PCA CASE NO. 2017-16

IN THE MATTER OF AN ARBITRATION BEFORE A TRIBUNAL CONSTITUTED IN ACCORDANCE WITH

THE AGREEMENT BETWEEN THE GOVERNMENT OF THE RUSSIAN FEDERATION AND THE CABINET OF MINISTERS OF UKRAINE ON THE ENCOURAGEMENT AND MUTUAL PROTECTION OF INVESTMENTS DATED 27 NOVEMBER 1998

-and-

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

-between-

(i) NJSC NAFTOGAZ OF UKRAINE (UKRAINE), (ii) NATIONAL JOINT STOCK COMPANY CHORNOMORNAFTOGAZ (UKRAINE), (iii) JSC UKRTRANSGAZ (UKRAINE), (iv) JSC UKRGASVYDOBUVANNYA (UKRAINE), (v) JSC UKRTRANSNAFTA (UKRAINE), (vi) SUBSIDIARY COMPANY GAZ UKRAIINY (UKRAINE)

(the "**Claimants**")

-and-

THE RUSSIAN FEDERATION

(the "**Respondent**," and together with the Claimants, the "**Parties**")

FINAL AWARD

The Arbitral Tribunal
Judge Ian Binnie, C.C., K.C. (Presiding Arbitrator)
Dr. Charles Poncet
Professor Dr. Maja Stanivuković

Registry
Dr. Levent Sabanogullari
Permanent Court of Arbitration

12 April 2023

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Glossary of Defined Terms and Abbreviations

AmCM or **Amended Counter-Memorial**	Respondent's Amended Counter-Memorial on Quantum, dated 24 January 2020
AmSOC	Claimants' Amended Statement of Claim, dated 12 December 2017
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
Application on Confidentiality Breach	Claimants' letter concerning confidentiality, dated 1 May 2020
AW	AgustaWestland
Belbek Set-Aside Proceedings	Case No. 200.266.443/01, the Court of Appeal in The Hague (Russische Federatie / Aeroport Belbek LLC & Mr. Kolomoisky)
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
Claimants or Naftogaz	NJSC Naftogaz of Ukraine, NJSC Chornomornaftogaz, JSC Ukrtransgaz, JSC Ukrgazvydobuvannya, JSC Ukrtransnafta, Subsidiary Company Gaz Ukraiiny
CNG	National Joint Stock Company Chornomornaftogaz
Crimea	"Autonomous Republic of Crimea" under the Ukrainian Constitution and the "Republic of Crimea" under the Russian Constitution
CRP	Country Risk Premium
Claimants' Answers	Claimants' Answers to the Questions of the Tribunal, dated 23 February 2018
Claimants' Submission on Costs	Claimants' Submission on Costs, dated 17 June 2022
Claimants' Supplemental Submission on Costs	Claimants' Supplemental Submission on Costs, dated 12 December 2022
DCF	Discounted Cash Flow

Dissenting Opinion	Dissenting Opinion of Professor Dr. Maja Stanivuković to the Final Award, dated 8 February 2023
DRC	Depreciated Replacement Cost
DTEK Arbitration	JSC DTEK Krymenergo v. The Russian Federation
EBITDA	Earnings before interest, taxes, depreciation and amortization
ECtHR	European Court of Human Rights
EURIBOR	The Euro Inter-Bank Offered Rate
Everest Set-Aside Proceedings	Case No. 200.252.396/01, the Court of Appeal in The Hague (Russische Federatie / Everest Estate LLC and others)
EY	Ernst & Young
FAS	Federal Antimonopoly Service of the Russian Federation
First Extension Request	Respondent's application for an extension of the deadline for the filing of the Counter-Memorial on Quantum, dated 28 August 2019
First FTI Report	Expert Report of Dr. Stuart Amor, Matthias Cazier-Darmois, Carter Davis, and Dr. Boaz Moselle, dated 6 December 2019
First GCA Report	Expert Report of Gaffney, Cline & Associates on the Fair Market Value of Naftogaz's Oil and Gas Assets, dated 27 June 2019
First Melgunov Report	Expert Report of Professor Vitaly D. Melgunov, dated 29 May 2020
First Paliashvili Report	Export Report of Dr. Irina Paliashvili, dated 14 September 2017
First Request to Strike	Claimants' request to strike, dated 18 December 2019
First Vygon Report	Expert Report on Technical Analysis and Economic Assessment of the Upstream Assets by VYGON Consulting, dated 29 May 2020
First Vygovskyy Report	Expert Report of Professor Oleksandr Vygovskyy, dated 1 June 2020
First Zhilin Report	Expert Report of Mr. Evgeny Zhilin, dated 14 February 2020
FMV	Fair Market Value
FTI	FTI Consulting

