpt is also referred to in an article published by Professor Kuzio in a book of the Soviet and Post-Soviet Politics and Society on *Ukraine's Euromaidan – Analyses of a Civil Revolution* (**Doc. RE-78**, p. 61).

Internal Affairs, Directorate on Organized Crime leaked a document entitled "Overview of the Most Dangerous Organized Crime Structures in Ukraine", in which Mr. Akhmetov is listed as a member of a criminal group that goes by the name of "*Lyuksovska hrupa*"[415].

524. Likewise, Harvard University's Professor Plokhy argues in his 2015 book *The Gates of Europe: A History of Ukraine* that in the early 1990s Mr. Akhmetov "took leadership of a company called Lux, known to the Ukrainian authorities for its criminal origins and connections"[416].

525. Several sources argue that around that same time, Mr. Akhmetov became a disciple of Mr. Akhat Bragin, described as a leader of the criminal underworld and the owner of the Shakhtar Donetsk football club[417]. Mr. Bragin was eventually murdered in a 1995 bomb explosion at the Shakhtar football stadium. According to the Kyiv Post, this crime remains unresolved to this day[418]. However, several newspaper articles and academic books point out that there have been rumors that Mr. Akhmetov might have been associated with this death. This may be due to the fact that Mr. Akhmetov was apparently not present in the match that evening, something which an online article claims "had never happened before"[419].

526. According to several pieces of evidence on the record, Mr. Akhmetov inherited Mr. Bragin's empire, including the Shakhtar Donetsk football club[420]. The OSW study notes that Mr. Akhmetov's significance in the Donetsk Oblast started to grow precisely after the assassination of Mr. Bragin in 1995[421].

527. Respondent has also introduced a three-page excerpt from Dr. Andrew Wilson's (senior lecturer in Russian and Ukrainian studies at the University of London) 2006 book *Ukraine's Orange Revolution*[422]. Dr. Wilson explains that in the mid-1990s a series of murders rocked the Donetsk clan. Besides Mr. Bragin, who was killed in a bomb explosion, his business partner, the former regional governor and owner of the Aton energy and metal trading concern, Mr. Yevhen Shcherban, was gunned down in broad daylight at the Donetsk airport, together with his wife. Several other prominent figures in the Donbas region also died[423]. Dr. Wilson notes that after this, a younger generation, which used mafia methods, ascended to power. This new generation was led by Mr. Akhmetov, who is allegedly associated with the death of Mr. Bragin[424].

528. In a chapter of the previously cited 2012 book Organized Crime, Political Transitions and State Formation in Post-Soviet Eurasia, which is dedicated to

[415] **Doc. RE-78**, p. 61.
[416] **Doc. RE-84**, p. 331.
[417] **Doc. RE-20**; **Doc. RE-78**, p. 62; **Doc. RE-79**; **Doc. RE-80**, p. 88; **Doc. RE-81**.
[418] **Doc. RE-20**, p. 6.
[419] **Doc. RE-83**, p. 1.
[420] **Doc. RE-20**, p. 6; **Doc. RE-21**; **Doc. RE-77**, p. 387.
[421] **Doc. RE-80**, p. 88.
[422] **Doc. RE-81**.
[423] **Doc. RE-81**, p. 10.
[424] **Doc. RE-81**, pp. 10-11.

Ukraine's "Privatization and Re-privatization"[425], Dr. Alexander Kupatadze discusses the prevalence of organized crime in Ukraine. According to Dr. Kupatadze, a "particular feature of regional economic activity in Ukraine is its history of extensive violence". He goes on to explain that, as a result of a number of assassinations, Mr. Akhmetov gained in power, and that these assassinations were never investigated[426]:

> "Until the time of writing, there are 55 contract assassinations that have not been investigated. Importantly, the individuals targeted were mainly entrepreneurs and their assets ended up under the control of Rinat Akhmetov (Kuzin 2006). Vladimer Malishev, the head of the regional branch of the Ministry of the Interior, whose direct responsibility it was to investigate these cases, became Akhmetov's head of security and was subsequently elected to Parliament on the Party of Regions' ticket".

529. According to Dr. Kupatadze, the Donetsk clan managed to secure and take control of the regional business through informal and sometimes illicit deals, which produced "tightly-knit networks of politicians, entrepreneurs and criminals in Donetsk"[427]. Dr. Kupatadze also observes that many property transfers happened after the assassinations of politicians and businessmen, and the property formerly owned by them appeared on the books of companies controlled by Mr. Akhmetov[428].

c. Mr. Akhmetov's dominance of the energy sector

(i) Respondent's position

530. Respondent highlights Mr. Akhmetov's dominance of the energy sector and asserts that it is "general knowledge in Ukraine" that Mr. Akhmetov accumulated his substantial wealth through privatizations of State property rigged in his favor[429].

531. Respondent argues that, considering Mr. Akhemtov's ties to then President, Mr. Victor Yanukovych[430], it is "not surprising" that Mr. Akhmetov was one of the most prolific buyers at the privatization auctions for regional power distribution and generation companies in Ukraine during that time[431].

532. Respondent asserts that, even before the privatization auctions had taken place, it was already apparent to experts and the public that "[…] the privatization of the Ukrainian energy sector [would] benefit one person [Mr. Akhmetov]"[432]. According to Respondent, this is because Mr. Akhmetov not only had a very significant political and financial influence, but because he also controlled most of coal mining facilities of Ukraine used to generate electricity and, thus, the privatization of

[425] **Doc. RE-82**.
[426] **Doc. RE-82**, pp. 102-103.
[427] **Doc. RE-82**, p. 103.
[428] **Doc. RE-82**, p. 104.
[429] R II, paras. 82 *et seq*.; RPreHS, para. 26.
[430] See section VI.6.3.1B *supra*.
[431] R II, para. 84-85, Appendix II.
[432] RPHB II, para. 40.

electricity companies could have enabled him to fully concentrate both production and distribution of electricity in Ukraine in his hands[433].

533. Respondent draws attention to Mr. Akhmetov's success in the privatization auctions over the energy sector between 2010 and 2014. Respondent identified 12 auctions during this period in which the shares of energy distribution and generation companies were privatized[434]. According to Respondent, of these 12 auctions, half (including the 2012 auction in which Claimant's shares were privatized) were won by Mr. Akhmetov's DTEK Holdings. Respondent additionally notes that of the remaining six auctions, three were won by companies associated with other Ukrainian oligarchs, and two were won by independent participants "not connected to the Ukrainian oligarchy"[435].

(ii) Claimant's position

534. Claimant does not refute that Mr. Akhmetov is a dominant force in the energy sector as well as other businesses sectors in Ukraine. Claimant nevertheless argues that only Krymenergo is relevant and asserts that the Krymenergo Auction was competitive and approved by the then government[436].

535. Claimant points to the detailed review conducted by Dr. Paliashvili in which she concluded that the Auction was held in compliance with the applicable legislation. Claimant also notes that no complaints were ever received by Krymenergo of the SPF as to the conduct of the Auction.

(iii) Evidence submitted

536. The OSW study provides perspective regarding the scope of Mr. Akhmetov's dominance of the energy sector. The study explains that in late 2011 and early 2012, the DTEK Energy Group strengthened its position on the power engineering market by buying controlling stakes in power plant complexes from the State as part of tenders, including Zakhidenergo, Dnieproenergo, and Kyivenergo. The study notes that, with the takeover of these three power plant complexes, in addition to the assets he already owned in the energy sector (including Skhidenergo in the Donetsk Oblast), Mr. Akhmetov controlled approximately 30% of the electricity produced in Ukraine[437].

537. In arriving at its figures, the OSW study, which was published in September 2012, does not factor the DTEK Energy Group's acquisition of Claimant nor other acquisitions identified by Respondent (including PJSC Donetskoblenergo, PJSC Westenergy, and PJSC Dniprooblenergo[438]).

[433] RPHB II, para. 40.
[434] R II, para. 86, Appendix II.
[435] R II, para. 86, Appendix II.
[436] CPreHS, para. 167.
[437] **Doc. RE-80**, p. 54.
[438] R II, Appendix II.

538. Mr. Akhmetov's dominance of the energy sector is not limited to ownership of his large share of energy distribution companies in Ukraine, including Krymenergo; it also includes the control of at least half of Ukraine's production of coal[439]. This, it is argued, freed Mr. Akhmetov from dependence on external suppliers, thus enabling him to run an integrated production chain from coal mining and enrichment to the production and distribution of electricity[440].

539. Other sources submitted by Respondent similarly affirm Mr. Akhmetov's position as the most dominant figure in the energy sector in Ukraine. The Chatham House research paper, published more recently in July 2021, states that[441]:

> "Rinat Akhmetov remains the biggest player in the coal industry. In 2017, his company DTEK accounted for 86 per cent of Ukraine's total production of 28 million tonnes of thermal coal".

C. Allegations and evidence on the Krymenergo Auction

540. On 4 May 2012 an auction was organized for the sale of Claimant's 45% share package owned by SPF (State Property Fund). The Krymenergo Auction was won by DTEK Holdings[442], after which DTEK Holdings and the SPF entered into a "Sale and Purchase Agreement of the Share Package of Krymenergo PJSC"[443].

541. Respondent has identified what it describes as two potential red flags in connection with the Krymenergo Auction: the restrictions placed on potential bidders (**a.**); and the low purchase price paid by the DTEK Energy Group (**b.**).

a. Restrictions placed on bidders

542. On 5 March 2012, the Cabinet of Ministers approved "**Resolution 116-r**" with the terms for selling the State's 45% stake in Claimant[444]. The document sets out the conditions and requirements for participation in the Krymenergo Auction. Among other things, buyers had to demonstrate compliance with one of the following characteristics[445]:

- That they could ensure "electricity transmission and supply for the recent three full calendar years, of at least 30 percent of [Krymenergo's] electricity transmission and supply for the same [period]"; or

- That they had a "direct holding for the recent three full calendar years of over 50 percent of the authorized capital of legal entities which transmit and supply electricity of at least 30 percent of [Krymenergo's] electricity transmission and supply for the same period".

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[439] **Doc. RE-80**, p. 54.
[440] **Doc. RE-80**, p. 54.
[441] **Doc. RE-201**, p. 18.
[442] **Doc. CE-333**.
[443] **Doc. CE-281**.
[444] **Doc. RE-187**.
[445] **Doc. RE-187**, p. 2.

543. The resolution excluded the participation of any entity that was owned in 25% or more by the Ukrainian State (or another State or government)[446].

544. Russia asserts that the requirements of Resolution 116-r clearly introduced a barrier to competition in the Auction: few companies had the required expertise. In fact, there were only two bidders in the Krymenergo Auction: DTEK Holdings and LEA[447].

545. Russia offers a press article to prove that the sole competitor of DTEK in the Krymenergo Auction – LEA – was owned by Mr. Akhmetov's business partner, Mr. Grigorishin. According to Russia, this points to the illusory character of competition in the Auction[448]. Other articles allege that the two had colluded under similar circumstances in the auction for Donetskoblenergo[449] and Dneproblenergo[450]. In both of those auctions, like in the Krymenergo Auction, the final price only increased minimally[451].

b. Purchase price

546. Russia raises concerns with respect to the apparently low sales price paid by DTEK Holdings at the Krymenergo Auction[452]. Russia submits that the low sales price at the Krymenergo Auction, as well as other privatization auctions, is indicative of systemic corruption[453]. According to Russia, an "obscure" valuation process resulted in the unnaturally low sales price of USD 30 M for the 45% share package of Krymenergo[454]. Russia notes that the price only increased by 4.7% (approximately USD 1.2 M) during bidding due to the lack of any legitimate competition[455].

547. Claimant denies that the purchase price set at the Krymenergo Auction is indicative of any wrongdoing, and asserts that the Auction was competitive and approved by the then government[456]. According to Claimant, the methodology for setting the purchase price was appropriate and was approved by the Cabinet of Ministers of Ukraine[457].

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[446] **Doc. RE-187**, p. 2.
[447] **Doc. CE-348**, p. 4.
[448] **Doc. RE-97**, p. 1.
[449] **Doc. RE-98**, p. 2.
[450] **Doc. RE-203**, p. 1; **Doc. RE-206**, p. 1, stating that "it was decided to create something akin to competition among bidders".
[451] **Doc. RE-98**, p. 2; **Doc. RE-206**, p. 2.
[452] R II, paras. 88-96; RPHB I, paras. 101-103; RPreHS, paras. 16-18.
[453] RPreHS, para. 16; **Doc. RE-92**.
[454] RPHB I, para. 105; **Doc. RE-98**; HT, Day 1, p. 190, ll. 2-7.
[455] RPHB I, para. 105; **Doc. RE-98**; RPHB II, para 41.
[456] CPreHS, para. 167; **Doc. CE-536**; **Doc. CE-282**; **Doc. CE-279**; **Doc. CE-281**.
[457] CPHB I, para. 14.

548. Claimant notes that the Krymenergo Auction resulted in a selling price UAH 10 M above the starting price and was "praised" by the then government[458] in two articles published by press service of the seller itself, SPF[459].

D. Allegations and evidence on investigations and legal actions

549. Russia claims that the lack of competition and fraudulent nature of the privatization auctions involving the energy sector did not go unnoticed by the authorities. Russia refers to several investigations lawsuits which allegedly sought to declare these privatizations illegal[460].

550. In 1993, the Ukrainian Parliament, in compliance with the Law on Privatization, created a "Special Control Commission" ["**Commission**"] on the privatization of State enterprises. The Commission was abolished in 2019 and ceased to carry out any parliamentary investigations, including an investigation commenced in 2017 in relation to the energy sector privatizations in 2011-2014 (the time period when the Krymenergo Auction took place)[461]. It issued its final report in 2018, with some bland statements that privatization had not been "efficient", and that the transformation of the public sector must be affected by "transparent and competitive privatization of state-owned property"[462]. The report does not have any specific reference to the privatization of Krymenergo. It has a section devoted to the privatization of Ukrtelecom, which is said to have resulted in an "unlawful arrangement to misappropriate" State-owned property[463], and another dedicated to the privatization of Dneproenergo, without voicing any criticism[464].

551. Claimant acknowledges that a report of the Commission raised concerns about the privatization of Ukrtelecom, the Ukrainian telecommunication company. Claimant asserts that neither the DTEK Energy Group nor any other companies, whose final beneficial ownership may be attributed to Mr. Akhmetov, participated in the initial privatization of Ukrtelecom in 2010-2011. Claimant explains that the Ukrainian-registered ESU LLC company acquired Ukrtelecom in the privatization made in 2011. After the privatization, a company owned by Mr. Akhmetov acquired Ukrtelecom from ESU LLC. Claimant notes that in 2020 Ukrainian courts dismissed the SPF's claims of illegality, and that the case is currently pending before the Supreme Court[465].

Dneproenergo

552. While it was operative, the Commission held a number of meetings, and there are transcripts of the statements made during these meetings.

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[458] **Doc. CE-282**.
[459] **Doc. CE-282**.
[460] RPreHS, para. 25; RPHB II, paras. 42-43.
[461] RPHB II, fn. 83.
[462] **Doc. CE-577**, p. 16/16.
[463] **Doc. CE-577**, p. 12/16.
[464] **Doc. CE-577**, p. 13/16.
[465] CPHB II, fn. 84.

553. The meeting of 4 March 2015 discussed the privatization of Dneproenergo – a company acquired by the DTEK Energy Group. The Commission invited another "oligarch" Mr. Igor Valrievich Kolomoisky to make a presentation and answer questions; he said that State property had been "unlawfully privatized"[466] and that Dneproenergo was "stolen twice" "for the first time it was 40% and then the second time, when they added another 25%"[467]; he added[468]:

> "They wrote the law for themselves […] it's like saying everyone plays football, but the one who always wins is Germany. So here everyone takes part in the privatization, but Akhmetov is the one who gets everything".

Zapadenergo

554. Russia adds that, in 2017, the Commission transferred to the Prosecutor General a report on the privatization of Zapadenergo, another utility acquired by the DTEK Energy Group[469]. The evidence submitted does not prove Respondent's averment; Russia has failed to marshal any proof that the Commission issued any report on the privatization of Zapadenergo and sent it to the Prosecutor General.

555. What the documents relied upon by Respondent show is that an individual deputy, Ms. Voitsitska, personally wrote to the Prosecutor General, saying that there were indicia that the privatization had resulted in the commitment of various criminal offences[470]. The Prosecutor General effectively initiated criminal proceedings in July 2017, and informed the Deputy, explaining that the "pre-trial investigation continues"[471]. There is no evidence in the file regarding the result of these pre-trial investigations.

Civil action by the Prosecutor General

556. In 2015, the Prosecutor General initiated civil proceedings[472] with regard to the privatization auction of Dneproenergo, which had been won by the DTEK Energy Group. The Prosecutor made several allegations, including[473]:

- That the conditions to participate in the auction were formulated in such a way as to artificially create barriers;
- That there was lack of competition in the determination of the price; and
- That the State received significantly less funds than it should have and thus the privatization violated the State's interests.

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[466] **Doc. RE-219**, p. 2/40.
[467] **Doc. RE-219**, p. 4/40.
[468] **Doc. RE-219**, p. 3/40.
[469] RPHB II, paras. 45-46.
[470] **Doc. RE-220**, p. 4/12.
[471] **Doc. RE-229**.
[472] Respondent says that the proceedings were criminal; this is false; the purpose of the procedure was the nullity of the privatization. See **Doc. RE-101**, p. 24/53.
[473] **Doc. RE-101**.

557. The Commercial Court of Kyiv upheld the Prosecutor's arguments, found that the privatization auction had been illegal and annulled the sale of Dneproenergo to the DTEK Energy Group[474]. But the first instance judgement was quashed in 2015 by the Supreme Commercial Court of Ukraine (presiding Judge O.O. Eevsikova and Judges O.A. Krovolets and O.B. Popikova), which found that there were no grounds to invalidate the privatization and consequently confirmed the privatization[475].

Announcement by the new Prosecutor General

558. On 2 December 2021, Ms. Irina Venediktova, the Prosecutor General of Ukraine, made an announcement in her Facebook page, saying that her office would resume the investigations of more than 200 criminal cases against "legal entities and individuals from the ambit of the owner of several channels, coal companies, energy companies, etc"[476]. The post does not mention Mr. Akhmetov, nor the privatization of Krymenergo (nor any other privatization in Ukraine). Some newspaper articles, however, speculate that the Prosecutor General may have been referring to Mr. Akhmetov[477].

559. There is no evidence in the file showing that the Prosecutor General actually resumed these investigations, that they targeted Mr. Akhmetov or any of his companies, and that they led to the indictment or conviction of Mr. Akhmetov.

3.2 LEGAL FRAMEWORK

A. The consequences of a finding of corruption

560. Respondent alleges that the DTEK Energy Group corruptly acquired its additional 45% stake in (and thus also control over) Krymenergo. Russia submits that international public policy requires the Tribunal to declare that Claimant's claim is inadmissible because of the illegal acts of Claimant's controlling shareholders. Alternatively, Respondent says that the Tribunal lacks jurisdiction because the alleged corruption has stained Claimant's investment, which therefore was not carried out in accordance with the BIT.

561. The Tribunal has taken Respondent's allegations very seriously.

562. After being confronted with Respondent's allegations of corruption, the Tribunal issued communication A22, inviting the Parties to provide additional briefing with respect to any law enforcement and/or parliamentary investigations into the privatization of the energy sector in Ukraine between 2012 and 2014, and especially with respect to the "Akhmetov Group", which, per the Tribunal's clarifications, was to include all companies in the energy sector whose final beneficial ownership may be attributed to Mr. Rinat Akhmetov or to the DTEK Energy Group[478].

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[474] **Doc. RE-101**, p. 24/53.
[475] **Doc. RE-102**, p. 19.
[476] **Doc. RE-232**.
[477] **Doc. RE-233**; **Doc. RE-234**; **Doc. RE-235**.
[478] Tribunal's communication A22, para. 3.

563. The legal consequences of corruption are stark: if an investor is shown to have procured or performed its investment through corruption, such an investor will lose access to the protections otherwise granted under international law. This arises from the principle of "unclean hands" and the longstanding doctrine upheld by investment tribunals that "an unlawful act cannot serve as the basis of an action in law"[479].

564. This understanding is further bolstered by the language of the BIT in this case, which extends protection only to those investments made "in accordance with [the host State's] legislation"[480] – and both Ukraine and Russia, the parties to the BIT, proscribe corruption in their national legislations.

565. The Tribunal notes that, even if the BIT did not contain this specific reference, the requirement that an investment may not be tainted by illegality is an implicit condition contained in all investment agreements. This is because no tribunal could rationally conclude that a State agreed to offer investment protections, enforceable through international arbitration, to an investor that acted unlawfully when obtaining such protections[481].

B. Burden of proof

566. International investment tribunals routinely apply the principle of "*actori incumbit probatio*", a doctrine which allocates the burden of proof to the party bringing a claim. This is a general principle of law and has been applied consistently by arbitral tribunals as well as by the ICJ[482]. Thus, in principle, the party which alleges a fact bears the burden of proving it. The same principle is reflected in Article 24(1) of the UNCITRAL Rules:

> "Each party shall have the burden of proving the facts relied on to support his claim or defence".

567. Since in this case it is Russia that is alleging that Claimant's investment was obtained through and is tainted by broad illegality and corruption, it is Respondent that has to provide supporting evidence.

C. Standard of proof

568. As for the standard to be applied to assess the evidence, the Tribunal perceives no reason to depart from the traditional standard of preponderance of the evidence, since neither the BIT nor the UNCITRAL Rules impose a different standard[483].

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[479] B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, Cambridge University Press (reprinted, 2006), p. 155.
[480] **Doc. CLA-1**, BIT, Article 1.
[481] **Doc. CLA-74**, *Flughafen*, para. 132; **Doc. RLA-257**, *Plama*, paras. 138-139; **Doc. RLA-86**, *Phoenix*, para. 101; **Doc. CLA-22**, *Saur*, para. 308.
[482] **Doc. RLA-92**, *Metal-Tech*, para. 237; **Doc. CLA-74**, *Flughafen*, para. 136; **Doc. RLA-328**, *Soufraki*, para. 58; *Glencore*, para. 668. See also B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, Cambridge University Press (reprinted, 2006), pp. 327-330.
[483] *Glencore*, para. 669.

569. Neither the BIT nor any other instrument of international law applicable to this arbitration provide specific guidance with respect to the standard of proof required for an arbitral tribunal to make (or reject) a finding of corruption. Thus, the Tribunal has wide discretion to determine the weight and significance of the evidence[484]. As the Tribunal in *Penwell* has recently found[485]:

> "This Arbitral Tribunal does not see any convincing reason why, *outside the field of criminal law*, a heightened standard of proof should apply to allegations of illegality. In the field of criminal law, the standard must be high because what is at stake is the risk of unjustly sanctioning an innocent person. Outside that field, what is at stake is the respective interests of two persons, the claimant and the respondent, and it would be paradoxical to impair the interests of the latter by reason of the seriousness of the alleged misbehaviour of the former".

Red flags

570. In international arbitration there will hardly ever be direct evidence of corruption and tribunals have no coercive powers. In most cases, corruption can only be proven by circumstantial evidence, through *indicia* of illicit conduct – the so-called "red flags" approach[486]. Red flags are part of circumstantial evidence, which can then give rise to proof of corruption[487]: if a party marshals evidence that proves the existence of certain indicia, and it is possible to infer from these indicia (using experience and reason) that a certain fact occurred, the Tribunal may take such fact as established. The absence of direct evidence should not be a bar to a finding of corruption, where the red flags are such that they convince the Tribunal of the reality of the allegations[488].

571. The Basel Institute of Governance has published a guideline (known as a "Toolkit for Arbitrators" on corruption and money-laundering in international arbitration[489]) which provides several non-exhaustive examples of "red flags". Included among these "red flags" are[490]:

- Personal connections to decision-makers of the State;
- The prevalence of corruptive behavior in the host State as revealed by certain international organizations or NGOs; or
- The existence of criminal investigations carried out prior to the arbitration proceedings, or in the meantime, by domestic authorities.

[484] **Doc. RLA-92**, *Metal-Tech*, para. 238.
[485] *Penwell*, para. 334.
[486] RPHB II, para. 35.
[487] **Doc. RLA-92**, *Metal-Tech*, para. 243.
[488] *Penwell*, para. 334.
[489] *Corruption and Money Laundering in International Arbitration: Toolkit for Arbitrators*, April 2019, pp. 7-8.
[490] *Corruption and Money Laundering in International Arbitration: Toolkit for Arbitrators*, April 2019.

572. What is the relevance of Ukrainian criminal investigations for the present arbitration?

573. This arbitration procedure and any potential criminal investigation operate in different legal spheres, are subject to diverging standards of proof, and may reach conflicting results. The fact that the Ukrainian criminal system has not punished alleged corrupt practices surrounding the acquisition of Krymenergo, does not preclude a hypothetical finding by this Tribunal that corruption has occurred. And *vice-versa.* That said, the conclusions of (or absence of investigation by) the municipal justice systems – which have a much higher capacity of investigation than this Arbitral Tribunal – is one of the various elements that must be considered when evaluating the available evidence[491].

3.3 DECISION

574. Respondent alleges that Claimant and its assets were obtained by fraud and corruption, because the 2012 acquisition by DTEK Holdings of a 45% shareholding in Krymenergo, which gave the buyer control over the company, involved large scale corruption. Consequently, says Respondent, the Tribunal should render Claimant's claim inadmissible, Claimant's investment being ultimately tainted with illegality, or, alternatively, it should deny jurisdiction[492].

575. Claimant, on the other hand, argues that Respondent's allegations of illegality address conduct by entities other than Claimant and are without legal relevance. In any event, Claimant argues that these allegations are plainly false[493].

576. Respondent's allegation of corruption in this case has a special characteristic, not encountered in the case law accessible to this Tribunal: Respondent is not alleging that Claimant, the Ukrainian company Krymenergo, acted corruptly when it procured the investment (*i.e.*, when it acquired the electrical assets located in Crimea, which allegedly have been impaired by Respondent's measures); nor is Respondent averring that Krymenergo acted corruptly in its dealings with the Crimean or Russian authorities, during the operation of its investment in Crimea.

577. Respondent's argument is different: it submits that the DTEK Energy Group engaged in corruption of the Ukrainian authorities when, in 2012, in the wake of the privatization of the Ukrainian electricity sector, it acquired from the Ukrainian State a 45% participation in Claimant. As a consequence of that acquisition, DTEK Holding (which was already a minority shareholder) became the controlling shareholder of Claimant.

578. In other words: Respondent is not alleging that the *investor* procured or performed the investment through corruption in the host State, but rather that the actions of the *controlling shareholder* of the investor, when it acquired control over the investor in the *home* State, was tainted by corruption. In Russia's submission, this

[491] *Glencore*, para. 673.
[492] See section VI.6.1 *supra*.
[493] See section VI.6.2 *supra*.

irregularity at the shareholder level must impair the standing of the subsidiary, to claim, as a protected investor, investment protection in the host State.

579. Russia's position raises significant legal problems.

580. In essence, what Russia is requesting is that the Tribunal sanction Krymenergo with the loss of its standing, for an alleged malfeasance committed not by it, but rather by its majority shareholder – without taking into consideration that, even after the Krymenergo Auction the DTEK Energy Group has not become the 100% shareholder of Krymenergo. Indeed, the Ukrainian State and other minority shareholders still hold a significant 42% stake in Krymenergo.

581. There is no allegation that either Krymenergo itself, its directors, officers or its minority shareholders, in any way cooperated or participated in the corruption. Respondent is asking the Tribunal to deny standing to Claimant, a company with separate legal personality and with significant minority shareholders, as a punishment for alleged wrongdoings performed by a third party, for which Claimant bears no responsibility. To accept Respondent's exception, and to deprive Krymenergo of standing to claim, could thus be considered a breach of the universal principle that no one can be punished for actions committed by third parties.

582. That said, the Tribunal does not have to delve into the difficult question of whether in international arbitration an investor can be deprived of standing because of corruption committed by its controlling shareholder when acquiring control over the investor because, even assuming *arguendo* that this was possible, a careful review of all the evidentiary record shows that Russia has failed to make out its case.

583. What does the evidence submitted by Russia prove?

A. Evidence regarding Mr. Akhmetov

584. The evidence regarding Mr. Akhmetov – the person who controls the DTEK Energy Group – presents him as one of Ukraine's wealthiest and most powerful oligarchs, one of the leaders of the Donetsk clan, and a person who has actively participated in Ukrainian politics. It is undoubted that Mr. Akhmetov has amassed a huge business empire in a few decades. The studies by think-tanks and academics (which seem to attract a higher degree of impartiality and objectivity than news outlets) suggest that Mr. Akhmetov had close ties with former presidents, Messrs. Kuchma and Yanukovych, and that his business benefitted considerably from these close associations – even if after the fall of President Yanukovych, Mr. Akhmetov's political influence seems to have waned to a certain degree[494].

585. Russia has filed extensive open-source information, hinting at an obscure, or even criminal record in Mr. Akhmetov's early life. Dr. Kupatadze, a Senior Lecturer at the Russia Institute in King's College London, notes nevertheless that there is "no formal evidence" confirming the alleged criminal past of Mr. Akhmetov. In fact, a

[494] **Doc. RE-200**, p. 3.

number of newspapers publicly apologized for linking Mr. Akhmetov to organized crime[495]. There is also no evidence in the file that Mr. Akhmetov was ever investigated, indicted or convicted, for any criminal activity and, consequently, he must be presumed innocent.

586. In 2021, the Prosecutor General of Ukraine made an announcement in her Facebook, saying that she would resume the investigation of more than 200 cases against an unnamed businessman. There have been some speculations that she may have been referring to Mr. Akhmetov – although this is not proven. There is no evidence in the file that the announcement, against whomever it was directed, has led to any investigation, indictment or conviction – of Mr. Akhmetov or of any other person.

B. Evidence regarding DTEK Energy Group's success in privatization auctions

587. It is undisputed that Mr. Akhmetov's DTEK Energy Group participated between 2012 and 2014 in 12 privatization auctions and that it was successful in six of them.

588. Was the success of the DTEK Energy Group achieved through the use of corruption?

589. The evidence marshalled by Russia which connects Mr. Akhmetov directly with corruption in the energy privatization process is very thin. Russia has only placed on the record two articles, one published on the internet and another in a newspaper, in which Mr. Akhmetov is outrightly accused of corruption:

- A 2019 article published in the internet page "Censor.net" in which Ms. Aleksandra Drik, a candidate running for the Ukrainian Parliament, refers to Mr. Akhmetov as corrupt and argues that he has never been held accountable[496]; and

- Another article published in the Ukrainian newspaper *Novoe Vremia* in March 2020, in which Mr. Mikheil Saakashvili, Head of the Odessa Regional State Administration, argues that to combat corruption in Ukraine oligarchs such as Mr. Akhmetov "should be imprisoned for corruption"[497].

590. Respondent has highlighted that between 1993 and 2019 a parliamentary Commission investigated the privatization process, criticized the privatization of Ukrtelecom (a company eventually acquired by the DTEK Energy Group, after the privatization) and made some bland recommendations with regard to the need to improve the privatization methodology. There is no evidence that this Commission ever criticized the privatization of Krymenergo. There is evidence that another oligarch, Mr. Kolomoisky, who gave evidence before the Commission, criticized the privatization of Dneproenergo in favor of the DTEK Energy Group. But the

[495] **Doc. RE-82**, p. 104.
[496] **Doc. RE-86**.
[497] **Doc. RE-87**.

probative value of his statement is very low, because he was a rival of Mr. Akhmetov in that transaction.

591. Respondent has also referred to letters and statements made by a single Ukrainian deputy, Ms. Voitsitska, who claimed that privatization of Zapadenergo has resulted in criminal offences. She wrote to the Prosecutor General, a file was opened, but there is no evidence that the investigations led to any indictment or conviction (or even to any conclusions).

592. Finally, the Prosecutor General initiated civil actions to annul the Dneproenergo privatization (in which the DTEK Energy Group had been successful), but the action was eventually dismissed by the Supreme Commercial Court of Ukraine. Russia has tried to undermine the impartiality of the judges of the Supreme Commercial Court of Ukraine, by pointing out that several years thereafter, the PIC examined Presiding Judge O.O Eevsikova for the position of Supreme Court judge and concluded "that the Candidate does not meet the criteria of integrity and professional ethics" for such position, in particular because of a failure to explain their sources of income[498]. The same occurred with Judge O.A. Krovolets, but the reasons were the influence of his mother-in-law in the advancement of his career and other procedural irregularities[499]. Be that as it may, there is no evidence that the judgement of the Supreme Commercial Court, which dismissed the Prosecutor General's claims, was obtained through corruption or through other irregularities.

593. If the evidence regarding corruption in general is thin, there is no evidence whatsoever which specifically links the 2012 privatization of Krymenergo (a transaction which occurred more than a decade ago) and malfeasance. There is no evidence of:

- Any formal complaint against either the SPF, the DTEK Energy Group, Krymenergo or their officials regarding the Krymenergo Auction[500];
- The parliamentary Commission having investigated or criticized the privatization of Krymenergo; or
- Any action by the Public Prosecutor, by the police, or of any judicial or civil actions before the courts with regard to the Krymenergo Auction.

C. Evidence regarding the Krymenergo Auction

594. Is there any other evidence that the Krymenergo Auction was rigged in favor of the DTEK Energy Group?

595. There are two factors which undoubtedly favored DTEK Energy Group over other possible bidders:

596. First, the SPF decided to privatize a 45% stake in Krymenergo. When the Auction was called, 70% of the shares belonged to Ukraine, while the DTEK Energy Group

[498] **Doc. RE-236**.
[499] **Doc. RE-237**, p. 3/12; **Doc. RE-239**.
[500] CPreHS, para. 23.

held 12.49% and other minority shareholders held the remaining 17.51%, with each shareholder owning less than 5%. If the aim of the SPF was to transfer control over Krymenergo to a private party, and thus to maximize the profit for the Ukrainian State, the financially reasonable solution would have been to auction off at least a 51% participation: in that case, the number of possible participants might well have been enlarged, since the successful bidder would have obtained control of Krymenergo (in which DTEK would only be a minority participant).

597. Instead of following this route, SPF chose to sell a 45% participation, which did not guarantee to any successful bidder control of the company, and consequently significantly reduced the attractiveness of the Auction (few buyers would be prepared to invest in a 45% shareholding, knowing that DTEK Holdings, the State and the other minority shareholders could outvote the buyer in Krymenergo's shareholders meeting). The selection of the 45% threshold also excluded the minority shareholders (who each owned less than 5%) from the list of buyers who could reach control of Krymenergo. In fact, the only person who could participate in the Auction and through that acquisition reach control of the company, was the DTEK Energy Group.

598. SPF's decision to sell a 45% stake thus played out to the advantage of DTEK Energy Group, because it minimized interest by third parties.

599. Second, Resolution 116-r, approved by the Cabinet of Ministers, limited the right to participate in the Auction to bidders who could prove significant experience in the field of electricity transmission and supply and who did not have a State participation in excess of 25%.

600. The requirements of Resolution 116-r also played out to the benefit of DTEK Energy Group. Few companies met the stringent requirements to be able to participate; and, in fact, only two companies – DTEK and LEA, both controlled by Ukrainian oligarchs – participated.

The resulting Auction Price

601. Any privatization auction requires a base bidding price. At the time of the Krymenergo Auction there were two general systems for determination of the base bidding price in Ukraine:

- The first one contemplated a "standardized valuation" by the SPF on the basis of three approaches: (i) an asset-based method; (ii) an income approach; and (iii) a comparative approach[501]; and

- The second system included an independent external valuation[502] and was only performed if there was only one bidder[503].

[501] R II, para. 94; Sokolovskyi ER, paras. 83-87.
[502] RPreHS, para. 18.
[503] Sokolovskyi ER, para. 88.

602. SPF decided to adopt the first system (because in fact there were two bidders: DTEK Holdings and LEA[504]) and set the base bidding price at UAH 246 M (roughly USD 30 M[505]). At that time, Krymenergo was a loss-making enterprise (it had lost UAH 160 M), with a high value of assets (UAH 2.62 billion) and significant equity (UAH 1.64 billion)[506].

603. The Auction began with the base bidding price of UAH 246 M. The price was raised four times. At the last stage, LEA offered UAH 253.6 M and DTEK Holdings offered UAH 256 M. LEA did not raise its offer any further, and the Competition Commission selected DTEK Holdings as the winner[507]. The increase was 4.7% of the base bidding price.

604. This UAH 256 M "**Auction Price**" corresponds to 45% of the share capital; applied to 100%, the value of the company would be UAH 569.1 M. This price must be adjusted by several factors (including a discount for lack of control, the limited number of participants and adding in Krymenergo's liabilities of UAH 874 M) resulting in an "**Adjusted Auction Price**", at the date of alleged expropriation, of USD 176.4 M – as will be explained in the quantum section VIII.1.4.3B of this Award. There the Tribunal will conclude, by majority (the President and Professor Pavić), that the fair market value of Krymenergo's business, as of the date of expropriation, amounted to USD 207.8 M. The Auction Price was thus, even after the adjustments, 15% lower than the fair market value of Krymenergo's business on the alleged date of expropriation.

D. Conclusion

605. Are there red flags? Do they connect?

606. From the above it results that there is evidence that Mr. Akhmetov, the ultimate controller of the investor, has enjoyed personal connections and close ties with politicians at the highest levels of the Ukrainian State, and that he himself has actively participated in politics. That constitutes a red flag.

607. However, the allegations of a criminal past are unproven.

608. There is evidence that the privatization process in Ukraine could have been carried out in a way which maximized the price obtained by the State, while avoiding the creation of powerful oligarchic groups – which benefitted from close connections with the political elite and were capable of accumulating enormous wealth. There is evidence that Mr. Akhmetov is the controller of one of these groups, and that he benefitted from his connections with the political power. There have been investigations into certain privatizations in which the DTEK Energy Group participated (Dneproenergo, Zapadenergo, possibly Ukrenergo). However, none of these investigations has resulted in the annulment of the privatization, or in the indictment or conviction of Mr. Akhmetov.

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[504] **Doc. CE-348**, p. 4.
[505] RPHB I, para. 105; **Doc. RE-98**.
[506] **Doc. RER-1-24**, p. 29/46.
[507] **Doc. CE-281**, pp. 11-12; **Doc. CE-280**, p. 4; **Doc. CE-348**, p. 4.

609. As regards the privatization of Krymenergo, there is no evidence of any investigation, by any political or judicial authority. There is not even any public accusation or statement that this particular transaction was affected by corruption or malfeasance. There simply is no red flag.

610. It is true that the SPF structured the Krymenergo Auction in a way which benefitted Krymenergo: the 45% stake which was put on the market and the strict requirements for participants, were limitations that reduced the number of possible bidders, and consequently lowered the purchase price which was eventually achieved. The DTEK Energy Group made a good bargain and was able to purchase control over Krymenergo at a good price.

611. A low sales price can be a red flag, as has been found by tribunals in several prior arbitrations[508]. But one must be careful in not drawing simplistic conclusions. The SPF must have been aware that, by privatizing a 45% stake and by restricting the number of potential buyers, it was impairing the price it would eventually receive. But price maximization is not the only legitimate public policy objective in a privatization. The State can legitimately forego a high price, if the buyer is a solid company, permits vertical integration, undertakes new contributions and investments and guarantees the reliability of the public service.

612. In sum, there are indeed certain red flags in relation to the privatization process in Ukraine, in general, and Mr. Akhmetov's participation, in particular. But there are no accusations at all regarding the Krymenergo privatization. Even though it is true that this transaction was structured in a way that did not maximize the sales price, there may have been legitimate policy reasons for the SPF to forego a high price.

613. The red flags which exist are set off by other possible explanations and simply do not connect. Russia has been unable to prove *quod erat demonstrandum*: that the privatization of Krymenergo in particular was rigged in DTEK Energy Group's favor by corruption or other malfeasance. Absent such evidence, the Tribunal cannot but dismiss Respondent's Admissibility Objection.

[508] See e.g., *Penwell*, para. 361 (in *Penwell* the tribunal found that a low sales price was indicative that the purchase price was not the true consideration for the investment).

VII. MERITS

614. Turning now to the merits of the present dispute, Claimant requests that the Tribunal adjudge and declare that Respondent violated Articles 2, 3 and 5 of the BIT. The Tribunal will first address the allegation of breach of Article 5 of the BIT, which is Claimant's primary claim (**VII.1**). Since it will come to the conclusion that there is a breach, the Tribunal will then briefly analyze whether Respondent also breached Articles 2 and 3 of the Treaty (**VII.2**).

VII.1. BREACH OF ARTICLE 5 OF THE BIT

615. Claimant's fundamental claim is that Russia unlawfully expropriated Krymenergo's investments, in breach of Article 5 of the BIT, which reads as follows[509]:

> "**Article 5**
> **Expropriation**
>
> 1. Investments made by investors of one Contracting Party in the territory of the other Contracting Party shall not be expropriated, nationalized or subject to other measures equivalent in effect to expropriation (hereinafter referred to as "expropriation"), except in cases where such measures are taken in the public interest under due process of law, are not discriminatory and are accompanied by prompt, adequate and effective compensation". [Emphasis added]

616. Respondent, in turn, submits that the taking of Claimant's assets satisfied the requirements for a lawful expropriation under Article 5 of the BIT.

617. The Tribunal will briefly summarize the positions of Claimant (**1.**) and Respondent (**2.**) before providing its analysis (**3.**).

1. CLAIMANT'S POSITION

618. Claimant submits that Russia directly expropriated its investment in Crimea by way of overt administrative and legislative measures that were enforced through local courts and physical force[510].

619. Specifically, on 21 January 2015, the State Council of the Republic of Crimea – which Respondent describes as a "constituent entit[y]" of the Russian Federation[511] – amended its previously adopted Expropriation Resolution and included all of Krymenergo's tangible and intangible property in Crimea on its list of property that shall be "taken into account as property of the Republic of Crimea" (previously defined as the "Amendment Resolution")[512]. That same day, Crimea's Council of Ministers – the executive branch of the Russian administration in Crimea[513] – transferred title to such property to a Russian State-owned enterprise – Russian Krymenergo. These acts were immediately followed by the outright physical

[509] **Doc. CLA-1**. Respondent's translation (**Doc. RLA-127**) does not differ significantly; however, Respondent's translation omits the wording "*are taken in the public interest under due process of law*". Respondent has corrected this omission in its written submissions, where it has added the wording in square brackets: "The investments of investors of either Contracting Party, carried out on the territory of the other Contracting Party, shall not be subject to expropriation, nationalization or other measures, equated by its consequences to expropriation (hereinafter referred to as expropriation), with the exception of cases, when such measures [*are taken in the public interest under the due process of law*] are not of a discriminatory nature and entail prompt, adequate and effective compensation" (see R II, para. 867).
[510] C I, paras. 104-113; C II, para. 101; CPreHS, paras. 172, 176-178.
[511] **Doc. CE-49**.
[512] **Doc. CE-79**.
[513] **Doc. CE-136**.

seizure and occupation of Krymenergo's offices. Furthermore, over the following months, the Crimean authorities transferred all of Claimant's bank accounts[514] and receivables to Russian Krymenergo, while leaving Claimant liable, under Russian law, for any outstanding debts[515].

620. Claimant further argues that the expropriation is attributable to Respondent because it was undertaken through the actions of Crimean authorities, whose acts are likewise attributable to Russia[516].

621. According to Claimant, Russia's complete taking of its business and assets in Crimea constitutes a "textbook expropriation", to the extent that it was even referred to by Respondent's officials as a "nationalization procedure"[517]. This language was echoed by the Prime Minister of the Republic of Crimea, who acknowledged that he made a "decision to submit a proposal to the State Council of Crimea to nationalize the Public Joint Stock Company [DTEK] Krymenergo"[518].

622. Furthermore, Claimant submits that the expropriation of DTEK Krymenergo's assets failed to meet any of the four cumulative criteria required for a lawful expropriation, as provided for in Article 5 of the BIT[519]:

- First, the expropriation was not accompanied by prompt, adequate, and effective compensation, not even an offer of compensation of any kind (**1.1**);
- Second, it lacked a legitimate public purpose (**1.2**);
- Third, it did not comply with basic due process (**1.3**); and
- Finally, it was part of a campaign of expropriation directed at Ukrainian investors and was thus discriminatory (**1.4**).

623. Therefore, Claimant submits that Russia is liable for unlawfully expropriating Krymenergo's investments in Crimea, in violation of Article 5 of the BIT[520].

1.1 RUSSIA HAS NOT PROVIDED CLAIMANT ANY COMPENSATION

624. According to Claimant, the BIT expressly requires that expropriations must be accompanied by "prompt, adequate and effective compensation", that is to say[521]:

- Compensation shall be accorded without undue delay;

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[514] **Doc. CE-84**.
[515] C I, paras. 103, 107-111; C II, para. 101; CPreHS, para. 177. See also, Maggs ER, section VI.A.
[516] C I, para. 106, fn. 243, referring to **CLA-24**, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, with commentaries (2001), Article 4 and cmts. 1, 6.
[517] C I, para. 113; C II, para. 101. See also **CE-138, CE-137, CE-139**.
[518] C II, para. 101; CPreHS, para. 179; **CE-140**.
[519] C I, paras. 103-104, 114-115, 133; C II, paras. 100, 120, 126; CPreHS, paras. 173, 175, 180; CPHB I, para. 124.
[520] C I, paras. 104, 133; C II, para. 100; CPreHS, para. 180; CPHB I, para. 124.
[521] C I, paras. 130-131; C II, paras. 120, 125; CPreHS, para. 194.

- Must correspond to the market value of the expropriated investments immediately before the date of expropriation or before the fact of expropriation became officially known; and

- Must be actually available to the investor, *i.e.*, be paid in convertible and freely transferable funds.

625. Claimant avers that six years have elapsed, and Russia has not offered – let alone provided – any form of compensation[522]. Claimant submits that the settlement procedure that Russia allegedly has made available to Claimant expressly excluded public utilities – such as Claimant – and, in any case, provided for negotiations on the possibility of compensation, not a guarantee of payment itself[523].

626. It follows that an expropriation conducted without such compensation violates Article 5 of the BIT and thus renders the expropriation unlawful on its own[524].

1.2 RUSSIA EXPROPRIATED CLAIMANT WITHOUT A LEGITIMATE PUBLIC PURPOSE

627. Claimant further avers that the Russian Federation expropriated Claimant without a genuine and legitimate public purpose. According to Claimant, none of the rationales advanced by Respondent to justify the existence of such a purpose (which changed throughout the proceedings[525]) withstands scrutiny[526].

628. First, at the time of expropriation, Respondent did not raise the issue of any alleged improprieties in the acquisition of Claimant by its majority shareholder. Therefore, Russia's *ex-post facto* theory that the nationalization's "main purpose" was to cure the alleged illegal privatization of Krymenergo cannot be considered as a valid justification, and it is, in any case, contradicted by documentary evidence[527].

629. Second, Russia's argument that Claimant's assets were expropriated so as to secure the energy supply of the Crimean Peninsula is also pretextual[528]. By the time of the expropriation, the Crimean authorities had never perceived threats to the stability and security of power supply from Claimant – precisely the contrary[529]. In any case, Krymenergo, as responsible solely for the distribution of electricity (not for its generation), could not, and did not, take any measures to limit electricity supply or distribution to consumers in Crimea[530]. Claimant submits that an "assumption" that some of Claimant's affiliates "may" have had something to do with power cuts, on

[522] C I, para. 132; C II, para. 125; CPreHS, para. 195; CPHB I, paras. 126, 147.
[523] CPHB I, para. 147.
[524] C I, paras. 103, 114-115, 130, 133; C II, paras. 125-126; CPreHS, paras. 194, 196.
[525] HT, Day 1, pp. 71-74 (Gimblett).
[526] C I, paras. 116-120; C II, para. 121; CPreHS, para. 187; CPHB I, paras. 127, 130, 134.
[527] C II, para. 115; CPHB I, para. 133.
[528] C I, para. 117; CPHB I, para. 130.
[529] C I, para. 118; C II, para. 103; CPreHS, para. 182; CPHB I, para. 130; **Doc. CE-142**; Sokolovskiy WS, para. 46.
[530] C II, paras. 106-112; CPHB I, paras. 127, 130; Omelchenko ER, paras. 25-28.

the basis of press articles[531], does not amount to a legitimate basis for expropriation of Claimant's business[532].

630. Third, Claimant rejects Russia's allegation that it nationalized Krymenergo to put an end to Claimant's unlawful conducts related, *inter alia*, to "double advance payments". According to Claimant, there is simply no evidence of any illegal conduct. On the contrary, DTEK Krymenergo's billing practices were in line with applicable law and industry standards in Ukraine which were equally applicable in Crimea[533].

631. In light of foregoing, Claimant concludes that the expropriation of Krymenergo's assets was not motivated by any legitimate public purpose, which also renders the expropriation unlawful under the BIT[534].

1.3 RUSSIA FAILED TO ACCORD CLAIMANT DUE PROCESS

632. Claimant submits that, under the international standard of due process applicable to the BIT, due process requires prior notice of an expropriation and a meaningful opportunity to challenge the expropriation in advance[535]. However, Respondent failed to meet any of these criteria, in breach of Article 5 of the BIT[536]:

- Krymenergo received no prior notice of the expropriatory measures;
- Nor was there any meaningful opportunity to challenge the legality of the expropriation; and
- Russia failed to mention the real reasoning for the expropriation.

633. Furthermore, the expropriation violated the Russian Constitution. As determined by the Russian Constitutional Court[537], it was unconstitutional to expropriate property purely on the basis of its assets being included in the Annex to the Expropriation Resolution (the case of Claimant's assets). Russia's failure to comply with its own fundamental law constitutes a further ground to conclude that it did not comply with the international standard of due process[538].

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[531] C II, para. 111, referring to **Docs. RE-30** and **RE-31**.
[532] C II, para. 112.
[533] C II, para. 114, referring to Sokolovskiy WS II, paras. 20-24; CPreHS, paras. 29, 182; CPHB I, paras. 127, 131.
[534] C I, para. 126; CPHB I, para. 136.
[535] C I, paras. 127-128; CPreHS, para. 188; CPHB I, paras. 138-140; referring to **Doc. CLA-27**, *ADC*, para. 435; **Doc. CLA-32**, *Ioannis Kardassopoulos*, para. 396; **Doc. CLA-33**, *Crystallex,* para. 713; **Doc. CLA-34**, *Middle East Cement Shipping,* para. 143; **Doc. CLA-35**, *Siag*, para. 442; HT, Day 4, p. 52, ll. 10-15 and p. 75, ll. 21-25 (Maggs).
[536] C I, para. 129; C II, para. 122-124; CPreHS, paras. 189-190; CPHB I, paras. 125, 138, 142.
[537] **Doc. CE-249**. See also **Docs. CE-248**, **CE-364**, **CE-367**, **CE-376** to **CE-388**.
[538] CPreHS, paras. 191-193.

1.4 RUSSIA EXPROPRIATED CLAIMANT IN A DISCRIMINATORY MANNER

634. Finally, Claimant avers that the lack of a "legitimate public purpose" is further corroborated by the fact that the expropriation was carried out as part of a discriminatory campaign of expropriation against Ukrainian investors[539], which was confirmed not only by official statements[540], but also by the documented practices of Russian and local authorities across a range of industries[541].

635. Likewise, the fact that Crimean authorities did not pursue similar expropriation campaigns against investors from other States is further indicative of Russia's discriminatory policy. For instance, the Crimean authorities have not nationalized the electricity distribution company in the city of Sevastopol, EC Sevastopolenergo, which was owned by non-Ukrainians[542]. Similarly, there were 45 Ukrainian banks seized in Crimea, but there is no record of an expropriation of a Russian bank[543].

2. RESPONDENT'S POSITION

636. Respondent does not contest that there was a taking of Claimant's property[544]. Likewise, it does not object to Claimant's assertion that the taking is attributable to the Russian Federation.

637. Nonetheless, Respondent avers that the taking of Claimant's assets satisfied the requirements of Article 5 for a lawful expropriation, because[545]:

- First, Claimant had access to an adequate and effective compensation mechanism (**2.1**);
- Second, the nationalization was based on legitimate public policy considerations and, as such, was decided in the public interest (**2.2**);
- Third, it was compliant with the applicable standards of due process (**2.3**); and
- Finally, it was not discriminatory against Claimant (**2.4**).