FTS	Federal Tariff Service of the Russian Federation
Gaz Ukraiiny	Subsidiary Company Gaz Ukraiiny
Gazprom	Public Joint-Stock Company "Gazprom"
Gazprom GSA	Contract No. KP Between OJSC Gazprom and NJSC Naftogaz For the Purchase and Sale of Natural Gas in 2009-2019, as amended, dated 19 January 2009
Gazprom Letter	Letter from Public Joint Stock Company Gazprom, dated 15 July 2020
GCA	Gaffney, Cline & Associates
GDS	Gas Distribution Stations
Hearing on Jurisdiction and Liability	The hearing on jurisdiction and liability, which was held on 14-17 May 2018 in The Hague
Hearing on Quantum	The hearing on quantum, which was held on 23 February-3 March 2022 in The Hague
IFRS	International Financial Reporting Standards
ILC	International Law Commission
ILC Articles	International Law Commission Articles on State Responsibility for Internationally Wrongful Acts, adopted in 2001
Independence Resolution	Resolution No. 1745-6/14 of the State Council of the Republic of Crimea "On the Independence of Crimea", dated 17 March 2014
Krymgaz	Public Joint Stock Company Krymgaz
Law No. 263-FZ	Federal Law No. 263-FZ "On Making Amendments to Chapter 26 of Part Two of the Tax Code of the Russian Federation and Article 3.1 of Law of the Russian Federation 'On the Customs Tariff'", dated 30 September 2013
Law on Competition	Federal Law No. 135 "On the Protection of Competition", dated 26 July 2006
Law on Customs Tariff	Federal Law No. 5003-1 "On Customs Tariff", dated 12 May 1993
Law on Gas Export	Federal Law No. 117-FZ "On Gas Export", dated 18 July 2006
LDC	Local Distribution Companies
LIBOR	The London Inter-Bank Offered Rate
Likvo	Likvo Limited Liability Company (formerly Subsidiary Company Likvo)
Memorial on Quantum	Claimants' Memorial on Quantum, dated 27 June 2019

MET	Mineral Extraction Tax
Miscellaneous Midstream Assets	Miscellaneous Midstream Assets held by UTG and CNG in Crimea
Midstream Assets	CNG's, UTG's and NJSC Naftogaz's interests in operating gas pipelines (including fill gas in those pipelines), a gas storage facility (including cushion gas stored in that facility) and associated equipment
Nationalization Resolution	Resolution No. 1758-6/14 of the State Council of the Republic of Crimea "On the Issues of Energy Security of the Republic of Crimea", dated 17 March 2017
NJSC Naftogaz	National Joint Stock Company Naftogaz
NOHDs	New Offshore Hydrocarbon Deposits
Notice of Arbitration	Claimants' Notice of Arbitration, dated 14 October 2016
Notice of Dispute	Claimants' Notice of Dispute, dated 15 February 2016
Oschadbank Set-Aside Judgment	Paris Court of Appeals judgment in set aside proceedings between the Russian Federation and JSC Oschadbank, dated 30 March 2021
Partial Award	Partial Award on Jurisdiction and Liability, dated 22 February 2019
Parties	The Claimants and the Respondent
PCA	Permanent Court of Arbitration
PrivatBank Set-Aside Proceedings	Case No. 200.266.442/01, the Court of Appeal in The Hague (Russische Federatie / JSC CB Privatbank)
PRMS	Petroleum Resources Management System
PSA	Production Sharing Agreement
RAFs	Reserves Adjustment Factors
Rejoinder on Quantum	Respondent's Rejoinder on Quantum, dated 3 June 2020
Reply on Quantum	Claimants' Reply Memorial on Quantum, dated 14 February 2020
Request to Entertain Further Submissions	Respondent's Request for the Tribunal to use its Authority to Entertain Further Submissions on Jurisdiction, together with supporting evidence, dated 6 September 2019
Respondent's Submission on Costs	Respondent's Submission on Costs, dated 17 June 2022
Response to Matters Raised in the Rejoinder	Claimants' Response to Matters Raised in the Rejoinder on Quantum, dated 7 September 2020
RGSS	Regional Gas Supply System