2.1 CLAIMANT HAD ACCESS TO AN ADEQUATE AND EFFECTIVE COMPENSATION MECHANISM

638. Respondent rejects Claimant's allegation that no compensation was offered. According to Respondent, through Law of Crimea No. 345-ZRK/2016 ["**Law No. 345-ZRK**"][546], the Crimean authorities offered a compensation mechanism to the legal owners of assets included in the Expropriation Resolution. Pursuant to Article

[539] C I, paras. 120-122; C II, paras. 117, 121; CPHB I, paras. 126, 146.
[540] **Docs. CE-104**, **CE-137**, **CE-105**.
[541] C I, para. 122.
[542] C I, para. 124; C II, para. 117.
[543] C I, para. 125.
[544] R I, paras. 113, 328, 337-338.
[545] RPreHS, para. 198.
[546] **Doc. AA-16**.

5(3) of said Law, applications for compensation had to have been made before 1 June 2017[547]. However, Claimant failed to make any application and does not allege that it even contemplated such action[548]. Furthermore, although Article 1(2)1 of Law No. 345-ZRK initially excluded utility companies from its coverage, this article was inapplicable[549]. Therefore, Respondent submits that Claimant is precluded from relying on the absence of payment of compensation[550].

639. In any event, Respondent contends that the mere failure to pay compensation does not render an expropriation unlawful *per se*, as expressly recognized by several legal scholars and in multiple investment cases[551].

2.2 THE NATIONALIZATION PURSUED LEGITIMATE PUBLIC PURPOSES

640. According to Russia, sovereign States enjoy wide latitude in determining whether an action is taken for a public purpose. The sovereign determination of a public purpose should not be second-guessed[552]. Respondent alleges that the dispossession of Claimant's assets served several legitimate public purposes[553]:

641. First, the expropriation was aimed at curing Claimant's alleged investments of "the stain of fraud and corruption". Given the illegitimate circumstances in which Claimant's controlling shareholder obtained its privatized shareholding, it was in Respondent's legitimate public interest to erase the effects of the illegitimate privatization such that the assets could be returned to the possession of the State[554].

642. Second, it was justified by the need to protect public order:

643. *On the one hand*, it was intended to safeguard the energy supply of the Crimean Peninsula. Respondent contends that while power supply was in the hands of Claimant, power cuts increased in Crimea and the electricity supply was not reliable. Respondent further submits that Claimant's ultimate beneficial owner – Mr. Akhmetov – is directly responsible for power cut-offs and outages in socially and strategically important sites and institutions and, thus, he and his group, in any case, should not be considered a reliable energy operator[555].

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[547] R I, para. 370; R II, paras. 894-896; RPreHS, para. 203. Asoskov ER, paras 34-39.
[548] R II, para. 897; RPreHS, para. 203.
[549] RPreHS, para. 203.
[550] R II, para. 898.
[551] R I, para. 369; R II, paras. 899-907, RPreHS, para. 204; referring to **Docs. RLA-296**, M. Mohebi, *The International Law Character of the Iran-United States Claims Tribunal* (1999), p. 289; **RLA-137**, J. Crawford, *Brownlie's Principles of Public International Law* (8th ed., 2012), p. 624; **RLA-297**, A. Sheppard, *The distinction between lawful and unlawful expropriation*, in C. Ribeiro (ed.), Investment Arbitration and the Energy Charter Treaty (2006), p. 171; **RLA-298**, *Mobil*, para. 301; **RLA-299**, *Tidewater*, paras. 141, 146; **RLA-300**, *Ampal*, para. 286; **RLA-301**, *Compañía del Desarrollo de Santa Elena*, para. 101; **Doc. RLA-302**, *Southern Pacific Properties*, paras. 158, 183.
[552] R I, paras. 346-347; referring to **Doc. RLA-103**, *Rusoro*, para. 385.
[553] R I, paras. 345-348; R II, para. 804; RPreHS, paras. 177, 199; RPHB I, para. 94.
[554] R I, paras. 353-356; R II, paras. 802, 804(a), 805-810; RPreHS, paras. 42-45, 178-179; RPHB I, paras. 95-115; RPHB II, paras. 33-54.
[555] R I, paras. 334-338, 349-351; R II, paras. 804(b), 811-817; RPreHS, paras. 180-181; RPHB I, paras. 116-118, 121-135; RPHB II, paras. 55-58, 60-62.

644. *On the other hand*, it was justified by the need to put an end to Claimant's "illegal practices"[556]:

- Claimant unlawfully claimed 100% advance payments from consumers, in breach of Russian law;

- Furthermore, Claimant opted not to comply with the rules on protected zones and rules on the use of land plots;

- Finally, Claimant refused to accept the tariff established for DTEK Krymenergo.

645. In sum, Respondent submits that the dispossession of Claimant's assets pursued legitimate *bona fide* public interests, in compliance with Article 5 of the BIT[557].

2.3 THE NATIONALIZATION WAS COMPLIANT WITH THE APPLICABLE STANDARDS OF DUE PROCESS

646. Respondent further contends that the seizure of Claimant's assets complied with the applicable standards of due process[558]:

647. The adoption of the Expropriation Resolution was within and in accordance with the powers of the Crimean authorities and, contrary to Claimant's allegation, it did not violate the Russian Constitution[559].

648. Moreover, Claimant's position that the lack of advance notice and opportunity to be heard in advance violates due process is meritless. International law only imposes the obligation to provide an opportunity for an investor to challenge the legality of the expropriation through effective and transparent procedures[560]. Likewise, Russian law does not contain a requirement of prior notice of the seizure, but only imposes a guarantee of judicial control, which can be carried out before or after the expropriatory measures[561].

649. According to Respondent, Claimant was given this opportunity, like several other property owners impacted by the Expropriation Resolution. However, since Claimant was unable to establish legal acquisition and ownership of the assets, it deliberately and strategically opted not to challenge the Amendment Resolution and, instead, to proceed directly to arbitration. Claimant is now estopped from

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[556] R I, para. 357-358; R II, paras. 804(b), 818-821; RPreHS, para. 180, 182-183; RPHB I, paras. 120, 136-141.
[557] R II, paras. 822, 873; RPreHS, para. 184.
[558] R I, para. 362; R II, para. 875; RPreHS, para. 200; RPHB I, para. 149; RPHB II, paras. 63, 66.
[559] R I, paras. 363-364; R II, paras. 876-877; RPreHS, para. 200.
[560] R I, paras. 365-366; R II, paras. 888-889; RPreHS, para. 201; RPHB I, paras. 149, 151-155; RPHB II, paras. 64-65; referring to **Doc. RLA-280**, *South American Silver*, paras. 582, 585; **Doc. CLA-27**, *ADC*, para. 435; **Doc. CLA-32**, *Ioannis Kardassopoulos*, para. 396.
[561] R II, paras. 878-879; RPHB I, paras. 149, 156-158, 167-171; RPHB II, para. 66; HT, Day 4, pp. 209-210 (Prof. Asoskov).

claiming a violation of due process when it decided not to exercise the remedies available to it[562].

2.4 THE NATIONALIZATION WAS NOT DISCRIMINATORY AGAINST CLAIMANT

650. Respondent further rejects that Claimant's dispossession of assets was conducted in a discriminatory manner[563].

651. Before its reunification with the Russian Federation, Crimea was part of Ukraine; therefore, it is unsurprising that a majority of property owners in Crimea were Ukrainians. In any case, neither Law No. 38-ZRK, the Expropriation Resolution nor the Amendment Resolution refer to the nationality of those whose property was dispossessed, be it Ukrainian or otherwise. Moreover, the Amendment Resolution also covers a number of assets that belonged to non-Ukrainian companies[564].

652. In any case, a test for discriminatory treatment requires an appropriate comparator, which Claimant has failed to identify. The only such purported similar company presented by Claimant is inapposite because EC Sevastopolenergo, unlike Claimant, was not implicated in any violations of Russian law[565].

3. DISCUSSION

653. The Tribunal's analysis will start by defining the requirements for an expropriation under the BIT (**3.1**). The Tribunal will then summarize the proven facts (**3.2**). Thereafter, the Tribunal must answer two questions to determine whether Claimant's investment was unlawfully expropriated:

- Do the proven facts demonstrate that there was an expropriation under the BIT? (**3.3**)

- If so, did such expropriation comply with the criteria set forth in the BIT to be considered lawful? (**3.4**)

654. The Tribunal will conclude that Respondent's taking of Claimant's assets constituted an unlawful expropriation, in breach of Article 5 of the BIT (**3.5**). Therefore, the Tribunal will analyze the two counterarguments advanced by Respondent to justify the taking of Claimant's assets and the non-payment of compensation (**3.6**).

3.1 REQUIREMENTS FOR AN EXPROPRIATION UNDER THE BIT

655. Article 5 of the BIT contains a general prohibition against three types of dispossession measures taken by the host State:

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[562] R I, para. 365; R II, paras. 881-887; RPreHS, para. 201; RPHB I, paras. 150, 161-166. Asoskov ER, paras. 40-51.
[563] R I, paras. 360-361; R II, paras. 890-891; RPreHS, paras. 185-189, 202; RPHB I, para. 174.
[564] R II, paras. 826-829, 890; RPreHS, para. 186; RPHB I, para. 175; RPHB II, para. 68.
[565] RPreHS, para. 188; RPHB I, paras. 176-177.

- expropriations,
- nationalizations, and
- other measures with equivalent effect.

656. As a general rule, such measures are improper; as an exception, they are licit if the host State meets four cumulative requirements:

- the measures must be accompanied by prompt, adequate and effective compensation,
- be taken in the public interest,
- in accordance with due process, and
- not be discriminatory.

Measures

657. The concept of "measure", which is not defined in the BIT, must be understood in a broad sense – as is made clear by the text of the BIT itself, which only refers to the noun "measures", without any further qualification. Therefore, it covers all types of administrative, legislative or judicial acts carried out by any of the powers of the Russian Federation (or by any other entity for whose acts Russia is responsible in accordance with international law), and prohibits such acts from resulting in expropriation, nationalization or an equivalent measure.

Expropriation, nationalization

658. Likewise, the BIT does not provide a definition of "expropriation" or "nationalization", but both are well-established international law concepts.

659. In an "expropriation" a State, exercising its sovereign powers, dispossesses an investor of a protected investment, depriving the investor of the ability to manage, use or control its property, or of the ownership of the investment. The definition of expropriation is centered on the taking suffered by the investor: there is no requirement that the investor's loss translate into enrichment of the State – although typically expropriations will result in wealth passing from the investor to the State, to a public entity, or to a private beneficiary favored by the State.

660. Expropriations on a sector or industry-wide basis are usually referred to as "nationalizations". As explained by the tribunal in *OI European Group*[566]:

> "Nationalization is a concept analogous to expropriation, with the addition that it frequently involves complete sectors of the economy and that the State normally assumes ownership of the investment it has taken from the investor".

[566] **Doc. RLA-344**, *OI European Group*, para. 328.

661. Investor[567] and investment[568], in turn, are concepts defined in the BIT. The Tribunal has already concluded that the Claimant is an investor for the purposes of the Treaty[569], and that it is the holder of a protected investment, which includes real property, valuable equipment and other moveable property, cash, and intangible assets, such as shares, licenses, and contracts[570].

Types of expropriation

662. Expropriation can be direct or indirect:

- Direct expropriation involves the "outright taking or seizure of property rights in assets owned by private parties, usually combined with a transfer of such rights to either the expropriating state or to third parties"[571];

- Indirect expropriation occurs when the property is otherwise destroyed or there is a significant depreciation of the value of the assets, or the owner is deprived of its ability to manage, use or control its property, without the legal title being affected.

663. The main distinguishing characteristic between a direct and an indirect expropriation is whether legal title to property is affected[572].

3.2 PROVEN FACTS

664. On 27 February 2014, Russian military forces gained control of key locations in the capital city of the Autonomous Republic of Crimea, which before had been a part of Ukraine[573].

665. On 16 March 2014, an independence referendum was held[574], and the next day the State Council of the Autonomous Republic of Crimea declared the formation of the new sovereign entity named the Republic of Crimea[575] [already referred to as the "Independence Resolution"]; at the same time, the authorities made it clear that they were requesting that the new State entity be incorporated into the Russian Federation[576].

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[567] **Doc. CLA-1**, Article 1(2) of the BIT.
[568] **Doc. CLA-1**, Article 1(1) of the BIT.
[569] See section VI.5 *supra*.
[570] See section VI.4 *supra*.
[571] A. Reinisch and C. Schreuer, "Expropriation" in *International Protection of Investments: The Substantive Standards*, Cambridge University Press (2020), para. 156.
[572] A. Reinisch and C. Schreuer, "Expropriation" in *International Protection of Investments: The Substantive Standards*, Cambridge University Press (2020), para. 203.
[573] See, e.g., **Doc. CE-43**; **Doc. CE-44**, paras. 155-158.
[574] **Doc. CE-45**.
[575] **Doc. CE-46**.
[576] **Doc. CE-46**, para. 8, p. 3 of pdf.

666. Two days later, under the Annexation Treaty, the Republic of Crimea became part of the Russian Federation[577].

667. On 21 March 2014, Russia adopted the Incorporation Law, which undertook to integrate Crimea into the Russian Federation; this Law, *inter alia*:

- Extended the application of the Russian tax regime to the territory of the Republic of Crimea[578],
- Introduced the Russian RUB as the national currency in Crimea[579] and
- Established Russian courts in Crimea[580].

668. On 30 April 2014, the State Council of the Republic of Crimea, using as a legal basis the Incorporation Law, issued the Expropriation Resolution stating that certain categories of property "shall be considered the property of the Republic of Crimea"[581]. At that point, the affected categories of assets included Ukrainian State-owned property and "abandoned properties".

669. Claimant's investment, however, was not affected at this stage.

Claimant's investment continues in the Republic of Crimea

670. Adapting to the new situation, on 26 May 2014 Claimant restructured its corporate presence in Crimea, moving its corporate seat to Kyiv, Ukraine, and registering a Branch in Crimea[582].

671. The Russian authorities accepted Claimant's change: on 29 May 2014, the Russian tax authorities issued a certificate registering Claimant as a foreign entity doing business in Crimea[583].

672. On 11 August 2014, the Russian government issued a Decree on the regulation of electricity in Crimea, which, among other things, provided that only designated entities were permitted to distribute electricity in Crimea[584]. Less than three weeks later, on 29 August 2014, the Russian authorities in Crimea designated the Branch as an authorized supplier of electricity in Crimea[585].

673. The Russian authorities continued to condone Claimant's activity in Crimea until the end of 2014:

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[577] **Doc. CE-48**, Articles 2, 9(1).
[578] **Doc. CE-49**, Article 15.
[579] **Doc. CE-49**, Article 16.
[580] **Doc. CE-49**, Article 9.
[581] **Doc. CE-80**, Article 1.
[582] **Doc. CE-60**; **Doc. CE-61**; **Doc. CE-62**; **Doc. CE-64**.
[583] **Doc. CE-66**.
[584] **Doc. CE-67**. See also, Belyaev WS, para. 16.
[585] **Doc. CE-68**.

- On 21 October 2014, they approved Claimant's investment program[586];
- On 27 October 2014 and 19 December 2014, they set regulated tariffs for the supply of electricity by the Branch[587]; and
- Finally, on 4 December 2014, Russia's Ministry of Justice issued a certificate of accreditation to the Branch[588].

Claimant's investment is targeted by the Amendment Resolution

674. The manner in which the Russian Federation treated Claimant's investment changed abruptly in January 2015.

675. On 21 January 2015, the State Council of the Republic of Crimea passed an amendment to the Expropriation Resolution [already referred to as the "Amendment Resolution"] adding to the list of dispossessed properties all of Claimant's tangible and intangible assets in Crimea[589].

676. On that same day, the Council of Ministers of the Republic of Crimea adopted a regulation placing Krymenergo's movable and immovable property in Crimea under the control of a Russian state-owned enterprise – Russian Krymenergo[590].

677. In parallel, employees of Russian Krymenergo, accompanied by uniformed security personnel, entered the Branch office, demanded original financial documents, keys and seals, and ordered Krymenergo employees to leave the premises[591]. The following day, non-technical Krymenergo staff were barred entrance to the Branch office[592].

678. In the following month, the Crimean authorities took further expropriatory actions by amending the measures adopted on 21 January 2015, including by transferring all Claimant's bank accounts and receivables to Russian Krymenergo[593], and seizing Claimant's shareholding in PJSC East Crimean Energy Company[594].

679. No compensation has been paid by the Crimean or Russian authorities for Claimant's dispossessed assets.

[586] **Doc. CE-71**.
[587] **Doc. CE-69**; **Doc CE-70**.
[588] **Doc. CE-63**.
[589] **Doc. CE-79**.
[590] **Doc. CE-81**.
[591] Sokolovskiy WS, paras. 44-45; Belyaev WS, paras. 24-26.
[592] Belyaev WS, para. 27.
[593] **Doc. CE-84**.
[594] **Doc. CE-41**.

3.3 DID RESPONDENT EXPROPRIATE CLAIMANT'S INVESTMENT?

A. The taking of Claimant's assets

680. As seen above, the Russian Federation gained control over the Crimean Peninsula in February 2014. In April 2014, the Crimean authorities enacted the Expropriation Resolution, nationalizing certain enterprises[595].

681. Claimant's investment, however, was not affected by the Expropriation Resolution. Instead, Claimant continued to operate its business in the Republic of Crimea and, until the end of 2014, obtained further assurances which confirmed that its business was compliant with local regulations.

682. The situation changed in January 2015, when, suddenly, the Crimean authorities reversed course.

683. It is undisputed that there was a taking of Claimant's assets, which occurred through three main events on 21 January 2015:

- First, the State Council of the Republic of Crimea issued the Amendment Resolution[596] and placed all of Claimant's tangible and intangible property in Crimea on a list of property that should be "taken into account as property of the Republic of Crimea";

- Second, on the same day, Crimea's Council of Ministers transferred control of Claimant's property to Russian Krymenergo[597]; and

- Third, also on the same day, Russian Krymenergo employees physically entered the main office buildings of Claimant in Simferopol and forced Claimant's management from the offices without readmission to Claimant's facilities;

[the "**Expropriatory Measures**"].

684. Further actions were later adopted in furtherance of the Expropriatory Measures adopted on 21 January 2015; as a result, there was a complete dispossession of Claimant's business and assets in Crimea.

685. In light of the facts described, the Russian Federation does not contest that the taking of Claimant's assets constitutes an expropriation or nationalization: in fact, Respondent even refers to the Amendment Resolution as the "Decision to Nationalise"[598].

686. Likewise, there is no dispute between the Parties that the taking of Claimant's assets was a classic, direct expropriation: the actions taken by the Crimean authorities formally and expressly divested Krymenergo of title to each of its assets in Crimea,

[595] **Doc. CE-80**.
[596] **Doc. CE-79**.
[597] **Doc. CE-81**.
[598] R I, para. 328.

physically prevented Krymenergo from accessing its property on the peninsula, and, ultimately, transferred title, use, and benefit of Krymenergo's assets to Russian Krymenergo.

B. Attribution

687. The next question is whether the Expropriatory Measures can be attributed to the Russian Federation.

688. Article 4 of the International Law Commission Draft Articles on State Responsibility [the "**ILC Draft Articles**"] states as follows[599]:

> "Article 4. Conduct of organs of a State
>
> 1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.
>
> 2. An organ includes any person or entity which has that status in accordance with the internal law of the State".

689. The Expropriatory Measures of 21 January 2015 were undertaken by three entities:

- The State Council of the Republic of Crimea;
- The Council of Ministers of the Republic of Crimea; and
- The employees of Russian Krymenergo, a State-owned Russian company.

690. The actual entity responsible for the taking, however, is the State Council of the Republic of Crimea: the focal legal action was taken through the adoption of the Amendment Resolution, and the transfer of control over Claimant's assets by the Council of Ministers, as well as the physical eviction of the Branch office premises by Russian Krymenergo employees, were ancillary in nature.

691. In any case, Respondent does not dispute that the actions of these three entities can be attributed to the Russian Federation[600].

692. The first two are official organs of the Republic of Crimea, an entity which, according to Russian law, forms part of the Russian Federation. The Annexation Treaty and Incorporation Law are clear in delegating any local powers to the organs of the Republic of Crimea from the federal organs of the Russian Federation[601].

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[599] **Doc. CLA-24**, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001).
[600] The only reference to the question of attribution in Respondent's pleadings is found in R I, para. 330, in which Respondent states: "More specifically, the Crimean authorities (assuming that their actions can be attributed to the Russian Federation) enacted the [Expropriation Resolution] (and the subsequence [Amended Resolution] […]" [Emphasis added].
[601] **Docs. CE-46** and **CE-48**.

Thus, the actions of the State Council or the Council of Ministers of the Republic of Crimea can be attributed to the Russian Federation.

693. The third entity, *i.e.*, Russian Krymenergo, acting through its employees who physically threatened Claimant's staff and expropriated the premises of Claimant's Branch office, exercised the public powers of eviction, and executed the regulations introduced by the local legislative body. Thus, their actions can also be attributed to the Russian Federation[602].

694. As a result, the Tribunal confirms that the actions of the Crimean authorities and Russian Krymenergo are attributable to Respondent under Article 4 of the ILC Draft Articles.

* * *

695. There is thus no disagreement between both Parties that direct expropriation has indeed taken place, and that the Expropriatory Measures are attributable to the Russian Federation. The real issue in dispute between the Parties is whether such expropriation complied or not with the requirements of Article 5 of the BIT. The Tribunal will analyze this question in the next chapter.

3.4 WAS THE EXPROPRIATION COMPLIANT WITH ARTICLE 5 OF THE BIT?

696. Both Parties agree that the BIT does not forbid States from expropriating assets owned or controlled by investors, or from nationalizing natural resources or economic sectors. The Parties also agree, however, that the BIT establishes four requirements which the State must comply with in order for the expropriation to be lawful. The measure:

- Must ensure prompt, adequate and effective compensation (**A.**),
- Pursue a legitimate public purpose (**B.**),
- Be adopted under due process of law (**C.**), and
- Not be discriminatory (**D.**).

697. Claimant alleges that each of the requirements must be met[603]. The Tribunal agrees: failure to comply with any of the requirements will render the expropriation unlawful.

698. The Tribunal must therefore determine whether the Russian Federation satisfied such conditions when adopting the Expropriatory Measures – otherwise the expropriation would be deemed unlawful, in violation of Article 5.

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[602] **Doc. CE-58**. The Resolution of the State Council of the Republic of Crimea establishing Russian Krymenergo provides that (i) the Council of Ministers of Crimea shall "[d]efine the management body" of the enterprise; and (ii) a commission of the State Council of Crimea "shall be responsible for supervising the implementation of this Resolution".
[603] R I, para. 103.

699. Claimant argues that the Russian Federation has not complied with any of the conditions set for a lawful expropriation under Article 5 of the BIT. The Russian Federation, in turn, considers that it has complied with all of them.

700. The Tribunal will analyze each of these requirements in turn to determine whether the Russian Federation has complied with the provisions of the Treaty.

A. Prompt, adequate and effective compensation

701. Article 5 of the BIT requires that the measures are accompanied by

> "[…] prompt, adequate and effective compensation".

702. Claimant avers that Russia's failure to provide any form of compensation violates Article 5 of the BIT and, thus, renders the expropriation unlawful on its own. Respondent, for its part, does not deny that it did not pay any compensation to Claimant, but argues that the mere failure to pay compensation does not render an expropriation unlawful *per se*.

703. The BIT clearly states that expropriation must comply with four cumulative conditions, including the payment of "prompt, adequate and effective compensation". It follows that failure to pay such compensation renders the expropriation non-compliant with Article 5[604].

Respondent's counterargument

704. Alternatively, Respondent contends that Claimant had access – through Law No. 345-ZRK – to a "prompt, adequate and effective compensation" mechanism, but that it failed to apply within the deadline foreseen in the Law. Hence, Claimant is precluded from relying on the absence of payment of compensation.

705. The Tribunal disagrees.

706. First, Law No. 345-ZRK was enacted by the State Council of the Republic of Crimea only on 28 December 2016, *i.e.*, two years after the Expropriation Resolution. It follows that it was not "prompt" compensation.

707. Second, it was also not "effective" compensation, since Law No. 345-ZRK did not constitute a guarantee of payment. It established a procedure under which the authorities could grant compensation, subject to certain conditions. Particularly, Law No. 345-ZRK expressly states that the applicant must prove that it had ownership of the property[605]. However, according to Respondent's position in this arbitration, Claimant would not be able to establish legal acquisition and ownership of the assets. Respondent's attitude makes it likely that any application would have been rejected.

[604] **Doc. CLA-25**, *Vivendi II*, para. 7.5.21; **Doc. CLA-30**, *von Pezold*, para. 498.
[605] **Doc. AA-16**, Article 4.2(3).

708. Third, Law No. 345-ZRK expressly excluded utility companies from its scope:

> "2. The effect of this Law does not apply to property owned on the right of ownership before inclusion in the List by:
>
> 1) organizations that provided as of 21 February 2014 utilities and life support services for the population of the Republic of Crimea".

709. Russia does not deny that Law No. 345-ZRK expressly excluded utility companies, but avers that such exception is "inapplicable", because the State Council of the Republic of Crimea did not publish a list of the excluded entities, pursuant to Article 1(3) of Law No. 345-ZRK. This argument does not withstand scrutiny: failure to compile that list does not mean that the investor would automatically be eligible for compensation under Law No. 345-ZRK. It follows that Law No. 345-ZRK could not be considered "adequate" compensation either.

710. In sum, the Tribunal concludes that Respondent's failure to pay "prompt, adequate and effective compensation" constitutes a breach of Article 5 of the BIT.

* * *

711. Since the Expropriatory Measures did not comply with one of the fundamental requirements of Article 5 of the BIT, there would be no need to decide whether such Measures were taken in the public interest, conducted under due process of law and in a non-discriminatory manner. Nevertheless, as the Parties have pleaded extensively on these matters, the Tribunal will address them briefly.

B. Public purpose

712. To be considered lawful, Article 5 of the BIT also requires an expropriation to be

> "[…] taken in the public interest".

713. According to the Russian Federation, sovereigns enjoy wide latitude in determining whether an action is taken for a public interest – in other words, the sovereign determination of a public purpose should not be second-guessed by an investment tribunal[606]. Russia says that the expropriation of Claimant's assets served at least two legitimate public interests[607]:

- First, it was necessary to protect the public order, either to ensure "accident-free and stable operation of the power supply system of the Republic of Crimea and to prevent interruptions in the supply of electricity to socially significant objects" and to respond to "Claimant's continued unlawful practices" (**a.**); and

[606] R I, para. 346.
[607] R II, para. 804; RPreHs, para. 177.

- Second, it "cured Claimant's alleged investments of the stain of fraud and corruption arising out of the illegitimate 2012 privatization of the controlling stake in Claimant's shareholding" (**b.**).

714. Claimant, in turn, argues that Russia's allegations of "public purpose" are pretextual and unsupported. There is no evidence linking Claimant to the power cuts claimed to have inspired the expropriation. Likewise, there is no contemporaneous complaints about Claimant's conduct nor about the acquisition of Claimant by its majority shareholder. The real motivation for the expropriation was the desire to dispossess Ukrainians from their businesses in Crimea.

Tribunal's analysis

715. The Tribunal is respectful of Russia's sovereign right to determine what is in the public interest[608]. However, such respect does not mean *carte blanche*: the public interest must go beyond a State's mere declaration; therefore, the Tribunal is called to verify whether the alleged public interest is substantiated with "convincing facts or legal reasoning"[609].

716. As noted by the *ADC v. Hungary* tribunal[610],

> "[…] a treaty requirement for 'public interest' requires some genuine interest of the public. If mere reference to 'public interest' can magically put such interest into existence and therefore satisfy this requirement, then this requirement would be rendered meaningless since the Tribunal can imagine no situation where this requirement would not have been met".

717. Likewise, in *British Caribbean Bank Limited* the tribunal observed that public purpose requires an explanation of how the State's goal will be fulfilled[611]:

> "[public purpose] requires – at least – that the Respondent set out the public purpose for which the expropriation was undertaken and offer a *prima facie* explanation of how the acquisition of the particular property was reasonably related to the fulfilment of that purpose".

718. In addition, the public purpose requirement should be considered by reference to the time when the expropriatory measure was taken. In other words, the alleged public purpose must be contemporaneous to the expropriation, and not an *ex-post facto* construction that aims at justifying the taking.

719. To determine whether the expropriation was actually carried out in the public interest it is thus necessary to analyze how the contemporaneous official documents justified the taking of Claimant's assets:

720. The starting point is the Expropriation Resolution, which explained that[612]:

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[608] **Doc. RLA-103**, *Rusoro* para. 385.
[609] **Doc. CLA-27**, *ADC*, para. 430.
[610] **Doc. CLA-27**, *ADC*, para. 432.
[611] **Doc. CLA-28**, *British Caribbean Bank*, para. 241.
[612] **Doc. CE-80**.

> "[…] all State property (of the State of Ukraine) and abandoned property located on the territory of the Republic of Crimea shall be considered the property of the Republic of Crimea".

721. This wording was slightly modified through the Amendment Resolution, to read as follows[613]:

> "[…] all state-owned property (of the state of Ukraine) and ownerless property located in the territory of the Republic of Crimea, as well as the property specified in the Annex to this Resolution, is taken into account as property of the Republic of Crimea".

722. The Amendment Resolution also added a new clause, stating that:

> "[…] the Council of Ministers of the Republic of Crimea has the right to introduce a temporary administration indicating its powers to manage an enterprise, a company or its branch, in cases where the introduction of a temporary administration is necessary for provision of stable and trouble-free operation of the facilities which are recognized to be owned by the Republic of Crimea, with the aim of preventing the occurrence of disturbances during operation of these facilities". [Emphasis added]

723. The explanatory note to the draft resolution of the State Council of the Republic of Crimea "On Amendments to Certain Resolutions of the State Council of the Republic of Crimea" [the "**Explanatory Note to the Amendment Resolution**"] clarified that the inclusion of Claimant's movable and immovable property in the list of properties considered to be the properties of the Republic of Crimea was made[614]:

> "[…] in order to ensure stable and safe operation of power supply systems, prevent the occurrence of destabilizing situations while providing consumers of the Republic of Crimea with electricity and prevent the occurrence of interruptions in electricity supply for consumers in the Republic of Crimea".

a. Safeguarding power supply to the inhabitants of the Crimean Peninsula and responding to unlawful practices

724. It follows that the stated official and contemporaneous purpose of the Expropriatory Measures was to secure the energy supply of the Crimean Peninsula.

725. The Tribunal – in line with Claimant[615] – accepts that energy security constitutes, in principle, a legitimate public interest. However, the relevant question is not whether ensuring energy supply to the Crimean Peninsula could be seen as a legitimate public purpose – which it could – but whether the expropriation of Claimant's assets was "reasonably related to the fulfillment of that purpose".

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[613] **Doc. CE-79**.
[614] **Doc. CE-141**, p. 3.
[615] HT, Day 1, p. 66, ll. 21-23 (Gimblett).

726. Russia argues that the taking of Claimant's assets was necessary because Claimant did not provide a stable and reliable service, ignored the Russian regulations on electricity distribution, and, despite several warnings, continued its unlawful practices[616].

Power cut-offs

727. First, Russia avers that DTEK Krymenergo was responsible for several black-outs that occurred in the Crimean Peninsula[617]. The Tribunal, however, is not convinced by this argument. The evidence shows that DTEK Krymenergo could not have been responsible for the power outages in Crimea, because[618]:

- Claimant was a company responsible solely for the distribution of energy within Crimea, not for its generation in Ukraine; and

- Claimant's operations were limited to the territory of Crimea and, thus, had no bearing on the transmission of electricity from Ukraine to Crimea.

728. Claimant's expert's unrebutted opinion provides that it was the Ukrainian entity charged with ensuring the stability of the power grid, **NEC Ukrenergo**, and not the energy distributors such as Claimant, that could make the decision to cut-off electricity supply[619]:

> "NEC Ukrenergo is responsible for determining, on a real-time basis, how the IPS of Ukraine transmits electricity over MPTLs from the generating companies to the regional grids of electricity distribution companies".

729. If NEC Ukrenergo made the decision to limit the supply of electricity to Crimea, then Claimant simply could not transmit any energy to any local consumers, as it was itself cut-off from the source of energy[620]:

> "All real-time commands and instructions from NEC Ukrenergo (or from its standalone subdivisions – the regional electric energy systems) must be followed unconditionally by all business entities whose power industry facilities are connected to the IPS of Ukraine, including gencos [power generation companies] and distribution companies" [explanation and emphasis added].

730. Respondent appears to recognize the weakness of its argument when it acknowledges that Claimant could have been "connected to" rather than "personally responsible" for the interruptions in energy supply[621]:

> "[…] the Crimean authorities had every reason to assume that Claimant (as part of the DTEK Group) was (if not personally responsible) at least connected

[616] RPHB I, para. 120.
[617] R I, paras. 62, 350.
[618] Omelchenko ER, paras. 25-28.
[619] Omelchenko ER, para. 20.
[620] Omelchenko ER, para. 35.
[621] R I, para. 336.

> to the black-outs that were endangering the daily operations of crucial facilities in Crimea".

731. Second, Russia argues that, regardless of Claimant's operations, its ultimate beneficiary owner – Mr. Akhmetov – had responsibility for and influence over Ukrainian power generation and power cut-offs[622]. However, the Tribunal finds this argument irrelevant to the discussion on whether the seizure of Claimant's assets was taken to ensure stable supply of energy: what is relevant is that Respondent failed to demonstrate that Claimant (the company Krymenergo) was in any way responsible for such outages.

732. The result is that Russia's alleged public purpose, *i.e.*, ensuring the secure and uninterrupted supply of electricity to the Crimean Peninsula, would not have benefitted from the expropriation of Claimant's business.

Failure to supply energy to sensitive locations

733. Russia further submits that, in June 2014 (*i.e.*, six months before the Expropriatory Measures), Claimant ceased to supply electricity to certain military objects due to non-payment of the electricity bills[623].

> [*Pro memoria*: Before the annexation of Crimea, DTEK Krymenergo serviced the Ukrainian navy infrastructure under contracts with the Ukrainian Ministry of Defense which, in turn, paid the electricity bills. After the annexation, the Russian military seized navy bases, military offices and other property owned by the Ukrainian Ministry of Defense, which then stopped paying the electricity bills.]

734. Respondent argues that this was done in violation of the applicable Russian law, which prohibits the cutting-off of electricity supply whenever this may lead to environmental or social consequences[624].

735. However, in August 2014 (*i.e.*, four months before the Expropriatory Measures), DTEK Krymenergo and the Russian Ministry of Defense reportedly entered into new electricity contracts that provided for the supply of energy to these units; moreover, these contracts contained provisions prohibiting Claimant from cutting electricity[625].

736. The Tribunal concludes that Respondent has failed to prove that Claimant did not comply with this new arrangement and ceased to supply energy to those sites after entering into these new contracts.

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[622] R II, paras. 811-815; RPreHS, para. 180; RPHB I, paras. 121-127; RPHB II, paras. 60-61.
[623] R II, para. 816; RPreHS, para. 181; RPHB I, paras. 129-135; RPHB II, para. 58.
[624] R II, para. 815; RPreHS, para. 181; RPHB I, paras. 129-135.
[625] CPreHS, paras. 45, 217; **Doc. CE-290**.

Claimant's unlawful practices

737. Respondent further argues that Claimant unlawfully claimed 100% advance payments from Crimean consumers until the expropriation, despite a specific warning that these practices violated the applicable Russian law and, thus, should have ceased on 1 January 2015[626]. Moreover, Respondent avers that Claimant failed to ensure that its activities complied with the Russian legal requirements on protected zones[627].

738. However, the Tribunal is not convinced that such alleged practices created a threat to energy supply in Crimea so as to justify the seizure of Claimant's assets.

* * *

739. In sum: in view of the contemporaneous evidence, the Tribunal is not convinced that the expropriation was undertaken with the legitimate goal of securing the power supply to the inhabitants of the Crimean Peninsula. Although this was the pretext given in the Amendment Resolution itself, there is no evidence which could substantiate that the local authorities had a legitimate reason to worry about the security of energy supply by DTEK Krymenergo at the time of the expropriation.

b. Curing the illegal privatization of Claimant's assets

740. The main alleged public purpose for the expropriation of Claimant's assets, which Russia first introduced in its Rejoinder, and on which it focused in its subsequent submissions, concerns the alleged need to cure Claimant's illegalities.

741. As a general principle, it is legitimate for a State, in the exercise of its sovereign powers, to undertake actions aimed at curing illegalities.

742. In the current case, however, the Tribunal is convinced that Respondent was not guided by this principle when it expropriated Claimant's assets.

743. As noted above, the official contemporaneous documents do not refer to the necessity of "curing illegalities"[628].

744. Respondent, relying on the testimony of Professor Asoskov, now argues that the category of "State property" – which, pursuant to the Expropriation Resolution, should be considered the property of the Republic of Crimea – "logically encompasses illegal privatized companies in Crimea" and, thus[629]:

> "[…] it was possible for Claimant to understand from the nature and purpose of these legal acts what was the reason behind the seizure of Claimant's alleged assets".

[626] RPreHS, para. 182; RPHB I, paras. 139-140.
[627] RPreHS, para. 182; RPHB I, paras. 136-138.
[628] See paras. 720-723 *supra*.
[629] RPHB I, para. 112; HT, Day 4, p. 110, ll. 11-16, p. 139, ll. 14-20 and p. 140, ll. 1-10 (Asoskov).

745. The Tribunal disagrees. There is nothing in the language of the Expropriation Resolution or its amendments that refers to this alleged "main purpose" of the expropriation.

746. Respondent also argues that the Crimean authorities explained the purpose of curing the illegal acquisition of the assets both before and after the expropriation[630]. The Russian Federation bases its argument on two pieces of evidence:

747. (i) An article from San Diego Tribune from 2 December 2014[631]. The Tribunal finds, however, that this article is not authoritative of what the Crimean authorities considered the reason for the dispossession; while the article does ascribe certain statements to Mr. Aksyonov about his view that the Expropriation Resolution was needed "to right the wrongs committed by corrupt Ukrainian officials", there is no mention of Krymenergo.

748. (ii) An article from a news outlet from 22 January 2015[632], purporting to quote Mr. Aksyonov saying that "the privatization of the state shareholding did not take into account the interests of the Crimeans". Yet, even if such statement could be attributed to Mr. Aksyonov, it simply means that Mr. Aksyonov had a negative opinion as to the price at which the privatization was made – but this is different than making the allegation that the low price resulted from fraud or corruption.

749. In any event, Russia's argument about the expropriation curing Claimant's illegalities fails, because the Tribunal has already found that there is no evidence that the Krymenergo Auction was tainted by fraud or corruption[633].

C. Due process

750. Article 5 of the BIT also requires that the expropriation be completed "under due process of law".

751. Claimant asserts that Russia has not only violated the international standard of due process, which requires prior notice of an expropriation and a meaningful opportunity to challenge the expropriation in advance, but also its own fundamental Law, which would constitute a further ground to conclude that it did violate due process.

752. Respondent, in turn, avers that international law (and Russian law) only imposes the obligation to provide an opportunity for an investor to challenge the legality of the expropriation through effective and transparent procedures.

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[630] RPreHS, para. 179; RPHB I, para. 111; HT, Day 1, p. 192, ll. 1-2.
[631] **Doc. RE-136**.
[632] **Doc. RE-137**.
[633] See section VI.6.3.3C *supra.*

Preliminary issue

753. Unlike other treaties[634], which expressly require an expropriation to be carried out in accordance with the domestic law of the expropriating State, Article 5 of the BIT does not refer specifically to the regulations of the expropriating State, but to due process in general, a generic concept to be construed in accordance with international law.

754. Therefore, the Tribunal must limit itself to analyzing whether Russia has complied with the requirement of due process as understood by international law, without entering into an assessment of non-compliance with Russian domestic law.

755. It follows that Claimant's allegations that it was unconstitutional to expropriate property purely on the basis of its assets being included in the Annex to the Expropriation Resolution are irrelevant for this purpose.

Alleged violations of due process

756. Claimant identifies three alleged violations of due process:

- First, DTEK Krymenergo received no prior notice of the Expropriatory Measures;
- Second, there was no meaningful opportunity to challenge the legality of the expropriation; and
- Third, Russia failed to mention the real justification for the taking of Claimant's assets.

a. Prior notice and right to be heard

757. Claimant argues that DTEK Krymenergo received no prior notice of the Expropriatory Measures[635]. Mr. Belyaev, Claimant's CFO, explained that he learned of the Expropriatory Measures from the "Crimean TV news"[636]. Claimant further asserts that, since DTEK Krymenergo had no notice of the expropriation, it also had no meaningful opportunity to challenge the expropriation in advance[637]. Respondent, for its part, denies that international law imposes the obligation to provide advance notice of the expropriation[638].

758. The Tribunal considers Respondent to be correct on this point.

759. The Tribunal agrees that there is no general principle of international law that requires the expropriating State to inform the investor of its decision in advance.

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[634] A. Reinisch, "Legality of Expropriations", in *Standards of Investment Protection*, Oxford University Press (2008), p. 191.
[635] C I, paras. 44-61, 129; CPreHS, paras. 14, 189; CPHB I, paras. 138, 142; HT, Day 1, p. 70, ll. 10-12 (Gimblett).
[636] Belyaev WS, para. 23; Maslov WS, para. 27.
[637] C I, para. 129; CPreHS, para. 190.
[638] R I, paras. 365-366; R II, paras. 888-889; RPreHS, para. 201; RPHB I, paras. 149, 151-155; RPHB II, paras. 64-65.

There are some situations – e.g., in the midst of a food crisis or a collapse of the financial markets – in which immediacy is essential to achieve the intended public interest and in which informing in advance could frustrate such purpose. For these reasons, international law cannot grant the investor an absolute right to be heard and to challenge the measure before the State adopts the expropriatory measure.

760. The requirements of international law in relation to due process in the context of expropriation of assets owned by foreigners are more limited: in short, due process does not require the expropriated investor to be informed *ex ante* of the decision to expropriate, but rather that it has an opportunity to challenge such decision before an independent and impartial body (which could be done either before or after the measure)[639]. The standard of due process under international law in this context has been summarized in *ADC v. Hungary* as requiring[640]:

> "[…] an actual and substantive legal procedure for a foreign investor to raise its claims against the depriving actions already taken or about to be taken against it".

761. In the present case, Respondent submits that Claimant had the right to challenge, before the Russian courts, the decision to nationalize its assets[641], but that Claimant opted not to challenge the Amendment Resolution because it was unable to establish legal acquisition and ownership of the assets. Claimant, however, says it did not challenge because any attempt to obtain justice locally would have been futile – not only because all similar challenges were unsuccessful, but also because the judicial system in Crimea was unlikely to have given fair consideration to any complaint brought by Claimant after the Expropriatory Measures[642].

762. Be that as it may, Russia's averment that a right to appeal the decision before the Russian courts was available remains unchallenged and is sufficient for "due process of law" to have been complied with.

b. Justification(s) for the taking of Claimant's assets

763. Claimant also argues that, even if it had been afforded the possibility to challenge the Expropriatory Measures, the vague references to energy security reasons would not have allowed Claimant to prepare a reasoned defense against the Expropriatory Measures, particularly against what Respondent now advances as the "main purpose"[643] of the taking – *i.e.*, to cure the alleged illegalities in the 2012 Krymenergo Auction.

764. The Tribunal shares this assessment: an essential element of due process, required by international law, is that the expropriated party knows with certainty the grounds for the expropriation; otherwise, it will not be in a position to challenge the measure. In this case, if the Expropriation Resolution and its Amendment, which could have

[639] R. Dolzer, U. Kriebaum and C. Schreuer, *Principles of International Investment Law*, Oxford University Press, 3rd edition (2022), pp. 217-218.
[640] **Doc. CLA-27**, *ADC*, para. 435.
[641] RPreHS, para. 201.
[642] C II, paras. 123-124.
[643] See, e.g., RPreHS, para. 178.

been issued *inaudita parte*, did not identify the reason(s) for the taking with clarity and certainty, Claimant's right to submit its challenge would be undermined.

765. And, on this point, the official contemporaneous documents, enacted by the Russian Federation, show significant weaknesses:

766. First, the Expropriation Resolution and its Amendments are silent as to the justifications of the taking of Claimant's assets[644].

767. Second, the Amendment Resolution broadly says that[645]:

> "1.1. Before the completion of stock taking and allocation of property that is recognized as the property of the Republic of Crimea in accordance with the Annex to this Resolution, the Council of Ministers of the Republic of Crimea has the right to introduce a temporary administration indicating its powers to manage an enterprise, a company or its branch, in cases where the introduction of a temporary administration is necessary for provision of stable and trouble-free operation of the facilities which are recognized to be owned by the Republic of Crimea, with the aim of preventing the occurrence of disturbances during operation of these facilities". [Emphasis added]

768. Third, the Explanatory Note to the Amendment Resolution stated that the inclusion of Claimant's movable and immovable property in the list of properties considered to be the properties of the Republic of Crimea was made[646]:

> "[…] in order to ensure stable and safe operation of power supply systems, prevent the occurrence of destabilizing situations while providing consumers of the Republic of Crimea with electricity and prevent the occurrence of interruptions in electricity supply for consumers in the Republic of Crimea".

769. Again, by this time, there was no reference to the "main purpose" of the Expropriatory Measures.

770. It follows that, *in tempore insuspecto*, Respondent failed to clearly identify and explain the grounds (and, particularly, the primary reason) for expropriating Claimant's assets, which prevented Claimant from preparing a reasoned challenge against the Expropriatory Measures.

* * *

771. Summing up, the Tribunal finds that Respondent's failure to identify clearly and explain the reasons for expropriating Claimant's assets, which is a basic guarantee of due process required by international law, constitutes a breach of Article 5 of the BIT.

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644 **Docs. CE-80**, **CE-37**, **CE-41**, **CE-84**.
645 **Doc. CE-79**.
646 **Doc. CE-141**, p. 3.

D. Non-discrimination

772. Finally, Article 5 of the BIT requires that any expropriation is "not discriminatory".

773. Claimant says that the expropriation was carried out as part of a discriminatory campaign of expropriation against Ukrainian investors[647], which was further confirmed by the fact that Crimean authorities did not pursue similar expropriation campaigns against investors from other states, such as the EC Sevastopolenergo[648].

774. Respondent disagrees and argues that the Expropriation Resolution does not refer to nationality, whether Ukrainian or any other, and actually covers a number of assets that belonged to non-Ukrainian companies[649]. It adds that the purported "comparator" company presented by Claimant is inapposite because EC Sevastopolenergo, unlike Claimant, was not implicated in any violations of Russian law[650].

Applicable test

775. Claimant does not propose any specific test for the Tribunal to assess whether the expropriation was discriminatory. Respondent, in turn, proposes that the Tribunal uses the *Saluka* test[651].

776. In line with the *Saluka* tribunal's reasoning, a taking is discriminatory if

- similar cases,
- are treated differently,
- without reasonable justification.

777. The Tribunal considers that Claimant has successfully argued that the above test is met in the circumstances of the current case. Indeed, Claimant has proven that, while its assets were subjected to expropriation, (i) a similar foreign investor, EC Sevastopolenergo[652], (ii) was not expropriated (iii) without reasonable justification differentiating the two.

Respondent's counterargument

778. Respondent argues that EC Sevastopolenergo is not a proper comparator, because, unlike Claimant, it did not engage in illegal activities[653].

779. The Tribunal disagrees.

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[647] C I, paras. 120-122; C II, paras. 117, 121; CPHB I, paras. 126, 146.
[648] C I, para. 124; C II, para. 117.
[649] R II, para. 890; RPreHS, para. 186; RPHB I, para. 175.
[650] RPreHS, para. 188; RPHB I, paras. 176-177.
[651] RPreHS, para. 185, referring to **Doc RLA-100**, *Quiborax*, which, in turn, applied the three-pronged test formulated in *Saluka* (**Doc. CLA-62**).
[652] **Docs. CE-108, CE-109, CE-110, CE-111** and **CE-112**.
[653] RPreHS, para. 188; RPHB I, paras. 176-177.

780. The relevant moment to apply the *Saluka* test is the moment of the expropriation. At that time, there were no allegations of illegality against Claimant. Even if now Russia argues that the expropriation was made in furtherance of curing illegalities, there is no contemporaneous evidence supporting any such allegations.

781. In any event, the Tribunal is convinced that the discrimination was not made with a reasonable justification:

782. First, Claimant has proffered evidence from February 2015, *i.e.*, right after the expropriation took place, showing that the head of the Republic of Crimea expressly stated that the Expropriation Resolution was issued to "nationaliz[e] Ukrainian enterprises located on the Crimean Peninsula"[654], and not those belonging to persons with a different nationality.

783. Second, even if the assets of some Russian investors were included in the Expropriation Resolution, such investors were offered compensation[655].

* * *

784. Summing up, the Tribunal finds that Respondent's Expropriatory Measures were discriminatory, in breach of Article 5 of the BIT.

3.5 CONCLUSION

785. In the previous sections, the Tribunal has found that Respondent's taking of Claimant's assets failed to meet each of the four cumulative requirements set forth in Article 5 of the BIT, as it was:

- Not accompanied by "prompt, adequate and effective compensation",
- Not taken in the public interest,
- Not taken in accordance with due process, and
- Discriminatory.

786. Consequently, the Tribunal concludes that DTEK Krymenergo was unlawfully expropriated of its investments by Respondent, in violation of Article 5 of the BIT.

3.6 RESPONDENT'S COUNTERARGUMENTS

787. Respondent does not contest that it has "nationalized" Claimant's property[656]. This notwithstanding, Respondent advances two main defenses to justify the taking of Claimant's assets and, thus, evade payment of compensation:

[654] **Doc. CE-105**, p. 1. See also **Doc. CE-104**.
[655] **Docs. CE-100**, **CE-146**.
[656] See paras. 621 and 685 *supra*.

- First, Respondent argues that its actions do not constitute an expropriation within the meaning of Article 5 of the BIT, because the measures were taken in the exercise of Russia's legitimate police powers (**A.**); and

- Second, Respondent suggests that the existence of exceptional circumstances precludes a finding of liability under Article 5 of the BIT (**B.**).

788. For each of Respondent's counterarguments the Tribunal will analyze the Parties' respective positions (**a.** and **b.**) and then provide its conclusions (**c.**).

A. Police powers

a. Respondent's position

789. Respondent argues that its actions do not constitute an expropriation within the meaning of Article 5 of the BIT, because the Crimean authorities' enactment of the Expropriation Resolution and the Amendment Resolution was part of their regulatory powers to maintain public order – *i.e.*, it was a legitimate and *bona fide* exercise of Russia's legitimate police powers[657].

790. Respondent submits that the doctrine of police powers applies in cases of both direct and indirect expropriation[658]. Likewise, if an investor is involved in illegal or criminal activities, Russia argues that international authorities[659] and case-law[660] recognize that the seizure or dispossession of property may not amount to an expropriation when assets are confiscated as a sanction for noncompliance with the law[661].

791. According to Respondent, through the exercise of its police powers, a State can deprive a foreign investor of its property rights without compensation[662], provided that it exercises its police powers in good faith for the purpose of protecting the public welfare (i) and if the measures taken are (ii) non-discriminatory and (iii) proportionate[663]. Respondent submits that the dispossession of Claimant's assets complied with all these three requirements[664]:

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[657] R I, paras. 329-330; R II, para. 770(a); RPreHS, paras. 173-174.
[658] RPreHS, para. 174; RPHB I, paras. 90-91; referring to **Doc. RLA-100**, *Quiborax*, para. 200.
[659] **Doc. RLA-271**, A. Newcombe and L. Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (2009), pp. 325, 358-359; **Doc. RLA-275**, R. Mirzayev, *International Investment Protection Regime and Criminal Investigations*, 29(1) J. of Intl. Arb (2012), pp. 87-88.
[660] **Doc. RLA-100**, *Quiborax*, para. 202; **Doc. RLA-101**, *Philip Morris*, para. 293 (quoting ALI, Restatement (Third) of Foreign Relations Law 1987, para. 712, comment (g)); **Doc. RLA-276**, *Emanuel Too*, para. 26.
[661] R II, paras. 790-794.
[662] R II, paras. 775-778; RPreHS, para. 174; RPHB I, para. 89; RPHB II, para. 30; referring to, *inter alia*, **Doc. RLA-261**, A. Titi, *The Right to regulate in international investment law* (2014), p. 33; **Doc. RLA-262**, I. Alvik, *Contracting with Sovereignty: State Contracts and International Arbitration* (2011), p. 261; **Doc. RLA-101**, *Philip Morris*, para. 295.
[663] R I, paras. 331-332; R II, paras. 783-785; RPreHS, para. 174; RPHB I, paras. 89, 92; RPHB II, para. 30; referring to **Doc. CLA-62,** *Saluka*, para. 255; **Doc. RLA-100**, *Quiborax*, para. 202; **Doc. RLA-101**, *Philip Morris*, para. 305; **Doc. RLA-270**, *Chemtura Corp.*, para. 266.
[664] R II, para. 795; RPreHS, para. 175; HT, Day 1, p. 185, ll. 17-23; RPHB I, para. 93; RPHB II, para. 32.

792. First, under international investment law, it is well established that States enjoy a wide margin of appreciation in determining whether an expropriation or dispossession serves a public purpose[665]. And according to Respondent, the Expropriatory Measures served several legitimate public interests[666]:

- It intended to cure Claimant's alleged investments of the stain of the illegitimate privatization in 2012, which appears to have occurred at an undervalue and as a result of a rigged and illegal auction[667]; and

- It was justified by the need to protect the public order (i) to ensure that the distribution of electricity in Crimea was both safe and stable[668] and (ii) to respond to Claimant's continued unlawful practices"[669].

793. Second, the Expropriatory Measures were not discriminatory against Claimant[670]:

- They do not refer to nationality, whether Ukrainian or any other, and included assets that belonged to non-Ukrainian companies[671];

- Furthermore, Claimant failed to identify a similar investor that also should have fallen within the Amendment Resolution but did not; an investor involved in illegal activities will not be in similar circumstances to a company that operates legally[672].

794. Third, the Expropriatory Measures were also "reasonably proportionate" in light of the objectives pursued by the Crimean authorities[673]:

- International commentators recognize inherent proportionality if a State seizes and forfeits property that relates to the investor's involvement in illegal or criminal activities – this was precisely the case with Claimant[674];

- In any case, Respondent's actions were proportionate since they were reasonably related to preventing a harm to the security of the State and its citizenry that far outweighed Claimant's individual interests as an investor[675].

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[665] R I, para. 333; R II, paras. 786-789, 803; RPreHS, para. 176; referring to **Doc. RLA-272**, *Antoine Goetz*, para. 126; **Doc. RLA-102**, *Koch Minerals*, para. 7.20; **Doc. CLA-37**, *Lemire*, para. 273; **Doc. RLA-100**, *Quiborax*, para. 245.
[666] R II, paras. 804, 822-823; RPreHS, paras. 177, 184; RPHB I, para. 94.
[667] R I, para. 353-356; R II, paras. 802, 804(a), 805-810; RPreHS, paras. 42-45, 178-179; RPHB I, paras. 95-115; RPHB II, paras. 33-54.
[668] R I, paras. 334-338, 349-351; R II, paras. 804(b), 811-817; RPreHS, paras. 180-181; RPHB I, paras. 116-118, 121-135; RPHB II, paras. 55-58, 60-62.
[669] R I, para. 357-358; R II, paras. 804(b), 818-821; RPreHS, para. 180, 182-183; RPHB I, paras. 120, 136-141.
[670] R I, para. 339; R II, para. 833; RPreHS, para. 185; RPHB I, paras. 174-178; RPHB II, para. 68.
[671] R II, paras. 826-829, 890; RPreHS, para. 186; RPHB I, para. 175; RPHB II, para. 68.
[672] R II, para. 828; RPreHS, para. 188; RPHB I, paras. 176-177; RPHB II, para. 68.
[673] R I, para. 339; R II, para. 834; RPreHS, para. 190; RPHB I, para. 179-180.
[674] R II, para. 835; RPreHS, paras. 190-191; RPHB I, para. 180.
[675] R II, para. 838; RPreHS, para. 192; RPHB I, para. 181.

795. Respondent submits that Claimant bears the burden of proving that Respondent's actions were not a legitimate exercise of its police powers, as Respondent has demonstrated that the requirements of the police powers doctrine are at least *prima facie* met in the present case[676].

b. Claimant's position

796. Claimant rejects the application of the police powers doctrine in the case at hand:

797. First, Claimant avers that the circumstances surrounding Russia's expropriation of Krymenergo show that, at the time of expropriation, Russia did not consider that it was exercising its police powers; on the contrary, the Crimean authorities expressly admitted that the taking of Claimant's assets was a "nationalization"[677]. Therefore, the police powers defense is nothing more than Russia's *ex post facto* justification for its wrongdoing[678].

798. Second, Russia's reliance on a "police powers" defense is misplaced, as it is based on two lines of cases that deal with entirely different situations:

799. The first line of cases – *Philip Morris*[679], *Tecmed*[680] and *Saluka*[681] – are all cases that involved an indirect expropriation. However, the present case is a textbook example of direct expropriation, in which Claimant's assets were specifically targeted for seizure[682].

800. The second line of cases – *Quiborax*[683] and *Emanuel Too*[684] – recognized that seizure or dispossession of property may not amount to an expropriation when assets are confiscated as a sanction for non-compliance with law. Nonetheless, this is also inapplicable, as Respondent failed to provide any evidence of criminal or other proceedings against Claimant that resulted in a determination of non-compliance with laws[685].

801. Third, even applying the four-prong test incorrectly taken from *Philip Morris*[686], Russia failed to prove its defense. The expropriation of Krymenergo's investment was not a *bona fide* exercise of Russia's police powers; it was carried out as part of a discriminatory campaign of expropriation against Ukrainian investors and not for the purpose of protecting public welfare; furthermore, the decision to completely

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[676] R II, paras. 840-843, referring to **Doc. RLA-271**, A. Newcombe and L. Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (2009), p. 366; **Doc. RLA-281,** UNCTAD, Expropriation, UNCTAD Series on Issues in International Investment Agreements II (2012), p. 93; **Doc. RLA-277**, *Laboratoires Servier*, paras. 582-584.
[677] **Docs. CE-140**, **CE-104**, **CE-137**, **CE-105**.
[678] C II, para. 103; CPreHS, paras. 205-206.
[679] **Doc. RLA-101**, *Philip Morris*, para. 305.
[680] **Doc. CLA-20**, *Tecmed*, para. 122.
[681] **Doc. CLA-62**, *Saluka*, paras. 255-264.
[682] CPreHS, para. 203; HT, Day 1, p. 79, ll. 9-12; CPHB I, para. 152; CPHB II, para. 42.
[683] **Doc. RLA-100**, *Quiborax*, paras. 222-227
[684] **Doc. RLA-276**, *Emanuel Too*, paras. 24-27.
[685] CPreHS, para. 204; HT, Day 1, P. 79, ll. 13-18; CPHB I, para. 152; CPHB II, para. 43.
[686] CPHB II, para. 42.

and permanently seize Krymenergo's investment could not have been proportionate to the aim of securing the supply of electricity[687].

c. Tribunal's analysis

802. The Parties discuss whether the doctrine of police powers is applicable to the present case and, if so, whether the requirements for this doctrine are met.

803. The police powers doctrine provides that a State possesses an inherent right to regulate in protection of the public interest and does not act wrongfully when, pursuant to this power, it enacts *bona fide*, non-discriminatory and proportionate regulations in accordance with due process[688].

804. Investment arbitration tribunals and scholars have expressly recognized that regulatory activity exercised under this doctrine does not give a right to compensation[689]. Indeed, the tribunal in *Tecmed* held that[690]:

> "The principle that the State's exercise of its sovereign powers within the framework of its police power may cause economic damage to those subject to its powers as administrator without entitling them to any compensation whatsoever is undisputable".

805. The *Saluka* tribunal confirmed this approach saying that[691]:

> "It is now established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner *bona fide* regulations that are aimed at the general welfare".

806. The necessary requirements for the application of the police powers doctrine are not met in this case:

807. First, the Expropriatory Measures were not based on actual violations of Russian Law. As noted above, the official contemporaneous documents (notably, the Expropriation Resolution, the Amendment Resolution or even its Explanatory Note) did not refer to any such violations; instead, the inclusion of Claimant's movable and immovable property in the list of properties considered to be the properties of the Republic of Crimea was made[692]:

> "[…] in order to ensure stable and safe operation of power supply systems, prevent the occurrence of destabilizing situations while providing consumers

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[687] C II, para. 104; CPHB II, paras. 47-51.
[688] **Doc. CLA-62**, *Saluka*, para. 255.
[689] **Doc. CLA-62**, *Saluka*, para. 255; **Doc. CLA-20**, *Tecmed*, para. 119; **Doc. RLA-100**, *Quiborax*, para. 202; **Doc. RLA-101**, *Philip Moris*, para. 295; **Doc. RLA-261**, A. Titi, *The Right to regulate in international investment law* (2014), p. 33; **Doc. RLA-262**, I. Alvik, *Contracting with Sovereignty: State Contracts and International Arbitration* (2011), p. 261.
[690] **Doc. CLA-20**, *Tecmed*, para. 119.
[691] **Doc. CLA-62**, *Saluka*, para. 255.
[692] **Doc. CE-141**, p. 3.

> of the Republic of Crimea with electricity and prevent the occurrence of interruptions in electricity supply for consumers in the Republic of Crimea".

808. Second, Russia has not pointed out what provisions of Russian law would permit the dispossession of an investor's property as a sanction for non-compliance with the law. In this regard, Professor Asoskov denied that the taking was an application of Russian law allowing seizure of assets to secure energy supply[693].

809. Third, the Tribunal has already found that Respondent breached a basic guarantee of due process required by international law, by failing to identify clearly and explain the reasons for expropriating Claimant's assets.

* * *

810. In view of the above, the Tribunal finds that Russia's defense based on the police powers doctrine should be rejected.

B. Exceptional circumstances

a. Respondent's position

811. Russia also invokes the existence of exceptional circumstances, which precludes a finding of liability under Article 5 of the BIT or, at minimum, severely limits the payment of compensation[694].

812. Under the doctrine of exceptional circumstances, developed by the European Court of Human Rights ["**ECtHR**"], "major political transactions"[695] or "systemic risk to the financial system"[696] have been found to constitute exceptional circumstances that prevent a finding of liability against the State for alleged expropriations. According to Respondent, the fact that this doctrine was developed by the ECtHR has not prevented investment tribunals from expressly applying it to investment cases[697].

813. Respondent avers that the exceptional circumstances of the present case justify a finding of no liability under Article 5 of the BIT[698]. Respondent submits that the Amendment Resolution, together with the Law No. 38-ZRK, played an important role during the transition of the citizens of Crimea to Russian citizenship, ensuring public and social security[699]. According to Respondent, Mr. Akhmetov, who controlled the entire production of electricity delivered in monopolistic fashion to

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[693] HT, Day 4, p. 152, ll. 16-25 (Asoskov).
[694] R II, paras. 845-846; RPreHS, para. 194.
[695] R II, paras. 849-850; RPreHS, para. 194. Respondent refers to **Doc. RLA-282**, *Jahn*, para. 125.
[696] R II, paras. 852-854; RPreHS, para. 194. Respondent refers to **Doc. RLA-283**, *Dennis Grainger*, para. 39; **Doc. RLA-284**, *Marfin*, para. 870; **Doc. RLA-285**, *Holy Monasteries*, para. 71. See also, **Doc. RLA-286**, *Pressos Compania Naviera*, para. 38; **Doc. RLA-287**, *Zvolský and Zvolská*, para. 70; **Doc. RLA-288**, *Broniowski*, para. 276.
[697] RPreHS, para. 195, referring to **Doc. RLA-284**, *Marfin*, paras. 870-875.
[698] R II, paras. 857-865; RPreHS, para. 197.
[699] R II, para. 858; RPreHS, para. 197.

the people of Crimea, posed a systemic risk to the energy sector[700]. Respondent contends that the Amendment Resolution "fought the systemic risk posed by Claimant and [Mr. Akhmetov] during a major political transition"[701].

b. Claimant's position

814. Claimant, in turn, asserts that the doctrine of exceptional circumstances is alien to investor-State arbitration, as it was developed by the ECtHR (and, in any case, very cautiously[702]). Furthermore, the European Convention of Human Rights ["**ECHR**"] affords distinct protections against expropriation: for instance, unlike the BIT, the ECHR does not require compensation as a necessary requirement for lawful expropriation. Therefore, given the differences of the regimes, legal concepts developed under the ECHR cannot simply be transplanted into the context of the BIT[703].

815. Even if exceptional circumstances could apply (*quod non*), it is not a stand-alone justification to excuse liability. It arises to excuse lack of compensation as part of a proportionality test where the benefit to the community outweighs the detriment caused by the taking. In this case, the alleged public purpose cannot outweigh the harm caused to Claimant[704].

c. Tribunal's analysis

816. As seen above, under Article 5 of the BIT the taking of an investment without the payment of compensation renders the expropriation of Claimant's assets unlawful on its own.

817. Notwithstanding the above, Russia invokes the doctrine of exceptional circumstances, which, in its opinion, allows a greater margin of appreciation to States by precluding or excusing liability in case of an expropriation. Claimant disagrees, arguing that Russia's defense is misplaced and should be rejected.

818. The Tribunal rejects this defense in this case.

819. First, the concept of exceptional circumstances was developed by the ECtHR as a *ratio decidendi* justifying an exception from Article 1 of Protocol No. 1 of the ECHR, which reads as follows[705]:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public

[700] R II, para. 860; RPreHS, para. 197.
[701] R II, para. 861.
[702] CPreHS, para. 211, referring to **Doc. RLA-282**, Joint dissenting opinion of Judges Costa, Borrego, Ress and Botoucharova in *Jahn and others v. Germany*, Judgement, 30 June 2005 (Applications nos. 46720/99, 72203/01 and 72552/01), para. 5.
[703] CPreHS, paras. 174, 207-209; CPHB I, para. 153.
[704] CPreHS, paras. 210-212; CPHB I, para. 153.
[705] **Doc. RLA-274**, ECHR, Article 1 of Protocol No. 1.

> interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties".

820. As explained by the ECtHR[706]:

> "[…] the taking of property without payment of an amount reasonably related to its value will normally constitute a disproportionate interference and a total lack of compensation can be considered justifiable under Article 1 of Protocol No. 1 only in exceptional circumstances".

821. But the ECtHR has used the concept of "exceptional circumstances" very rarely, as[707]:

> "The concept of exceptional circumstances is itself a dangerous one, moreover, which in our view should be handled with great care".

822. Second, the concept of "exceptional circumstances" does not lend itself to generalizations or analogies. This is particularly true in a situation – like the present one – where the legal regimes for the taking of property differ considerably: under Article 1 of the Protocol No. 1 of the ECHR, compensation is merely relevant to balancing the public purpose of the taking, but it is not a requirement of legality of the taking[708], while under Article 5 of the BIT compensation does constitute a requirement for the lawfulness of the expropriation.

823. As noted by the ECtHR[709],

> "if an attempt is made to generalise the notion of 'exceptional circumstances' as a *ratio decidendi*, the Court will lose its status as an organ of justice".

824. In short, the Tribunal finds that the *exceptional* nature of the concept of "exceptional circumstances" prevents its application in the context of the BIT.

825. Third, even if the concept of "exceptional circumstances" could be applied in the context of the BIT (*quod non*), the requirements for its application are not satisfied in the case at hand. The Tribunal has already found that Claimant did not pose a threat to the energy supply in Crimea. Absent a "systemic risk", there is no room to apply the doctrine of exceptional circumstances.

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[706] **Doc. RLA-282**, *Jahn*, para. 94.
[707] **Doc. RLA-282**, Joint dissenting opinion of Judges Costa, Borrego, Ress and Botoucharova in *Jahn*, para. 5.
[708] **Doc. RLA-274**, ECHR, Article 1 of Protocol No. 1.
[709] **Doc. RLA-282**, Dissenting opinion of Judge Ress in *Jahn*, para. 4.

826. In view of the above, the Tribunal finds that Russia's defense based on the doctrine of exceptional circumstances should be rejected.

VII.2. OTHER BREACHES

827. According to Claimant, the Russian Federation not only breached Article 5 of the BIT but also[710]:

- Failed to guarantee unconditional legal protection to Claimant's assets, in contravention of Article 2(2) of the BIT;

- Subjected Claimant to discriminatory measures in contravention of Article 3(1) of the BIT and accorded Claimant treatment less favorable to that accorded to investors of third States, in violation of the national treatment and most-favored nation ["**MFN**"] obligations contained in Article 3(1); and

- Violated the full protection and security ["**FPS**"] and fair and equitable ["**FET**"] standards which can be imported from other BITs, by virtue of the MFN provision.

828. Respondent denies each of these arguments[711].

829. Article 2(2) of the BIT reads as follows[712]:

> "**Article 2**
> **Encouragement and Protection of Investments**
>
> […]
>
> 2. Each Contracting Party guarantees, in accordance with its legislation, the full and unconditional legal protection of investments by investors of the other Contracting Party".

830. In turn, Article 3(1) of the BIT provides that[713]:

> "**Article 3**
> **National Treatment and Most Favored Nation Treatment**
>
> 1. Each Contracting Party shall ensure in its territory for the investments made by investors of the other Contracting Party, and activities in connection with such investments, treatment no less favourable than that which it accords to its own investors or to investors of any third state, which precludes the use of

[710] CPreHS, paras. 239-240; HT, Day 1, p. 70, l. 25 – p. 71, l. 12; CPHB I, paras. 148-150.
[711] R II, paras. 13(d)-(g) and 758(c); RPreHS, para. 205.
[712] **Doc. CLA-1**. Respondent's translation does not differ significantly: "2. Each Contracting Party shall guarantee, in conformity with its legislation, the complete and unconditional legal protection of investments of investors of the other Contracting Party" (**Doc. RLA-127**).
[713] **Doc. CLA-1**. Respondent's translation does not differ significantly: "1. 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" (**Doc. RLA-127**).

> measures discriminatory in nature that could interfere with the management and disposal of the investments". [Emphasis added]

831. In section VII.1.3 *supra*, the Tribunal has already found that the Russian Federation expropriated DTEK Krymenergo's investment in violation of Article 5 of the BIT, since the taking of Claimant's assets was:

- Not accompanied by "prompt, adequate and effective compensation";
- Not taken in the public interest;
- Not taken in accordance with due process; and
- Discriminatory.

832. Considering the Tribunal's prior findings, the Tribunal must also conclude that the Russian Federation breached its commitments:

- Under Article 2(2) of the BIT to legally protect Claimant's investment; and
- Under Article 3(1) of the BIT to refrain from adopting measures discriminatory in nature that could interfere with the management and disposal of Claimant's investment.

833. The discussion of any additional standards under Article 3(1) of the BIT is thus moot, since the Tribunal is already in a position to declare that Respondent breached Articles 2 and 3 of the BIT, as requested by Claimant in its prayer for relief[714]. In any event, the additional breaches invoked by Claimant have no impact on the decision on compensation, given that they concern the same State actions and resulting injuries.

[714] CPreHS, para. 341(b); CPHB I, para. 202(b).

VIII. DAMAGES

834. The Tribunal has already determined that Russia's taking of Krymenergo's investment gave rise to an unlawful expropriation, which was not accompanied by appropriate measures of compensation[715]. The expropriated assets constituted Krymenergo's Branch in Crimea, an enterprise dedicated to the transport and distribution of electric energy in Crimea.

835. As compensation, Krymenergo is claiming damages in an amount of not less than USD 421.2 M, plus a gross-up for Ukrainian taxes on the award and pre- and post-award interest[716].

836. Russia submits that Claimant has fallen short of demonstrating any measure of damage that could come close to meeting the standard of proof[717] and its expert proffers that compensation based on the price paid in 2012 in the privatization of Krymenergo – USD 125.6 M – would be a better indicator of the initial value that the Russian regulator would have assigned to Krymenergo, and which could act as a proxy for any damage caused[718].

837. The Tribunal will first address the quantum of damages to which Claimant is entitled (**VIII.1**), it will then turn to the claim of pre- and post-award interest (**VIII.2**) and it will finally deal with the tax indemnity requested by Claimant (**VIII.3**).

[715] See section VII.1.3.5 *supra*.
[716] CPHB I, para. 202.
[717] RPHB I, para 191.
[718] Compass ER, para 24.

VIII.1. QUANTUM

Treaty provisions

838. The Treaty provides very limited guidance as regards the appropriate compensation for breaches of its provisions. As previously discussed, Article 5(1) prohibits expropriatory measures, except in cases where such measures are taken in the public interest, under due process of law, without discrimination and are "accompanied by prompt, adequate and effective compensation". Article 5(2) defines the price characteristics that such compensation must meet[719]:

> "**Article 5**
> **Expropriation**
>
> […]
>
> 2. The amount of such compensation shall correspond to the market value of the expropriated investments immediately before the date of expropriation or before the fact of expropriation became officially known, while compensation shall be paid without delay, including interest accruable from the date of expropriation until the date of payment, at the interest rate for three-month deposits in US dollars on the London Interbank Market (LIBOR) plus 1%, and shall be effectively disposable and freely transferable".

839. The Treaty thus establishes that the compensation for expropriation:

- corresponds to the market value of the expropriated investments,
- calculated just before the expropriation is decreed or becomes known,
- must be effectively disposable and freely transferable, and
- accrues interest at the LIBOR rate plus 1% until actual payment.

840. The compensation provided for in Article 5 only covers cases of expropriation. For other breaches, absent any specific Treaty language, damages must be calculated in accordance with the rules of international law. The relevant principle was originally formulated in the seminal judgement of the Permanent Court of International Justice in the *Chorzów* case: reparation must wipe-out the consequences of the breach and re-establish the situation as it is likely to have been absent the breach. The well-established principle complements those found in the ILC Draft Articles, and

[719] **Doc. CLA-1**. Respondent's translation does not differ significantly: "2. The compensation shall correspond to the market value of the expropriated investments, prevailing immediately before the date of expropriation or when the fact of expropriation has become officially known. The compensation shall be paid without delay with due regard for the interest, to be charged as of the date of expropriation till the date of payment, at the interest rate for three months' deposits in US Dollars prevailing at the London interbank market (LIBOR) plus 1%, and shall be efficiently realizable and freely transferable" (**Doc. RLA-127**).

particularly in Article 31, which advocates full reparation for the injury caused as a consequence of a violation of international law[720].

841. Additional principles of international law mandate that Claimant bear the burden of proof and that damages be certain, so that speculative or hypothetical harm be excluded[721].

842. Any assessment of damages in a complex factual situation, involving revenue-generating enterprises, as it happens in this case, includes some degree of estimation – the same degree which is also applied by actors in the real world when valuing enterprises. Because of this difficulty, tribunals retain a certain margin of appreciation. This should not be confused with acting *ex aequo et bono*, because the Tribunal's margin of appreciation can only be exercised in a reasoned manner and with full respect of the principles of international law for the calculation of damages[722].

Lawful vs. unlawful expropriation

843. In PO 14, the Tribunal asked the Parties to discuss whether an eventual finding by the Tribunal that the expropriation was lawful, or that it was unlawful, had any relevance for the calculation of compensation[723].

844. Claimant initially submitted that customary international law requires that Claimant be accorded "full reparation" for Russia's breaches of the Treaty, which in this case amounts to "any financially assessable damage", with the goal "to re-establish the situation which existed before the wrongful act was committed"[724]. To apply this standard, the Tribunal should use the depreciated replacement cost ["**DRC**"] of the expropriated assets, which in this case coincides with the fair market value ["**FMV**"] prescribed by Article 5(2) of the Treaty[725].

845. Respondent, in turn, has underlined that in lawful expropriations the appropriate standard for valuing the compensation is FMV, as acknowledged by Article 5(2) of the Treaty. In cases of unlawful expropriation, the standard is full reparation, but this standard is equivalent to the market value of the expropriated assets[726]. Compensation in this case, involving an alleged expropriation (lawful or unlawful) can at most be the FMV of the assets[727]. Any difference between the BIT standard of compensation and the standard of an illegal expropriation is entirely irrelevant[728].

[720] **Doc. RLA-103**, *Rusoro*, para. 640; **Doc. CLA-70**, *Gold Reserve*, para. 679.
[721] **Doc. RLA-352**, *Amoco*, para. 238; **Doc. CLA-119**, *Lemire*, para. 246; **Doc. CLA-70**, *Gold Reserve*, paras. 685-686.
[722] **Doc. CLA-70**, *Gold Reserve*, para. 686; **Doc. RLA-103**, *Rusoro*, para. 642.
[723] PO 14, para. 20.
[724] CPHB I, para. 157.
[725] CPHB II, para. 56.
[726] RPHB I, para. 184.
[727] RPHB I, para. 185.
[728] RPreHS, para. 249.

Finally, Respondent adds that a discounted cash flow methodology ["**DCF**"] is in this case the most appropriate[729].

846. The Tribunal concurs with both Parties (who in essence also concur between themselves).

847. In an expropriation, whether lawful or unlawful, the expropriated claimant is entitled to compensation at the FMV of the assets that have been taken[730]. In this case, Claimant says that the FMV should be calculated by establishing the DRC of the assets, while Respondent advocates for the DCF methodology – a question which will be discussed in the following sub-sections.

848. A classic discussion in international investment protection law is whether an investor who has suffered unlawful expropriation is entitled to any further compensation, when the damage is not adequately covered by the payment of the FMV of the expropriated assets. But in this case the discussion is moot, because Claimant's claim is limited to the FMV of the assets.

Evidence

849. The Parties have submitted evidence to support their cases:

- Claimant has produced a report by Mr. Carlos Lapuerta, of The Brattle Group, dated 7 December 2018[731] (previously defined as "Lapuerta ER"); and

- Respondent has produced a report authored by Dr. Boaz Moselle and Mr. Julian M. Delamer, of Compass Lexecon, dated 10 April 2020[732] (previously defined as "Compass ER").

850. Mr. Lapuerta and Mr. Delamer appeared at the Hearing, made an oral presentation supported by slide presentations as direct evidence[733] and were then cross-examined by counsel to the counterparty. Dr. Moselle, who was excused from attending in person, was permitted to respond to certain questions in writing after the Hearing[734].

* * *

851. The Tribunal will first summarize the positions of the Parties (**1.** and **2.**) and then analyze the various valuation methods presented by their experts (**3.**).

[729] RPHB II, para. 75.
[730] **Doc. CLA-74**, *Flughafen*, para. 747.
[731] Lapuerta ER, dated 7 December 2018.
[732] Compass ER, dated 10 April 2020.
[733] H-17 (Mr. Lapuerta) and H-19 (Mr. Delamer).
[734] PO 14, para. 21(1). Dr. Moselle submitted his answers on 15 October 2021.

1. CLAIMANT'S POSITION

852. Claimant says that its damage expert, Mr. Carlos Lapuerta, has quantified the damages owed by Russia using two principal methods.

853. First, Mr. Lapuerta has calculated the DRC of the expropriated assets, *i.e.*, the amount it would have cost to reproduce the assets taken by Russia accounting for their age and condition. The DRC of Krymenergo's assets is USD 421.2 M[735]. Claimant adds that the DRC valuation is appropriate and often used in capital-intensive industries like electricity distribution – especially if a material change to future cash flows is expected, as is the case here[736] – and provides an estimate of the FMV of the business, to which Claimant is entitled under the Treaty[737].

854. Claimant explains that the DRC figure is based on the 2013 Deloitte calculations, which are accurate and were properly certified by the Ukrainian regulations at the time, and were then updated by Mr. Lapuerta to 2015. The Ukrainian government's 2013 DRC methodology is reasonable and in line with common practices in the industry and aligns with that applied in other countries. There are no meaningful differences between the Ukrainian and the Russian DRC regulation – the core elements of the two methodologies are aligned[738].

855. Second, Mr. Lapuerta has calculated the DCF value of Claimant's Crimean business and assets. The DCF value is either USD 312.1 M or USD 259.9 M[739], depending on assumptions as to when Claimant would have transitioned to Regulatory Asset Base ["**RAB**"] tariff regime in Russia. Claimant avers that the DCF valuation is submitted as an alternative position and should be used only if the Tribunal finds a legal or factual impediment to the use of the DRC valuation[740].

2. RESPONDENT'S POSITION

856. The Russian Federation says that any methodology used to assess FMV must take into account the overall limits on the full reparation standard, such as the requirement that any compensation be causally linked to the State action. The Tribunal should also consider how a reasonable buyer would have perceived the effects on the value of the property of the overall political and regulatory climate within Crimea on the date of assessment. Further, any compensation cannot include punitive damages[741].

857. Respondent submits that it is not reasonable for a willing buyer to use a DRC methodology to value the assets, because[742]:

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[735] CPreHS, para. 263.
[736] CPHB II, para. 56.
[737] CPHB I, para. 163.
[738] CPHB I, para. 167.
[739] These figures were updated during the Hearing in H-17.
[740] CPreHS, para. 264.
[741] RPreHS, para. 250.
[742] RPreHS, paras. 251-257.

- Krymenergo would not be allowed to switch to RAB-based regulation in the near future,

- The Russian regulator would not accept the DRC valuation, and

- Asset-based methodologies are not generally used by willing buyers purchasing going concerns.

858. A DRC only approximates FMV if there is a regulatory method that ties future cash flows to the replacement cost of the assets – something which did not happen in this case[743]. Consequently, the FMV of Krymenergo must be established on the basis of a DCF valuation[744].

859. Turning to Claimant's DCF valuation model, Russia says that Claimant has failed to provide any credible evidence to support the key assumptions on which such model is based[745]. A willing buyer would not have estimated future cash flows using the assumptions that form the basis of Claimant's DCF model:

- Transitioning to RAB regulation in either 2017 or 2020[746],

- Staying on RAB for several regulatory periods, and

- Tariffs generated under the RAB methodology would be those assumed in Claimant's DRC estimate[747].

860. In any case, Claimant's DCF model contains modelling errors, which if corrected lead to a decrease in the FMV of the assets of USD 85.1 M (2017 RAB introduction) or USD 87.4 M (RAB introduction postponed until 2020)[748]. Including the debt to Energorynok (a whole-sale market operator) would result in decreases of USD 45.7 M (assuming 2017 RAB) or USD 57.1 M (assuming that RAB would have been postponed until 2020)[749].

861. Respondent adds that the Krymenergo Auction price provides a more reasonable basis for the value of Krymenergo's initial RAB[750] and would result in a FMV of Krymenergo in 2015 of approximately USD 126 M[751]. This corresponds to UAH 1,443 M as of 2012, which at the then existing exchange rate amounted to approximately USD 180 M (the decrease can be explained as a result of the depreciation of the UAH and the RUB against the USD between 2012 and 2015)[752].

[743] RPreHS, paras. 258-260.
[744] RPHB I, paras. 192, 200.
[745] RPreHS, paras. 266-267.
[746] RPHB I, para. 206.
[747] RPreHS, para. 268; RPHB I, para. 223.
[748] RPreHS, para. 298.
[749] RPreHS, paras. 298-303.
[750] RPreHS, para. 279.
[751] RPreHS, para. 286; RPHB I, para. 232.
[752] RPHB I, para. 233.

862. Finally, Respondent says that Claimant's DCF model results in EV/EBITDA ratios significantly above the mean and median multiples derived from Russian electricity distribution companies[753]. The EV of Russian electricity distribution companies is substantially below their RAB (with an average EV/RAB ratio of 58%).

3. VALUATIONS BY THE EXPERTS

863. Under Article 5(2) of the Treaty the Tribunal is called to establish the "market value" – *i.e.*, the FMV – of Krymenergo's expropriated investments "immediately before the date of expropriation or before the fact of expropriation became officially known". The expropriation took place in January 2015, and both experts consider 22 January 2015 as the appropriate "**Valuation Date**"[754].

864. Each expert has produced his preferred valuation of Krymenergo's assets at the Valuation Date, using different valuation methods:

- Claimant's expert Mr. Lapuerta proffers the DRC methodology (**3.1**); while
- Respondent's expert relies on the 2012 privatization price (and the book value of assets) (**3.2**).

865. The experts also invoke alternative valuation methods, such as:

- The DCF method (**3.3**), and
- Market capitalisation (**3.4**).

866. The Tribunal will thereafter discuss the relevance of the various valuation methods and come to its own conclusion (**4.**) and reach a decision (**5.**)

3.1 DRC VALUATION

867. The DRC methodology measures the cost to be incurred by a potential buyer if it tried to reproduce Krymenergo's assets, taking into consideration their age, condition and technical efficiency[755]. Krymenergo's assets included around 30,000 km of electricity wires and cables of multiple voltage classes, as well as over 300 transformer sub-stations. Krymenergo also had buildings, tools, equipment and vehicles related to the operation and maintenance of the electricity distribution network[756].

[753] RPreHS, para. 322.
[754] Both Party-appointed experts agree that 22 January 2015 should be used as the Valuation Date (see, e.g., Lapuerta ER, para. 9; Compass ER, paras. 21 and 150).
[755] Lapuerta ER, para. 20.
[756] Lapuerta ER, para. 37.

868. In April 2013 Deloitte had already valued Krymenergo's assets using the DRC methodology established by the Ukrainian government[757]. The value had been UAH 4,353.5 M (or USD 535 M)[758].

Claimant's valuation

869. Krymenergo never updated this DRC valuation – it was Claimant's expert who did so, bringing the results forward from April 2013 through the Valuation Date in January 2015[759]. When performing this task, Mr. Lapuerta did two things:

870. First, he increased the value of certain assets:

- Value of international assets, such as copper wiring, cable lines, machinery and equipment: the price of these products on the international market (expressed in USD) tends to be stable, but since the RUB/UAH depreciated strongly against the USD, the value of these international assets in RUB/UAH would have increased significantly[760] (the exchange rate between the UAH and the RUB remained stable during the relevant period); to avoid this artificial increase, the expert converted the RUB/UAH value to USD, and then applied the United States inflation index for prices of industrial machinery and equipment[761];

- Value of local assets, such as buildings[762]: the expert used historic prices in RUB/UAH, applying the Ukrainian price index (for engineering buildings provided by the Ukraine State Statistical Service) to update the value – the expert favors this index over a Russian RUB-based inflation index, because there is no specific RUB-based index for Crimea, and the economic conditions in Ukraine are closer to those in Crimea[763].

871. Second, he deducted the additional depreciation of the assets for 22 months. The expert used a geometric depreciation, at 5% per year, the rate for electrical transmission, distribution and industrial equipment[764].

872. As a result, Mr. Lapuerta calculated the updated DRC as of the Valuation Date at USD 421.2 M (UAH 6,665 M)[765].

Respondent's reaction

873. Dr. Moselle and Mr. Delamer, Respondent's experts, opine that the DRC methodology is fundamentally flawed, because it does not represent FMV, except

[757] Lapuerta ER, para. 41.
[758] Lapuerta ER, para. 41.
[759] Lapuerta ER, para. 44.
[760] Lapuerta ER, para. 47.
[761] Lapuerta ER, para. 52.
[762] Lapuerta ER, para. 47.
[763] Lapuerta ER, para. 54.
[764] Lapuerta ER, para. 62.
[765] Lapuerta ER, Table 4.

if the regulation provides that the market value of the assets for remuneration purposes is equal to their DRC[766]. At the Valuation Date the exception was not applicable: there was no indication that the Russian regulator would use a DRC valuation methodology as the basis to determine the applicable tariff[767].

3.2 AUCTION PRICE

874. In 2012 Ukraine decided to carry out the Krymenergo Auction, offering the sale of a 45% stake in Krymenergo which was in the hands of the State[768]. DTEK Energy acquired this 45% participation in Krymenergo's capital for a consideration equal to UAH 256 M[769] [the "**Auction Price**"].

Respondent's experts

875. Respondent's experts, Dr. Moselle and Mr. Delamer, submit that the Russian regulator would probably have considered the book value of assets, as implied in the Auction Price paid, as an appropriate basis for valuing Krymenergo's asset base and would have set tariffs accordingly[770]. The Auction Price, properly adjusted as of the Valuation Date, thus represents the FMV which an informed buyer would have paid for Krymenergo's Crimean assets.

876. The Auction Price for 45% of Krymenergo's stock was UAH 256 M, implying a value for 100% of the equity of UAH 569 M. Krymenergo's liabilities (of UAH 874 M) must be added, to properly represent the value of its assets. In total, as of 5 May 2012, the value of Krymenergo's assets, taking as a reference the Auction Price, was UAH 1,443 M[771].

877. Respondent's experts convert this amount into RUB at a 3.7 conversion rate, resulting in RUB 5,350 M, and on this amount they apply the allowed rate of return for Russian electricity distribution companies, which is 11%[772]. The experts also add the negative cash flows which would have been generated by the enterprise and deduct the positive ones, to arrive at a final value of RUB 8,062 M at Valuation Date, which, converted into USD at a 64.2 exchange rate, is equal to USD 126 M[773].

Claimant's expert

878. Mr. Lapuerta criticizes the use of the Auction Price for valuation purposes, as this price would have included a substantial minority discount, since only 45% of the share capital was being privatized. Additionally, DTEK Energy, already being a shareholder, only had to out-bid other bidders by a marginal amount, which also

[766] Compass ER, para. 25.
[767] Compass ER, para. 26.
[768] Compass ER, para. 76.
[769] Compass ER, para. 76.
[770] Compass ER, para. 81.
[771] Compass ER, para. 82.
[772] Compass ER, para. 83.
[773] Compass ER, Table 3.

resulted in a reduction of the Auction Price[774]. Furthermore, the Price entailed investment commitments, which have not been accounted for in Respondent's calculations[775]. The expert also opines that the reasonable profit margin should be 13%[776]. Finally, Mr. Lapuerta says that by converting the amounts to USD only at the Valuation Date, the value masks the significant depreciation of the RUB between 2012 and 2015[777].

3.3 DCF VALUATION

879. At the end of 2013 Krymenergo had developed an internal DCF model, which applied existing Ukrainian regulation, and which forecast for the period 2014 – 2030 Krymenergo's future revenues from electricity sales and future costs from electricity acquisition and distribution[778]. Both experts have used this internal DCF model to come up with DCF valuations of Krymenergo's assets on the Valuation Date.

Claimant's expert

880. Claimant's expert in general agrees with the assumptions in the 2013 internal model developed by Krymenergo[779] and in essence has only performed two adjustments:

- He has converted amounts in UAH into RUB[780]; and
- He introduced the adjustments required by differences between Ukrainian and Russian regulation; during this process, the expert made an important assumption: that Russia would have completed its transition from a cost-plus regulation to a RAB methodology either by 2017 or alternatively by 2020[781].

881. The expert calculated a terminal value in 2034[782] and applied a discount rate of 11%[783]. The amounts in RUB were then converted into USD, resulting in[784]:

- USD 312.1 M if RAB was introduced in 2017; or
- USD 259.9 M if RAB was postponed until 2020.

[774] H-17, p. 11.
[775] H-17, p. 11.
[776] Lapuerta ER, para. 82.
[777] H-17, p. 11.
[778] Lapuerta ER, para. 68; **Doc. CE-163**.
[779] Lapuerta ER, para. 70.
[780] Lapuerta ER, para. 78.
[781] Lapuerta ER, paras. 29, 86-88.
[782] H-17, p. 5.
[783] **Doc. CE-554**-Updated.
[784] H-17, p. 4; **Doc. CE-554**-Updated, Tab A (new) 1.

Respondent's experts

882. Dr. Moselle and Mr. Delamer object that Mr. Lapuerta's projections are based on errors and unrealistic assumptions:

- Mr. Lapuerta's DCF valuation is affected by a modelling error[785];
- Mr. Lapuerta's assumption that Krymenergo would have switched to a RAB based regulation is unsubstantiated[786] - it was more reasonable for Krymenergo to have switched to a long-term indexation of gross necessary revenue ["**GNR**"], instead[787];
- Mr. Lapuerta overestimates Krymenergo's initial RAB[788];
- Mr. Lapuerta's assumption regarding Krymenergo's future efficiency gains is unsubstantiated and at odds with Russian regulatory practice[789];
- Mr. Lapuerta incorrectly computes the terminal value before the cash flow projections reach a steady state[790];
- Mr. Lapuerta wrongly computes and internalizes country risk[791];
- There are certain additional issues in Mr. Lapuerta's DCF valuation, which further reduce the valuation[792]; and
- 11% is not a proper discount factor; the weighted average cost of capital ["**WACC**"], set at 13.8%[793], is more appropriate[794].

3.4 MARKET CAPITALISATION

883. Krymenergo was publicly traded in the relevant time period of 2013 through 2015. A standard way of assessing the value of a traded company is through its share price[795]. The market capitalization renders a value of UAH 337 M[796].

[785] Compass ER, paras. 124-128.
[786] Compass ER, paras. 129-133.
[787] Compass ER, para. 131.
[788] Compass ER, paras. 134-135.
[789] Compass ER, paras. 136-140.
[790] Compass ER, paras. 141-146.
[791] Compass ER, paras. 147-159.
[792] Compass ER, para. 160.
[793] The Tribunal understands that the figure 13.9% reflected in H-19, p. 25 should be closer to 13.8%, as results from **Doc. RER-1-25**, T6 (the result of adding 8.1% [Cost of Capital in RUB according to Mr. Lapuerta] and 5.7% [Country risk Premium applicable according to Dr. Moselle and Mr. Delamer]) (see H-19, p. 25).
[794] H-19, p. 25; **Doc. RER-1-25**, T6.
[795] Lapuerta ER, para. 125.
[796] Lapuerta ER, para. 131.

884. Claimant's expert, however, argues that the share price understates the FMV of Krymenergo's assets, because:

- Only a minimal fraction of the shares (0.08%) was traded – typically, minority shares trade at a discount which reflects the lack of control of those shareholders; the minority discount can be as high as 50%[797];

- The shares of Krymenergo were illiquidly traded and investors pay less for illiquid assets – the size of liquidity discounts vary, but a 20% is reasonable[798]; and

- The market capitalisation only represents approximately 13% of Krymenergo's book value at the end of 2013[799].

4. TRIBUNAL'S ANALYSIS

885. The discussion among the experts turns around the selection of the most appropriate methodology to establish the FMV of Krymenergo's expropriated assets as of the Valuation Date. Neither expert discusses the essence of the FMV of an enterprise like Krymenergo's Branch: it is the price in money which a willing buyer would be prepared to deliver to a willing seller, both having accurate information of the asset being sold, and both acting in good faith and in accordance with the appropriate market rules, in an open and unrestricted market[800]. But the experts do disagree on the most appropriate methodology to establish such FMV:

- Mr. Lapuerta, Claimant's expert, relies mainly on the DRC methodology, while

- Dr. Moselle and Mr. Delamer, Respondent's experts, proffer the Auction Price as the most appropriate methodology.

886. The Tribunal sees no reason to exclude any of these approaches; they all are indicators of the FMV of the expropriated assets; but in the specific circumstances of this expropriation, some are more appropriate to value Krymenergo's assets than others. In the present circumstances, the most appropriate solution is for the Tribunal to analyze the advantages and disadvantages of the various methodologies proposed by the experts and to attribute a specific weighting to each one. The result of the weighted average will provide a proxy of the FMV of Krymenergo's Branch as of the Valuation Date – the compensation owed by the Russian Federation for the unlawful expropriation of these assets[801].

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[797] Lapuerta ER, para. 129.
[798] Lapuerta ER, para. 130.
[799] Lapuerta ER, para. 131.
[800] **Doc. CLA-74**, *Flughafen*, para. 748; **Doc. RLA-103**, *Rusoro*, para. 751.
[801] See **Doc. RLA-103**, *Rusoro*, paras. 787 *et seq*.

4.1 DRC

887. The DRC represents the cost which a hypothetical buyer would incur, if such buyer decided to acquire the expropriated assets, in their current condition, on the Valuation Date.

888. There is a valuation of Krymenergo's DRC, performed by a respected third party *in tempore insuspecto*: in April 2013 Deloitte determined, applying the methodology set by the Ukrainian regulation, that such DRC amounted to UAH 4,353.5 M[802]. Mr. Lapuerta, Claimant's quantum expert, performs two adjustments on the April 2013 DRC, to bring the value to Valuation Date, which occurred 20 months thereafter. In doing so, he assumes that during the 20-month lapse the value of the assets

- would have decreased due to depreciation;
- but would have increased because of inflation (international assets would have appreciated applying US inflation and local assets applying Ukrainian inflation).

889. After having performed these adjustments, the DRC at Valuation Date is, according to Claimant's expert, USD 421.2 M[803]. This is the highest of all valuations and Claimant's preferred solution.

890. Respondent's quantum experts do not take issue with Deloitte's calculation of the DRC, nor with the adjustments performed to bring the DRC to Valuation Date[804]. Respondent's criticism focuses on the adequacy of DRC as a proxy for the FMV of Krymenergo's assets. They submit that the FMV of Krymenergo's assets at Valuation Date is dependent on the cash these assets will generate in the future and that, in turn, is determined by the Russian tariff regulation for electricity distribution[805]. So, unless there was evidence that the DRC would be used by the Russian authorities to establish the tariff, DRC would have no bearing on the FMV[806].

891. Claimant's expert counters that DRC is often used not only to set tariffs by regulators[807], but also to update the book value of assets, in order to reflect market value[808].

892. The Tribunal shares the opinion of Respondent's expert that the FMV of the expropriated assets is dependent on the Russian tariff regulation, but does not see sufficient merit in Respondent's criticism to dismiss the relevance of DRC altogether: it is a fact that DRC is frequently used as a proxy for FMV and Deloitte's

[802] **Doc. CE-30**, item 9.
[803] **Doc. CE-554**-Updated; Lapuerta ER, Table 4. Mr. Lapuerta uses a conversion rate of 0.06 USD/UAH.
[804] H-17, p. 9.
[805] RPHB I, para. 199, referring to HT, Day 7, p. 90, l. 23 – p. 91, l. 4 (Mr. Delamer).
[806] H-19, p. 5.
[807] HT, Day 6, p. 59, ll. 10-14.
[808] CPHB I, para. 164; HT, Day 6, p. 62, ll.12-15.

valuation was prepared to support Krymenergo's tariff entitlement in accordance with Ukrainian regulation.

893. Respondent further argues that the value obtained through the DRC methodology is unrealistically high[809]. The Tribunal agrees that DRC renders a value which is at the far end of the spread of all potential values, obtained applying different valuation methods. That fact will influence the Tribunal's decision as to the weighting factor attributed to the DRC driven value.

4.2 BOOK VALUE

894. A generally conservative approach to the determination of the FMV of an entrepreneurial asset is through the value recorded in the company's books. Both experts have referred to the book value of Krymenergo's assets as an auxiliary mean to support the reasonableness of their preferred valuation[810].

895. The latest assessment of the book value of Krymenergo's assets is dated 30 September 2014 – some three months before the expropriation; the book value amounts to UAH 2,601 M[811]. Claimant says that this figure would still be valid on the Valuation Date[812] and Respondent has not refuted this point.

896. The Tribunal, by majority (the President and Professor Pavić), finds the book value to be a good indicator of the value of Krymenergo's assets. Converted at Valuation Date, at the conversion date put forward by the experts (0.0632 UAH/USD)[813], the book value of the assets equals to USD 164.6 M (UAH 2,601 M).

An important confirmation

897. There is a further, reliable source which confirms that the value of Krymenergo's assets should be in a range between UAH 2,500 and 3,000 M: two years before the Valuation Date, PricewaterhouseCoopers ["**PWC**"], the auditing firm, had confirmed, in the audited consolidated financial statements of DTEK Energy (the controlling owner of Krymenergo)[814] that, as of December 2012, the FMV of Krymenergo's assets amounted UAH 2,494 M[815] – a number which is reasonably close to UAH 2,601 M book value some two years later.

[809] RPreHS, paras. 230, 264; RPHB I, paras. 192-193.
[810] Lapuerta ER, para. 32; Compass ER, para. 81.
[811] **Doc. CE-163**.
[812] CPHB I, para. 170.
[813] **Doc. CE-150** (UAH/USD Tab).
[814] **Doc. CE-12**.
[815] **Doc. RER-1-7**, p. 51; Compass ER, para. 82 (fn. 60).

4.3 AUCTION PRICE

A. Background

898. On 5 May 2012 the Ukrainian government held the Krymenergo Auction, to privatize 45% of the stock of Krymenergo. The DTEK Energy Group paid UAH 256.1 M as consideration for 45% of the stock.

899. Respondent's preferred valuation method is the "**Auction Price**", with some additions and adjustments.

900. Claimant disagrees and says that there is no legal basis to assume that the Russian regulator would fix the tariff based on the price paid for the shares five years earlier[816]. Respondent replies that the historical costs method has, in fact, been used by regulators to calculate tariffs[817].

901. The Tribunal considers that the Auction Price is a natural point of reference because it shows the FMV in 2012 for a 45% (and consequently non-controlling) participation in Krymenergo. Of course, the Auction Price would have to be adjusted as a proxy for FMV to take account, *inter alia*, of the fact that the government's auction rules strictly limited the number and nature of qualified buyers, but it cannot be totally disregarded when establishing Krymenergo's 2015 FMV.

B. The necessary adjustments to the Auction Price

902. The Auction Price in May 2012 was UAH 256.1 M for a 45% stake in Krymenergo, equivalent for 100% of the share capital to UAH 569.1 M (USD 70.8 M[818]). The price must be subjected to several adjustments in order to determine the Adjusted Auction Price:

a. Inclusion of Krymenergo's liabilities

903. First, PWC has calculated Krymenergo's liabilities at UAH 874 M, as of the Auction date[819]. Respondent's experts add this amount to the Auction Price to determine the value of Krymenergo's assets[820]. This adjustment is not controversial and must be added to the UAH 569.1 M Auction Price, rendering a total of UAH 1,443.1 M.

[816] H-17, p. 12.
[817] RPHB I, para. 224.
[818] At a 0.1244 USD/UAH exchange rate on 5 May 2012.
[819] **Doc. RER-1-7**, p. 51. This amount has been calculated by Respondent's expert at Compass ER, para. 82 (fn. 58) and Claimant has not challenged this calculation. The Tribunal also notes that Krymenergo's financial statements as of 31 December 2012 showed liabilities in the same range (**Doc. RER-1-24**, pp. 29-32).
[820] Compass ER, para. 82.

b. Passage of time between the Krymenergo Auction and the Valuation Date

904. Second, the Krymenergo Auction occurred in May 2012, while the Valuation Date is in January 2015. A reasonable return on the investment must be added to remunerate the hypothetical investor for this time gap.

905. Respondent's experts apply an 11% return on the Auction Price (augmented by the net debt)[821]. Claimant's expert is of the view that a 13% profit margin is more adequate[822]. Both Parties support the percentage of return on the remuneration offered by relevant regulation.

906. The Tribunal agrees with the Parties that a good indicator of a reasonable return is the rate chosen by the regulator when setting the applicable tariffs. The question is which of the two proposed rates of return – 11% or 13% – was applicable between 2012 and 2015.

907. Respondent's experts argue that 11% was the rate of return foreseen by Russian legislation[823]. The Tribunal finds that the Russian legislation would only be relevant after the annexation of Crimea. Prior to that, the Tribunal must look at the Ukrainian legislation. However, as Claimant's expert acknowledges, there seems to be no material difference, since prior to the annexation of Crimea, both the Russian and the Ukrainian regulations were very similar[824].

908. Claimant's expert proposes a 13% profit margin, which would allegedly be supported by the report of Professor Anatole Boute[825]. This percentage was only applicable during the transition period, after December 2014 and, since the expropriation took place only a couple of weeks thereafter, the Tribunal finds that the discussion, ultimately, bears no relevance.

909. All in all, the approach of Respondent's experts appears to be preferable, as confirmed by the report of Professor Boute, who provides the allowed rate of return under the Russian tariff and submits that, for the years 2012 to 2015, 11% is the maximum rate of return[826].

910. Respondent's experts have carried out the precise calculation of Krymenergo's FMV as of the Valuation Date, taking as a starting point the UAH 1,443.1 M explained in the previous sub-section, converting this amount into RUB, adding the actual free cash flow to the firm in the years 2012, 2013 and 2014 and applying a regulatory return of 11%. The result in USD, using the RUB/USD exchange rate as of the Valuation Date, is USD 126 M[827].

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[821] Compass ER, Table 3.
[822] Lapuerta ER, para. 82.
[823] H-19, p. 10.
[824] Lapuerta ER, para. 81.
[825] Lapuerta ER, para. 82, with reference to Annex A (Boute Report, section 5.3).
[826] Lapuerta ER, Annex A – Boute Report, Tables 1 to 5.
[827] Compass ER, Table 3; H-19 p. 10.

c. Impact of additional investments

911. Claimant says that it not only agreed to pay the purchase price, but that it also undertook to carry out significant additional investments[828]. Respondent acknowledges that investments were made, but says that the financial impact of these investments on the FMV of Krymenergo is caught by the inclusion of the negative and the positive cash flows generated by Krymenergo's new investments in the years 2012, 2013 and 2014[829].

912. The Tribunal confirms that the calculation of the FMV as of the Valuation Date, under Respondent's methodology, does indeed take into consideration the actual free cash flows to the firm, as shown in Table 3 of Compass Lexecon's report[830].

d. Other adjustments

913. There are two additional adjustment which may be relevant, due to the fact that the Auction Price does not reflect a control premium and that the regulatory regime imposed stringent requirements on companies that wished to participate in the Krymenergo Auction.

914. Before May 2012, the DTEK Energy Group held a minority participation in Krymenergo (12.49%)[831]. In the Krymenergo Auction, it acquired an additional 45%, rendering a total participation of 57.49% and, thus, the control of the company[832].

915. Claimant suggests applying an adjustment upwards to reflect the fact that the price paid by DTEK Energy Group did not include a control premium – the control ensued because DTEK Energy Group already held more than 12% in the share capital[833]. Respondent does not take issue with the concept of control premium, but finds that in this case, the price paid already included that premium, because Claimant, after the acquisition, held a controlling position[834].

916. The Tribunal disagrees: the shares sold represented a minority stake and the Claimant out-bid another bidder who would not have acquired control – there is, thus, no indication that the price paid by the Claimant included a control premium.

917. Claimant's expert adds that auction sales may have carried a further discount, because the conditions of the auction limited the universe of possible buyers; in cases like this an auction price does not reflect the terms of an arms-length transaction without barriers[835].

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[828] CPHB I, para. 177.
[829] H-19, p. 10.
[830] Compass ER, Table 3 and H-19, p. 10.
[831] **Doc. RER-1-6**.
[832] **Doc. RER-1-6**.
[833] **Doc. RER-1-6**.
[834] H-19, p. 11.
[835] HT, Day 6, p. 67, ll. 14-23 (Mr. Lapuerta).

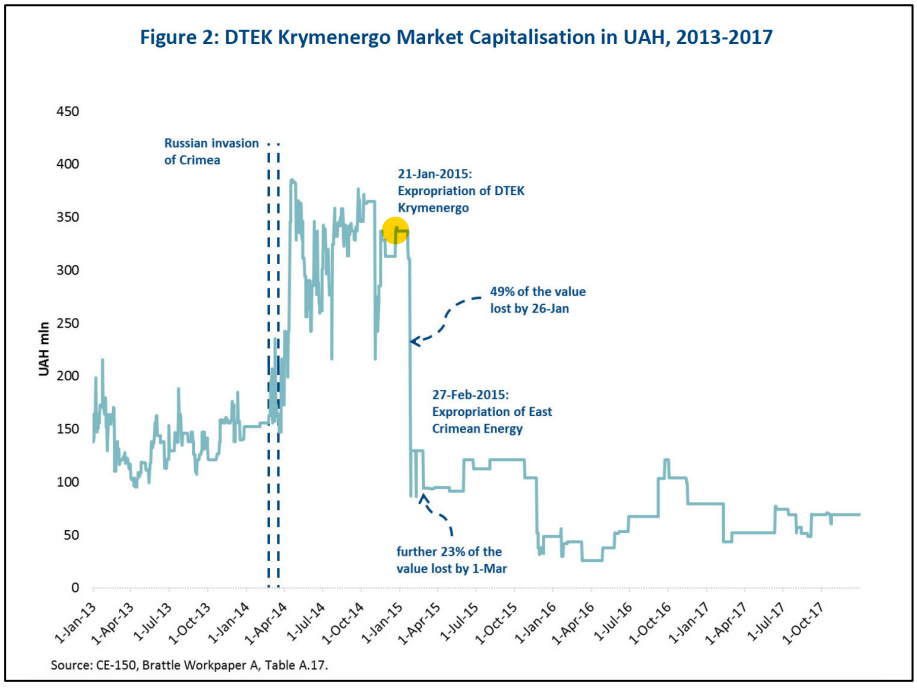
918. The Tribunal agrees that in this case the onerous conditions required by Resolution 116-r must have restricted the number of companies entitled to participate, and the lack of bidders may have resulted in a reduction of the price at which the assets were eventually sold.

919. The difficult question is how to adjust the price properly to correct for these two factors. Claimant's expert has stated that the control premium may be as high as 50%[836], but submits that 30% would be reasonable[837]. Respondent's experts seem to agree with this number[838]. There is no equivalent calculation for the price impact of the regulatory restrictions on companies entitled to participate in the Krymenergo Auction.

920. All in all, the Tribunal, by majority (the President and Professor Pavić), finds that a 40% premium is a reasonable estimate for the impact of these two factors. Applying this premium on the USD 126 M Auction Price, after the initial adjustments, results in an Adjusted Auction Price, which may serve as a proxy for the FMV as of the Valuation Date, of USD 176.4 M[839].

4.4 PRICE OF THE LISTED SHARES

921. Krymenergo is a publicly traded company. It was listed before and after the expropriation. Below is a diagram reflecting the price of its shares – the yellow dot shows the price at the Valuation Date:



[836] Lapuerta ER, para. 129.
[837] Lapuerta ER, para. 135.
[838] H-19, p. 15.
[839] USD 126 M x 1.4 = USD 176.4 M.

922. The diagram shows that, at the Valuation Date, the price of the shares traded at the higher end of the spread, compared to previous and later years. The price on Valuation Date was UAH 2 per share, rendering a total market capitalization of UAH 346 M[840].

923. Claimant submits that the market capitalization would require, at least, two adjustments to become a reasonable proxy for the FMV of Krymenergo's assets, with which Respondent's experts agree[841]:

924. First, only a very minor percentage of the shares (0.08%) was traded on the average trading day in the stock market[842]. If that price was to be used to determine the value of all the shares, a control premium of 30% should be added[843].

925. Second, shares are not liquidly traded in this stock exchange, therefore a further illiquidity discount, of 20%, should be accounted for[844].

926. Respondent's experts have also increased the value to account for Krymenergo's liabilities[845].

927. The market value at Valuation Date thus calculated by Respondent, including all adjustments, is USD 114 M[846].

928. The Tribunal, for the reasons explained above, is of the opinion that the price of the shares is only partially indicative of the FMV of the company's assets. This will be taken into account by the Tribunal when assessing the weight attributable to this value indicator.

4.5 DCF

929. A buyer will, typically, focus on how much cash flow an asset can generate in the future and, based on this assessment, determine the FMV it is willing to pay. The method used to calculate the FMV of an entrepreneurial asset, based on its expected income, is the DCF, the discounting of future cash flows.

930. Russia's experts have insisted that the market value of an electricity distribution business, such as Krymenergo, must be established based on a DCF valuation[847]. Claimant's expert accepts the principle that such a methodology is frequently used to value a business and has proffered his own DCF valuation[848].

931. The Tribunal agrees that, as a general rule, DCF valuation is an appropriate method to determine the value of cash flow generating assets, provided that certain

[840] **Doc. CE-150**, A 17.
[841] H-19, p. 15, note 3.
[842] Lapuerta ER, para. 129.
[843] Lapuerta ER, para. 135.
[844] Lapuerta ER, para. 130.
[845] H-19, p. 15, note 3.
[846] H-19, p. 15.
[847] RPHB I, para. 235.
[848] Lapuerta ER, para. 65.

requirements are fulfilled. The precise requirements have been set forth by the tribunal in the *Rusoro* case[849]:

> "DCF, however, cannot be applied to all types of circumstances, and while in certain enterprises it returns meaningful valuations, in other cases it is inappropriate. DCF works properly if all, or at least a significant part, of the following criteria are met:
>
> - The enterprise has an established historical record of financial performance;
> - There are reliable projections of its future cash flow, ideally in the form of a detailed business plan adopted *in tempore insuspecto*, prepared by the company's officers and verified by an impartial expert;
> - The price at which the enterprise will be able to sell its products or services can be determined with reasonable certainty;
> - The business plan can be financed with self-generated cash, or, if additional cash is required, there must be no uncertainty regarding the availability of financing;
> - It is possible to calculate a meaningful WACC, including a reasonable country risk premium, which fairly represents the political risk in the host country;
> - The enterprise is active in a sector with low regulatory pressure, or, if the regulatory pressure is high, its scope and effects must be predictable: it should be possible to establish the impact of regulation on future cash flows with a minimum of certainty".

932. In the present case, most of these requirements are met: Krymenergo is indeed a company with a long record of performance, it had produced *in tempore insuspecto* a detailed business plan, there is no uncertainty regarding its capacity to finance its business plan, a meaningful WACC can be calculated, and it is possible to make estimations regarding the future cash flows of the company – although these estimations are dependent on the future tariffs to be applied to the distribution of electricity in the Russian Federation, a question surrounded by uncertainty.

933. The estimation of cash flows in an electricity transporting and distributing utility as Krymenergo is largely dependent on the regulatory tariff. It is undisputed that since Crimea was incorporated into the Russian Federation, the applicable tariff system was based on a short-term cost-plus methodology. All experts agree, however, that at the Valuation Date it was reasonable to assume that the Russian regulator would change the tariff system[850]. There were two possible alternatives: either a long-term indexation of the Gross Necessary Revenue method ["**GNR**"] or a Regulated Asset Based method (previously defined as "RAB")[851].

[849] **Doc. RLA-103**, *Rusoro*, para. 759.
[850] Compass ER, para. 69.
[851] Dolmatov ER, para. 12.

Mr. Lapuerta's DCF valuation

934. Claimant's expert Mr. Lapuerta has provided a DCF valuation as of the Valuation Date, under the assumptions that Russia would introduce RAB based tariffs either in 2017 or in 2020 and that Krymenergo would opt for this alternative:

- USD 312.M if RAB was introduced in 2017; or
- USD 259.9 M if RAB was postponed until 2020.

935. Mr. Lapuerta says that a prospective buyer in 2015 would have assumed that Krymenergo would, eventually, switch to RAB. RAB, as it was configured in 2015, was the best option, and even Respondent's expert, Dr. Dolmatov, accepted that Krymenergo would have been incentivized to apply for a RAB transition[852].

Respondent's expert

936. Respondent, however, takes the view that it would have been more logical for Krymenergo to switch to GNR. Respondent's reasoning is the following: the pilot companies that started applying RAB saw their tariffs increased significantly and this led the Russian regulator to revise the parameters and to toughen the requisites to be eligible for RAB; as a result, the number of companies using RAB started to decrease in 2012 and, by 2015, many had switched from RAB to GNR[853]. In fact, at the end of 2017 the clear trend was to move away from RAB[854]. Respondent also questioned whether Krymenergo would meet the requisites for RAB. In these circumstances, a willing buyer in 2015 would have assumed that Krymenergo would not transition to RAB, but to GNR[855].

Discussion

937. The Tribunal is not persuaded by Respondent's reasoning, which is largely tainted by a retrospective bias: knowing, with hindsight, that in the future companies would choose GNR over RAB, the Respondent's experts assume that any willing buyer in 2015 would also opt for that choice. There is, however, insufficient evidence to prove that at Valuation Date a willing buyer would move away from the more obvious preference for RAB: in 2015 there was a dominance of RAB in terms of market share in Russia and RAB applied to the majority of Russian grids, as acknowledged by Respondent[856].

938. The Tribunal, thus, agrees with Mr. Lapuerta's assumption that Krymenergo would have sought to switch to RAB.

939. When would that switch have occurred? Mr. Lapuerta provides two alternatives: either in 2017 or in 2020. Given the uncertainties surrounding any change in tariffs, and the long delays in the implementation of such regulatory change, the Tribunal

[852] CPHB I, para. 181.
[853] Dolmatov ER, para. 27.
[854] RPHB I, para. 216.
[855] RPHB I, para. 222.
[856] RPHB I, para. 214 with quotes to Hearing.

prefers the alternative that the change to RAB based regulation would only occur in 2020. Assuming the regulator accepted a switch to RAB, Mr. Lapuerta calculates a FMV as of the Valuation Date of USD 259.9 M.

Discount rate

940. Claimant's expert calculates discounted cash flows using an 11% rate, which is equal to the regulatory rate of return after adoption of the RAB[857].

941. Respondent's experts prefer Krymenergo's cost of capital, which, expressed in USD, is 11.3%, pursuant to the following breakdown[858]:

- Risk free rate: 3.1%
- Market risk premium: 5.5%
- Levered Beta: 0.46
- Country risk premium: 5.7%

942. Krymenergo's income will of course be in RUB, and for this reason an additional 2.3% needs to be added, representing the expected differential inflation between Russia and the US. In total, in Respondent's calculation, Krymenergo's cost of capital in RUB amounts to 13.8%[859].

943. Claimant sees no sense in Respondent's proposition: for an investment to remain attractive, the rate of return should be higher than the cost of capital[860]; there is no logic in fixing the rate of return at 11%, with a cost of capital at 13.8%, as investors would lose 2.8% every year[861].

944. Respondent counters this argument, relying on a 2012 report by Gazprombank, which submits that many electricity distributors operated under a rate of return that was below their cost of capital[862].

945. The Tribunal favors the opinion of Claimant's expert: regulated rates of returns are fixed for long periods of time and should allow the utility company to cover its cost of capital. It may well be that, at some particular moment in time, the cost of capital is above the rate of return, but in the long run that situation should not be recurrent. In any case, a prospective buyer will tend to apply the rate that is acknowledged by the regulatory system, because this represents the effective income such buyer would receive.

946. All in all, the Tribunal accepts Mr. Lapuerta's DCF calculation, under the assumption that the RAB-based tariff system would be introduced in 2020 and that

[857] **Doc. CE-554**-Updated.
[858] H-19, p. 25. This is the result of the following calculation = 3.1% (Risk free rate) + 0.46 (levered Beta) x 5.5% (Market Risk Premium) + 5.7% (Country Risk Premium) [see Lapuerta ER, Table 6].
[859] **Doc. RER-1-25**, T6, with only a slight variation in decimals.
[860] H-17, p. 17.
[861] CPHB I, para. 185.
[862] H-19, p. 27.

the regulator would accept that Krymenergo qualified for RAB. Subject to weighting, the Tribunal will consider the USD 259.9 M valuation as one of the alternatives to establish the FMV of Krymenergo's expropriated assets.

5. DECISION

947. There is a final point that needs to be addressed before fixing the amount of compensation due: the currency of the compensation.

948. Claimant has requested compensation in USD. Respondent does not seem to object, and, in fact, its experts have carried out alternative calculations of the compensation owed, also in USD.

949. The Tribunal agrees that USD is the appropriate currency for the compensation, as this seems to be in line with Article 5(2) of the BIT, which foresees that, if the compensation is not paid promptly, it will accrue interest at the rate of three-months USD LIBOR deposits plus 1%. Financial principles dictate that there be a correlation between the currency of the principal amount due and that in which interest is indexed – otherwise, the interest rate would not adequately be compensating the risk and harm caused by the delayed payment.

950. The Parties have put forward different valuation methods, each of which renders a distinct value of Krymenergo's business as of the Valuation Date, expressed in USD. The Tribunal has analyzed each of the valuations proposed by the Parties, and has validated the calculations or, otherwise, adjusted the figures, when the criticisms from the counterparty seemed convincing; and the Tribunal has also noted the strengths and weaknesses of each of the methods.

951. In view of the reasoning contained in the previous section, the Tribunal decides that each of the valuation methods should be taken into consideration and that each alternative should be attributed a reasonable weighting, established by the Tribunal taking into consideration the specific strengths and weaknesses of each methodology:

- **DRC**: USD 421.2 M; this valuation was established through an objective procedure, by an independent third party, and the calculations are not questioned; but it is uncertain that the Russian regulatory system would accept this value for the establishment of the tariff and that a prospective purchaser would be prepared to pay a price based on this valuation; for these reasons the Tribunal, by majority, awards it a weighting of 10%;

- **Book value**: USD 164.6 M; this is an objective criterion, established by the investor, and frequently used in the valuation of expropriated assets; however, book value is frequently unreflective of the FMV of a company's assets; the Tribunal, by majority, awards it a weighting of 30%;

- **Adjusted Auction Price**: USD 176.4 M; this figure reflects a price established in a public auction, under different circumstances and at a different time, which has been adjusted by the Tribunal, to take into consideration changed circumstances at the Date of Valuation; that said, the adjustments are based

on rules of thumb, which are used to provide a simplified model of complex realities; the Tribunal, by majority, awards it a weighting of 30%;

- **Listed share price**: USD 114 M; this is the lowest value, determined by reference to the stock exchange price of Krymenergo – a company which was listed, but which had minimal free float; for this reason, the Tribunal, by majority, awards it a 10% weighting; and

- **DCF valuation**: USD 259.9 M; Krymenergo's business is well suited to the application of a DCF methodology, and the company had developed and was applying its own DCF model, which Mr. Lapuerta adapted; that said, any prediction of tariff-based income in a situation as fragile as that of Crimea in 2015 was fraught with uncertainties; the Tribunal, by majority, thus awards a 20% weighting to this alternative.

952. The weighted average of these alternatives is USD 207.8 M. The Tribunal concludes, by majority (the President and Professor Pavić), that this amount adequately represents the FMV, as of the Valuation Date, of Krymenergo's Crimean Branch, which was taken from Krymenergo by the Russian Federation in breach of the Treaty[863]. The Tribunal orders the Russian Federation to pay to Krymenergo this amount, as compensation for the unlawful expropriation.

[863] See Mr. Rowley's Separate Opinion on Quantum.

VIII.2. INTEREST

953. Claimant submits that it should be awarded pre- and post-award interest based on the yield to maturity on USD-denominated Russian sovereign bonds. Respondent takes issue with this proposal and considers that the Tribunal should apply interest at the three-month LIBOR rate for USD plus 1%, in accordance with Article 5(2) of the BIT.

954. The Tribunal will summarize the Parties' positions with respect to interest (**1.** and **2.**) and then adopt a decision (**3.**).

1. CLAIMANT'S POSITION

955. Claimant contends that Krymenergo is entitled to pre- and post-award interest based on the yield to maturity on dollar-denominated Russian sovereign bonds[864].

956. Mr. Lapuerta calculated pre-award interest from the date of the expropriation (21 January 2015) through October 2018, but noted that if payment of the award was delayed beyond April 2020, then the Tribunal should apply a higher rate from January 2015 to the date of payment[865]. In his updated workpaper, Mr. Lapuerta refreshed the interest calculation based on the assumption that the award will not be issued until after April 2021[866]. Further, considering the actual date of the award, Claimant submits that the interest due must exceed Mr. Lapuerta's latest calculations to reflect the higher rate of interest applicable to bonds of longer nature[867].

957. Claimant explains, relying on Mr. Lapuerta, that the use of USD-denominated Russian bonds is justified, because it reflects the economic reality that Russia has effectively owed amounts to Krymenergo since 21 January 2015 and, accordingly, has forced Krymenergo to become a creditor to Russia[868]. Additionally, Claimant submits that the Russian borrowing rate is the only suitable rate to provide full compensation, as required under the standard of full reparation[869].

958. Contrary to Russia's position, Claimant argues that the interest rate contained in Article 5(2) BIT [the "**BIT Interest Rate**"] does not apply. According to Claimant's view, the BIT Interest Rate applies only to compensation in cases of lawful expropriations, where prompt, adequate, and effective compensation has been made – requisites that are not met in the present case[870].

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[864] C I, paras. 175-176; CPreHS, para. 333. See also Lapuerta ER, paras. 140 and 144.
[865] Lapuerta ER, paras. 145-149 and Table 8.
[866] CPreHS, para. 333; **Doc. CE-554-**Updated, Tab "A(new)14".
[867] CPreHS, para. 333.
[868] CPreHS, para. 334, referring to **Doc. CLA-120**, *PV Investors*, para. 834.
[869] CPreHS, para. 337.
[870] CPreHS, paras. 335-336.

Compound interest

959. The Parties do not contest the appropriateness of compound interest on an annual basis[871]. Claimant submits, however, that annual interest must accrue and become payable evenly throughout the year[872].

2. RESPONDENT'S POSITION

960. Respondent submits that the BIT Interest Rate should apply to any award in favor of Claimant. Respondent emphasizes that Article 5(2) BIT specifically states that interest should be charged "as of the date of expropriation until the date of payment, at the interest rate for three-month deposits in US dollars on the London Interbank Market (LIBOR) plus 1%", and that said provision leaves no room for ambiguity[873].

961. Respondent supports its view by case law:

- It relies on *OA Tatneft*, where Ukraine affirmed that to award anything other than the rate specified in the BIT "would be to ignore the BIT carefully negotiated and agreed between Russia and Ukraine"[874];

- It notes that other tribunals, like *Ukrnafta*[875], *Stabil*[876] and *Siag*[877], have also found the Article 5(2) rate applicable to expropriation claims under the BIT, whether lawful or unlawful[878]; and that the BIT rate is sufficient to provide full reparation in the case of unlawful expropriation[879].

962. Respondent takes issue with Claimant's argument that the BIT Interest Rate cannot apply to a claim of unlawful expropriation. Respondent first emphasizes that Mr. Lapuerta is a quantum expert – not a legal one – specifically instructed by Claimant's counsel not to apply the BIT Interest Rate[880]. Furthermore, Respondent argues that Claimant has provided scant legal authority to support Mr. Lapuerta's conclusion and adds that his argument has been explicitly rejected by several authorities, as incompatible with the applicable customary international law standard[881].

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[871] CPreHS, para. 340; RPreHS, para. 336.
[872] CPHB I, para. 200.
[873] RPreHS, para. 329.
[874] RPreHS, para. 330, referring to **Doc. CLA-55**, *OAO Tatneft*, para. 623.
[875] **Doc. RLA-338**, *Ukrnafta (Final Award)*, paras. 393-394.
[876] **Doc. RLA-339**, *Stabil (Final Award)*, paras. 411-412.
[877] **Doc. CLA-35**, *Siag*, para. 597.
[878] RPreHS, para. 331.
[879] RPreHS, para. 332.
[880] RPreHS, para. 333.
[881] RPreHS, para. 334.

Compound interest

963. The Parties do not contest the appropriateness of compound interest on an annual basis[882].

3. TRIBUNAL'S ANALYSIS

964. The Tribunal has concluded that Claimant is entitled to compensation for the unlawful expropriation of its investment in the amount of USD 207.8 M. The Parties agree that Claimant is entitled to receive interest on any awarded amounts[883], but they disagree on the applicable interest rate:

- While Claimant considers that the Tribunal should award pre- and post-award interest based on the yield to maturity on USD-denominated Russian sovereign bonds;

- Respondent submits that the Tribunal should apply interest at the three-month LIBOR rate for USD plus 1%, consistent with Article 5(2) of the BIT (previously defined as the "BIT Interest Rate").

965. As provided in Article 38(1) of the ILC Draft Articles, "the interest rate and mode of calculation shall be set so as to achieve" full reparation. Bearing this in mind, the Tribunal will decide on the applicable interest rate (**3.1.**), reflect the Parties' agreement on the issue of compounding (**3.2.**) and establish the *dies a quo* and *dies ad quem* (**3.3.**).

3.1 APPLICABLE INTEREST RATE

966. The only reference to interest in the BIT is contained in Article 5(2), which deals precisely with expropriation claims and provides that interest accrues at the interest rate for three-month deposits in USD LIBOR plus 1%[884]:

> "2. The amount of such compensation shall correspond to the market value of the expropriated investments immediately before the date of expropriation or before the fact of expropriation became officially known, while compensation shall be paid without delay, including interest accruable from the date of expropriation until the date of payment, at the interest rate for three-month deposits in US dollars on the London Interbank Market (LIBOR) plus 1%, and shall be effectively disposable and freely transferable". [Emphasis added]

967. The BIT Interest Rate, as defined in this Article of the Treaty, is, in the Tribunal's opinion, the proper interest rate to be applied in the present case. The following reasons support this conclusion:

968. First, the language of the Treaty is clear and unequivocal: a plain reading of the provision allows the Tribunal to confirm that in expropriation cases it is appropriate

[882] CPreHS, para. 340; RPreHS, para. 336.
[883] CPreHS, paras. 333 *et seq*.; H-1, slide 115; RPreHS, paras. 329 *et seq*.
[884] **Doc. CLA-1**.

to apply the BIT Interest Rate – the LIBOR rate for three-month deposits denominated in USD plus 1%. This is the rate that the contracting States considered appropriate and agreed upon when they entered into the Treaty, to compensate for the delay in payment of the compensation owed by the expropriating host State to the expropriated investor.

969. Until recently, LIBOR represented the interest rate at which banks borrowed funds from other banks in the London interbank market; it was fixed daily by the British Bankers' Association for different maturities and for different currencies. LIBOR was universally accepted as a valid reference for the calculation of variable interest rates.

970. Second, contrary to Claimant's argument[885], the Tribunal sees no reason to deviate from the BIT Interest Rate in the context of an unlawful expropriation, as in the present case. Interest serves as compensation for the unavailability of funds to a creditor during a specific period – and the unavailability is identical, whether the expropriation is lawful or unlawful.

971. Third, the Tribunal is unconvinced by Mr. Lapuerta's testimony that only the Russian borrowing rate would compensate Claimant for its economic loss as required under the standard of full reparation[886]. Mr. Lapuerta is a quantum expert unqualified to give legal opinions, who was specifically instructed not to consider the BIT Interest Rate[887]:

> "I am instructed that since, as a matter of international law, the expropriation was unlawful, the interest rate specified in the Ukraine-Russia BIT does not apply". [Emphasis added]

End of LIBOR on 30 June 2023

972. The Tribunal notes that, on 30 June 2023, the LIBOR rate for three-month deposits ceased to exist[888]. Despite being aware of this situation and having ample opportunity to submit arguments on this point, the Parties did not do so. The Tribunal encourages the Parties, within 45 days from the date of this award, to reach an agreement as to the alternative rate applicable to interest accruing after that date. However, should the Parties not reach an agreement by such date, the Tribunal finds that the applicable interest rate is the Secured Overnight Financing Rate ["**SOFR**"]. The SOFR is the alternative to LIBOR in USD recommended by the Federal Reserve Board and the Federal Reserve Bank of New York[889].

973. Since the applicable LIBOR rate is the three-month rate, the SOFR replacement, if applicable, should be the 90-day SOFR average rate published by the Federal Reserve Bank of New York[890].

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[885] CPreHS, paras. 335-336.
[886] Lapuerta ER, paras. 138-140. See also CPHB I, para. 200.
[887] Lapuerta ER, para. 138.
[888] See https://www.fca.org.uk/news/press-releases/announcements-end-libor.
[889] See https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2021/ARRC_Press_Release_Term_SOFR.pdf.
[890] See https://www.newyorkfed.org/markets/reference-rates/sofr-averages-and-index.

Case law

974. The Tribunal's finding is supported by previous case law:

975. The *Ukrnafta*[891] and *Stabil*[892] tribunals, equally applying the present Treaty, concluded that there was no reason to depart from the BIT Interest Rate in cases of unlawful expropriation (both awards contained the following wording):

> "It is true that the standard of compensation set forth in Article 5(2) of the Treaty applies only in the event of lawful expropriation. This is equally true of the interest rate specified in that provision. At the same time, the Tribunal considers that this provision is indicative of the Contracting Parties' view that LIBOR constitutes an appropriate basis for the calculation of late interest. Moreover, the Tribunal sees no reason why late interest which compensates for the fact that funds payable to a creditor were not available to him during a certain period of time, should be set differently in case of a lawful act of expropriation as opposed to an unlawful one". [Emphasis added]

976. The same conclusion was reached by the *Siag*[893] tribunal, which applied the interest rate of the Italy-Egypt BIT in an unlawful expropriation:

> "The Tribunal has already observed that in the present case there may be no practical difference between compensation for a lawful or unlawful expropriation. In the same way, it can be said that if LIBOR rates were thought to compensate adequately for delay in payment of compensation for a lawful expropriation, there is no reason not to hold that they are similarly adequate to compensate in case of delayed payment of compensation for an unlawful expropriation". [Emphasis added]

977. The decision of the *Tatneft*[894] tribunal, a legal authority submitted by Claimant and on which Respondent also relies, is inapposite, because in that case the tribunal found that Ukraine had incurred in breaches other than expropriation and that the BIT did not include an interest provision for this type of breaches. For that reason, the tribunal chose to deviate from the interest rate stipulated in the BIT for expropriations:

> "It is true, as argued by the Respondent, that Article 5(2) of the Russia-Ukraine BIT provides specifically for the interest rate to be applied in the case of expropriation.
>
> However, the Tribunal notes that no similar provision concerning interest can be found in connection with damages resulting from other breaches of the BIT. The Tribunal has already found in favor of the claimant concerning breaches on grounds other than expropriation. The Tribunal is therefore free to define the interest rate that should apply in the present circumstances". [Emphasis added]

[891] **Doc. RLA-338**, *Ukrnafta (Final Award)*, para. 393.
[892] **Doc. RLA-339**, *Stabil (Final Award)*, para. 411.
[893] **Doc. CLA-35**, *Siag*, para. 597.
[894] **Doc. CLA-55**, *OAO Tatneft*, paras. 624-625. See also H-1, p. 115.

3.2 COMPOUND INTEREST

978. The Parties agree that compound interest on an annual basis is appropriate[895]. Therefore, the Tribunal decides that interest on the compensation should be compounded annually.

3.3 *DIES A QUO* AND *DIES AD QUEM*

979. Article 5(2) of the BIT provides that interest shall be "accruable from the date of expropriation until the date of payment".

980. The expropriation took place in January 2015, and both experts consider 22 January 2015 as the appropriate Valuation Date[896]. Therefore, interest shall accrue from the Valuation Date until the amounts owed in accordance with this Award have been finally paid by the Russian Federation.

* * *

981. In view of the above, the Tribunal awards Claimant interest on the compensation of USD 207.8 M granted in this Award from 22 January 2015 until the date of payment at LIBOR rate applicable to three-month deposits denominated in USD (or the equivalent SOFR rate), plus a margin of 1%[897], compounded annually.

[895] CPreHS, para. 340; RPreHS, para. 336.
[896] See para. 863 *supra*.
[897] This rate shall apply to pre- and post-award interest, since Claimant has not asked that post-award interest accrue at a different rate.

VIII.3. TAX INDEMNIFICATION

982. Claimant submits that it should be awarded a "gross-up for Ukrainian taxes on the award"[898]. Russia rejects Claimant's contention and asks the Tribunal to deny this request.

983. The Tribunal will summarize the Parties' positions with respect to Krymenergo's claim for tax indemnification (**1.** and **2.**) and then adopt a decision (**3.**).

1. CLAIMANT'S POSITION

984. Krymenergo avers that it is entitled to a tax indemnification to make up for applicable taxes to which the award may be subject in Ukraine. According to Claimant, failure to do so will lead to under-compensation of the damages it might be entitled to[899].

985. In essence, Krymenergo avers that any compensation awarded will be subject to income tax and value added tax ["**VAT**"] in Ukraine[900]. Relying on Mr. Lapuerta's updated workpaper[901], whose calculation of damages was "on an after-tax basis"[902], Claimant considers that a tax gross-up of between USD 133.3 and USD 193.5 M would be appropriate, depending on the damages scenario used[903].

2. RESPONDENT'S POSITION

986. Respondent says that Claimant's indemnification claim, for taxes that it might have to pay on the award in Ukraine, fails to provide both the necessary legal and factual support[904].

987. First, from a legal perspective, Respondent avers that the customary international law standard of full reparation provides no support for Claimant's claim, since there is no requirement under international law to gross up compensation as a result of tax considerations[905].

988. Furthermore, Respondent contends that a tax gross-up to cover taxes fails to meet the requirement of causation of the loss, because the causal link is broken once Respondent satisfies the award and pays compensation to the Claimant[906].

989. Second, from a factual standpoint, the Russian Federation submits that Claimant has failed to satisfy its burden of proof regarding the amount of taxes actually

[898] CPreHS, section V.E and para. 341(c); CPHB I, para. 202(c).
[899] CPreHS, para. 327, referring to **Doc. CLA-67**, *Chorzów Factory*, para. 125. See also CPHB I, para. 201.
[900] CPreHS, paras. 327-329.
[901] **Doc. CE-554-**Updated, Tab "A(new)3", Cells I17, I18, I1, and Tab "A(new)2", Cells G17, G18, and G19.
[902] CPHB I, para. 201.
[903] CPreHS, para. 330.
[904] RPreHS, para. 323.
[905] RPreHS, para. 324.
[906] RPreHS, para. 324.

owed[907]. In particular, Respondent takes issue with Claimant's submission of excerpts from the Ukrainian tax code discussing general rates for income tax and VAT, which it deems insufficient and inaccurate[908].

990. Additionally, Respondent considers that without an actual assessment of the award from the Ukrainian authorities, and without detailed financial information about Krymenergo's tax and financial situation from 2015 until the year the award is paid out, the Tribunal should avoid speculating on the appropriateness of any proposed gross-up[909].

3. DISCUSSION

991. Claimant seeks an indemnity in respect of the taxation of the award that may arise in Ukraine, since it considers that failure to gross-up the award for applicable taxes will lead to under-compensation of its damages; Respondent opposes the request.

992. The claim lacks merit.

993. First, because any indemnification for future taxes would be speculative and uncertain. As Claimant's expert himself admitted in his first opinion, without comprehensive financial statements it is impossible to know what the final tax treatment of the award will be[910]. The fact that Krymenergo has already claimed significant losses caused by the impugned measures, which would offset the amount of tax due on the award[911], further reinforces the Tribunal's view.

994. Previous case law confirms the Tribunal's conclusion. For instance, the *PV Investors* tribunal dismissed tax indemnification claims given their speculative and uncertain nature[912]:

> "Although the Tribunal has considered the possible tax ramifications of this Award, it can find no reason to speculate on the appropriateness, one way or another, of any proposed "gross-up" to take into account potential tax liability, whether in Poland or in France. The ultimate tax treatment of an award representing the "real value" of an investment must be addressed by the fiscal authorities in the investor's home jurisdiction as well as the host state". [Emphasis added]

995. Second, the Tribunal is not persuaded that the tax indemnification sought would meet the requirement of causation of the loss. Indeed, any taxation is attributable to the conduct of the State imposing the tax, and not to the conduct of Respondent.

996. This view was espoused by the *PV Investors* tribunal, by reference to the words of the tribunal in *Rusoro*, which found that any tax liability arising under the home

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[907] RPreHS, para. 325.
[908] RPreHS, paras. 325-327.
[909] RPreHS, para. 328.
[910] Lapuerta ER, paras. 150-151.
[911] **Docs. RE-191**, **RE-192**, **RE-193**, **RE-194**, **RE-195**, and **RE-196**.
[912] **Doc. CLA-120**, *PV Investors*, para. 861.

State's tax laws does not qualify as consequential loss arising from Respondent's breach of the Treaty and, therefore, does not engage the Respondent's liability[913]:

> "[a]ny tax liability arising under [the home State's] tax laws (or from any other fiscal regime, other than the [respondent State]), does not qualify as consequential loss arising from [the respondent's] breach of the Treaty and does not engage [the respondent's] liability".

997. The reason for that, as the *Tenaris* tribunal explained[914], is that the respondent host State cannot be liable for taxes imposed outside its territory, once the State has satisfied the award and paid the compensation awarded to the claimant, free of taxes or withholdings imposed by the host State. Thereafter, the causal link is broken, and the host State cannot be held liable for the sovereign acts of another jurisdiction.

998. Third, Claimant has failed to point to any other investor-State arbitration case in which a tribunal has upheld similar claims for a tax indemnity on account of taxes imposed by a jurisdiction other than that of the host State. Although this absence of precedent is not a determining factor for the Tribunal's decision, it further demonstrates that the type of remedy sought by Claimant is not appropriate[915].

999. In light of the above, the Tribunal dismisses Claimant's claim with respect to the tax indemnification for eventual taxes to which the award may be subject in Ukraine.

[913] **Doc. CLA-120**, *PV Investors*, para. 863, citing *Rusoro* at para. 854 (**Doc. RLA-103**).
[914] **Doc. RLA-357**, *Tenaris*, para. 794.
[915] **Doc. CLA-120**, *PV Investors*, para. 864.

IX. COSTS OF ARBITRATION

1000. In this final section, the Tribunal will establish and allocate the costs of this arbitration ["**Costs of Arbitration**"]. The Tribunal will first determine the applicable rules (**1.**) and then analyze each category of Costs of Arbitration: the fees and expenses of the arbitrators and the PCA (**2.**), and the fees and expenses incurred by the Parties for their defense in the arbitration (**3.**). The Tribunal will finally make its decision (**4.**).

1. APPLICABLE RULES

1001. Articles 38 to 40 of the UNCITRAL Rules govern the determination and allocation of the Costs of Arbitration. Article 38 of the UNCITRAL Rules provides the general rule that:

> "The arbitral tribunal shall fix the costs of arbitration in its award".

1002. These Costs include only[916]:

> "(a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 39;
>
> (b) The travel and other expenses incurred by the arbitrators;
>
> (c) The costs of expert advice and of other assistance required by the arbitral tribunal;
>
> (d) The travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;
>
> (e) The costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;
>
> (f) Any fees and expenses of the appointing authority as well as the expenses of the Secretary-General of the Permanent Court of Arbitration at The Hague".

1003. Thus, the Costs of Arbitration include:

- The fees and expenses of the arbitrators, of the appointing authority, of any other assistance required by the tribunal, and the fees and expenses of the PCA, under paragraphs (a), (b), (c) and (f) of Article 38 [the "**Administrative Costs**"];

- The reasonable costs and expenses incurred by the "successful party" in the course of the arbitration, as well as the travel and other expenses of witnesses

[916] Article 38 of the UNCITRAL Rules.

to the extent such expenses are approved by the tribunal, under paragraphs (d) and (e) of Article 38 [the "**Legal Costs**"].

1004. Furthermore, Article 40(1) and (2) of the UNCITRAL Rules establishes that:

> "1. Except as provided in paragraph 2, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.
>
> 2. With respect to the costs of legal representation and assistance referred to in article 38, paragraph (e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable." [Emphasis added]

1005. It follows that, in principle, the Costs of Arbitration shall be borne by the losing party; nevertheless, the Tribunal enjoys ample discretion to apportion the Costs differently, if it considers that it is reasonable to do so considering the circumstances of the case.

2. ADMINISTRATIVE COSTS

1006. Pursuant to PO 1, the fees of the members of the Tribunal shall be determined at a daily rate of USD 7,000 (based on a six-hour day) for all hearings and at the hourly rate of USD 950, excluding VAT[917]. In addition, the members of the Tribunal shall be reimbursed for all reasonable expenses incurred in connection with this arbitration[918].

1007. Furthermore, PO 1 provides that the work performed by the PCA shall be billed in accordance with the PCA's schedule of fees and that the PCA's fees and expenses shall be paid in the same manner as the Tribunal's fees and expenses[919].

1008. In accordance with Article 41 of the UNCITRAL Rules, the Parties deposited a total of USD 2,380,000 with the PCA as an advance for the Administrative Costs, as follows:

- Claimant's deposit: USD 1,405,000
- Respondent's deposit: USD 975,000

1009. The fees and expenses of the Arbitral Tribunal are hereby fixed as follows:

- Mr. J. William Rowley KC: USD 594,121.58 and USD 13,676.02, respectively.

[917] PO 1, para. 12(b).
[918] PO 1, para. 12(j).
[919] PO 1, para. 5(iv).

- Professor Vladimir Pavić: USD 439,925.00 and USD 6,958.05, respectively.
- Dr. Stanimir A. Alexandrov (before resignation): USD 184,890.00.
- Professor Juan Fernández-Armesto: USD 633,825.00 and USD 6,910.31, respectively.

1010. Following correspondence between the Parties and the Tribunal in July 2021, Mr. Adam Jankowski was appointed to act as Assistant to the Tribunal in these proceedings. Mr. Jankowski's personal disbursements in this arbitration amount to USD 3,208.92[920].

1011. Pursuant to section 5 of PO 1, the International Bureau of the PCA was appointed to act as Registry in these proceedings. The PCA's fees for registry services in this arbitration amount to USD 198,126.96.

1012. Other Administrative Costs, including court reporters, interpretation, hearing room equipment, audio-visual support, catering, bank charges, courier fees, and all other expenses relating to the arbitration proceedings, amount to USD 255,781.04.

1013. Based on the above figures, the combined Administrative Costs – *i.e.*, costs covered in paragraphs (a), (b), (c) and (f) of Article 38 of the UNCITRAL Rules – amount to USD 2,337,422.88. This amount shall be deducted from the deposit established by the Parties. Claimant having made a substitute deposit on behalf of Respondent at the close of the proceedings, the unexpended balance of USD 42,577.12 will be returned to Claimant.

3. LEGAL COSTS

1014. On 21 January 2022 the Parties submitted their Statements of Costs (previously defined as "C SofC" and "R SofC"). With respect to paragraphs (d) and (e) of Article 38 of the UNCITRAL Rules, the Parties' claims for Legal Costs are set out below.

3.1 CLAIMANT'S POSITION

1015. Claimant requests compensation for all the costs and expenses of the arbitration, including Administrative and Legal Costs[921].

1016. Claimant submits that it has incurred **USD 9,401,644.76** in Legal Costs under Article 38(d) and (e) of the UNCITRAL Rules[922]. Claimant asks that the Russian Federation be ordered to bear in full these costs if Claimant prevails on the merits[923].

[920] Communication A8, para. 38.
[921] C SofC, para. 1.
[922] C SofC, para. 27.
[923] C SofC, para. 29(a).

1017. First, based on Article 40(1) and (2) of the UNCITRAL Rules Claimant argues that, in allocating costs between the Parties, the prevailing principle is for costs to follow the event. Alternatively, it claims that the Tribunal may also apportion costs between the Parties if it considers the apportionment reasonable, in light of the circumstances of the case[924].

1018. Second, Claimant considers that in the present arbitration, there have been several instances in which Respondent sought to delay and disrupt the proceedings (including those listed below); therefore, Respondent must bear the entirety of the related costs:

- Respondent's improperly tardy submission of its Statement of Defense[925];
- Respondent's delayed submissions of evidence in its Rejoinder[926]; and
- Respondent's challenges to the presiding arbitrator, Dr. Alexandrov, as well as Mr. Rowley and Professor Pavić, which led to the resignation of the former and to a 15-month delay of the Hearing[927].

3.2 RESPONDENT'S POSITION

1019. Russia asks that Claimant be ordered to bear all Costs of Arbitration, including Administrative and Legal Costs[928]. Russia submits that it has incurred **EUR 12,408,766.33** in Legal Costs.

1020. First, based on Articles 38 to 40 of the UNCITRAL Rules, Respondent also considers that, in allocating costs between the Parties, the prevailing principle is for costs to follow the event. Additionally, it argues that the Tribunal should consider if a Party's procedural conduct was frivolous, *mala fide*, or unnecessarily burdensome[929].

1021. Second, Respondent submits that Claimant should bear the entirety of Respondent's costs, or at the very least EUR 800,000, as well as the Administrative Costs as[930]:

- The Tribunal dismissed Claimant's application for security of costs;
- The Tribunal dismissed Claimant's request to exclude evidence presented with its Rejoinder; and
- Claimant did not disclose all the circumstances following its privatization process.

[924] C SofC, paras. 4-6.
[925] C SofC, paras. 10-12.
[926] C SofC, paras. 13-15.
[927] C SofC, paras. 16-21.
[928] R SofC. para. 18.
[929] R SofC, paras. 4-9.
[930] R SofC, paras. 10-12.

1022. Third, Respondent avers that, in deciding the allocation on costs, the Tribunal should take into account Russia's good faith and adherence to the Tribunal's directions, contrary to Claimant's accusations of Russia's attempts to delay the proceedings[931].

4. TRIBUNAL'S DECISION

1023. As noted in para. 1005 *supra*, Article 40 of the UNCITRAL Rules gives the Tribunal broad discretion to allocate the Costs of Arbitration between the Parties, the principal guideline being that the costs should be borne by the "unsuccessful party".

1024. In the present case, Respondent is the unsuccessful party. Indeed, Claimant has prevailed:

- In all its defenses to Respondent's multiple jurisdictional objections;
- In the merits of the case; and
- In the quantification of damages, although the Tribunal has decided on a lower amount than the one claimed by Claimant.

1025. Following the principle that costs follow the event, enshrined in Article 40 of the UNCITRAL Rules, the Tribunal decides that the Administrative Costs should be borne entirely by the Russian Federation. This is only fair considering that Claimant was forced to resort to arbitration to obtain relief for the Expropriatory Measures adopted by Russia.

1026. As to Claimant's Legal Costs, the Tribunal also finds that they should also be borne by Respondent. Article 40(2) of the UNCITRAL Rules establishes, however, that when apportioning Legal Costs the Tribunal should bear in mind reasonableness.

Reasonable Legal Costs

1027. Claimant asks for USD 9,401,644.76 in Legal Costs. The question is whether these Costs are "reasonable". Considering the complexity of the present case, the amount in dispute, and the Legal Costs incurred by Respondent, the Tribunal finds that the Legal Costs incurred by Claimant are reasonable:

- The Legal Costs represent approximately 2.2% of the total amount claimed by Claimant in this arbitration as compensation for expropriation;
- Furthermore, by way of comparison, Respondent is claiming over EUR 12 M in Legal Costs – approximately EUR 3 M more than Claimant's Legal Costs.

* * *

[931] R SofC, paras. 13-15.

1028. Claimant has requested that the Tribunal award DTEK Krymenergo its costs and legal fees in accordance with Article 40 of the UNCITRAL Rules[932]. The Tribunal notes that Claimant's request for relief is limited to the awarding of "its costs and legal fees in accordance with Article 40 of the UNCITRAL Rules"[933].

1029. In view of the above, the Tribunal determines that Respondent should reimburse Claimant the amounts of **USD 1,362,422.88** paid as Administrative Costs and **USD 9,401,644.76** incurred as Legal Costs.

[932] CPreHS, para. 341(d); CPHB I, para. 202(d). See also C I, para. 177(c); C II, para. 152; CPHB II, para. 70.
[933] CPreHS, para. 341; CPHB I, para. 202. For the damages Claimant asks for an award of not less than USD 421 M "plus a gross-up for Ukrainian taxes on the award and pre- and post-award interest compounded at Russia's sovereign borrowing date"; there is no equivalent request for interest on the amount of costs awarded.

X. DISPOSITIF

1030. For the reasons set out herein, the Tribunal adopts the following decisions, unanimously except in those cases where it is explicitly stated that the decision is by majority:

1. Dismisses the First Jurisdictional Objection;

2. Dismisses by majority the Second Jurisdictional Objection;

3. Dismisses the Third Jurisdictional Objection;

4. Dismisses the Fourth Jurisdictional Objection;

5. Dismisses the Admissibility Objection;

6. Declares by majority that the Tribunal has jurisdiction to hear and adjudicate JSC DTEK Krymenergo's claims against the Russian Federation;

7. Declares that the Russian Federation has breached Articles 2, 3, and 5 of the BIT;

8. Orders by majority the Russian Federation to pay to JSC DTEK Krymenergo damages in the amount of USD 207,800,000, plus interest over this amount at LIBOR rate applicable to three-month deposits denominated in USD (or the equivalent SOFR rate), plus a margin of 1%, compounded annually, from 22 January 2015 until the date of payment;

9. Orders the Russian Federation to reimburse JSC DTEK Krymenergo in the amount of USD 1,362,422.88 paid as Administrative Costs and USD 9,401,644.76 incurred as Legal Costs; and

10. Dismisses any other prayer for relief.

Place of Arbitration: The Hague (Netherlands)
Date of issuance: 1 November 2023

J. William Rowley KC
Arbitrator

Professor Vladimir Pavić
Arbitrator

Professor Juan Fernández-Armesto
Presiding Arbitrator

J. WILLIAM ROWLEY KC - SEPARATE OPINION ON QUANTUM

1. Although it would not have been my preferred approach, it may not be unreasonable in this case to use a weighted average of different valuation methodologies to measure Claimant's loss. I therefore accept its use. However, I am unable to agree with the relative weightings assigned by the majority to the five methodologies in issue. Had I been sitting alone, and been inclined to use a weighted average, I would have given the valuations resulting from the five contending methodologies the weightings set out in the JWR column below. These adjustments to the majority's weighting would increase the capital value of Claimant's entitlement to damages (without interest) from $207.8m to $288.34m.

Methodologies	**Majority's weighting**	**JWR Weighting**
1. DRC, $421.1m	10%	40%
2. Book value, $164.6m	30%	20%
3. Adjusted Auction Price, $176.4m	30%	20%
4. Listed share price, $114m	10%	05%
5. DCF, $259.9m	20%	15%

DRC Weighting

2. I would have increased DRC from 10% to 40% for several reasons. The remarkably low 10 % weighting given to the DRC valuation by the majority was stated to be: (a) "influenced" by the fact that Mr Lapuerta's calculation of the relevant DRC indicated "…a value which is at the far end of the spread of potential values…"; and (b) the uncertainty that the Russian regulatory system would accept this value in establishing Krymenergo's tariff.

3. As to (a), the fact that the use of a DRC produces the highest valuation has no relevance to its weighting. Weighting has to do with relative appropriateness of the methodology employed and its execution, not the valuation it produces. Here, the record shows that a determination of Krymenergo's FMV at the Valuation Date based on the DRC of its Crimean distribution assets was highly appropriate. It is not in issue that DRC is frequently used to value electricity distribution assets, and to re-value inappropriate book-values (CEER); it is also accepted as a proxy for FMV in this industry. Moreover, it is used routinely by regulators to establish the RAB for electricity distributors. Mr Lapuerta's calculation of Krymenergo's DRC as at the Valuation Date was based on a previous valuation done by Deloitte in 2013 of the DRC of Krymenergo's distribution assets. That valuation was done in accordance with Ukraine's regulatory regime and in the ordinary course of Krymenergo's business before Russia's annexation of Crimea. Importantly, the

accuracy of Deloitte's and Mr Lapuerta's calculations of the DRC was not contested by Respondent's experts. I consider it unacceptable to give this valuation the same 10% weighting that the majority assigns to Respondent's share price valuation, which for reasons below, I consider to be an extremely poor proxy for the FMV of Krymenergo on the Valuation Date.

4. As regards (b), a degree of uncertainty always exists as to the future and the uncertainty here was based solely on the opinions of Russia's valuation experts as to the likely behaviour of the regulator. But expert assumptions require to be assessed against the regulator's actual practice. And Russia offered no evidence from its own electricity regulator concerning its use or non-use of DRC in establishing RAB for tariff purposes.

5. In these circumstances, to give this valuation the same 10% weighting that the majority assigns to Respondent's share price valuation is unsupported and unsupportable. Where, as here, only a tiny fraction of Krymenergo's shares (less than 0.08%) were traded on a daily basis, no commercial player *i.e.*, (a fair value vendor or purchaser) would consider Krymenergo's market capitilisation to represent the company's FMV.

Book Value Weighting

6. I would have assigned book value a weighting of 20% rather than the 30% top weighting assigned by the majority. Book value is almost never reflective of the FMV of a company's assets. CEER says that book values should be revalued annually in this business (which was not done here).

Adjusted Auction Price

7. I would have moved the Adjusted Auction Price down from 30% to 20%. There were only two bidders in the auction, mainly because of the very strict requirements to qualify as a bidder. The fact that few bidders could qualify necessarily implies that the price achieved at auction, even after the adjustments made by the majority, does not qualify as an FMV. The Tribunal's job is to come to a value which best approximates FMV where these restrictions would not apply.

Listed Share Price

8. Given Krymenergo's miniscule, traded volumes (less than 0.08%), and the absence of any liquidity, it is hard to justify weighting this methodology at all. In these circumstances, I would have been hard pressed to have given it a 5% weighting.

DCF Weighting

9. The majority considers that Krymenergo's business is well suited to the application of a DCF methodology and that Mr Lapuerta's DCF valuation deserves a 20% weighting. However, the majority also concludes that "…any prediction of [Krymenergo's] tariff-based income in a situation as fragile as that of Crimea in 2015 was fraught with uncertainties." To my mind, the inability to establish the impact of regulation on future cashflow with a minimum of uncertainty (a key

requirement set out by the tribunal in the *Rusoro* case, see infra fn.860) suggest a lower than the 20% weighting given by the majority. I would have assigned it a maximum of 15%.

Location: The Hague (Netherlands)
Date: 1 November 2023

J. William Rowley KC
Arbitrator