RUB	Russian Ruble
Russia or Respondent	The Russian Federation
Russian Chernomorneftegaz	State Unitary Enterprise of the Republic of Crimea "Chernomorneftegaz"
Russian Scenario	A hypothetical scenario, which provides that from 17/18 March 2014 onwards, a Russian legal and regulatory framework will apply in Crimea
Second Extension Request	Respondent's application for an extension of the deadline for the filing of the Rejoinder on Quantum, dated 7 April 2020
Second FTI Report	Second Expert Report of Dr. Stuart Amor, Matthias Cazier-Darmois, Carter Davis, and Dr. Boaz Moselle, dated 3 June 2020
Second GCA Report	Second Expert Report of Gaffney, Cline & Associates on the Fair Market Value of Naftogaz's Oil and Gas Assets, dated 14 February 2020
Second Melgunov Report	Second Expert Report of Professor Vitaly D. Melgunov, dated 16 November 2020
Second Paliashvili Report	Second Export Report of Dr. Irina Paliashvili, dated 22 February 2018
Second Request to Strike	Claimants' request to strike, dated 18 June 2020
Second Vygon Report	Second Expert Report on Technical Analysis and Economic Assessment of the Upstream Assets by Vygon Consulting, dated 16 November 2020
Second Vygovskyy Report	Second Expert Report of Professor Oleksandr Vygovskyy, dated 16 November 2020
Second Zhilin Report	Second Expert Report of Mr. Evgeny Zhilin, dated 7 September 2020
Sevastopolgaz	Public Joint Stock Company Sevastopolgaz
Service Assets	CNG's four jack-up drilling rigs, 22 marine vessels and three helicopters, which were used to explore and develop offshore oil and gas resources
Special Permits	Special Permit No. 3907, dated 22 December 2010, Special Permit No. 4125, dated 5 April 2012, Special Permit No. 4300, dated 17 January 2013
SPEE	Society of Petroleum Evaluation Engineers

SPFI	Subsurface Plots of Federal Importance
Submission of Ukraine	Submission of Ukraine as Non-Disputing Party to the Agreement Between the Cabinet of Ministers of Ukraine and the Government of the Russian Federation on the Encouragement and Mutual Protection of Investments, dated 13 March 2018
Sur-Rebuttal on Quantum	Respondent's Sur-Rebuttal on Quantum, dated 16 November 2020
Third Extension Request	Respondent's application for an extension of the deadline for the filing of the Rejoinder on Quantum, dated 15 May 2020
Third GCA Report	Third Expert Report of Gaffney, Cline & Associates in response to the Expert Report of Vygon Consulting on Technical Analysis and Economic Assessment of the Upstream Assets, dated 7 September 2020
Third Paliashvili Report	Third Export Report of Dr. Irina Paliashvili, dated 7 September 2020
Tr.	Hearing transcript
Transition Period	18 March 2014 to 31 December 2014
Russian Objection	Letter from Ms. O.V. Zentsova, Deputy Director of the Department of International Law and Cooperation of the Ministry of Justice of the Russian Federation, dated 19 January 2017
UAH	Ukrainian Hryvnia
UGS Facility	Underground Gas Storage Facility in Hlibovske
UGSS	Unified Gas Supply System
UGV	Joint Stock Company Ukrgasvydobuvannya
Ukrainian Scenario	A hypothetical scenario, which provides that from 17/18 March 2014 onwards, a Ukrainian legal and regulatory framework will apply in Crimea
UTG	Joint Stock Company Ukrtransgaz
UTN	Joint Stock Company Ukrtransnafta
Upstream Assets	CNG's, UGV's and NJSC Naftogaz's interests in special permits under which CNG, UGV and NJSC Naftogaz were permitted to develop and exploit the underlying oil and gas fields and prospects

UNCITRAL Rules	The Arbitration Rules of the United Nations Commission on International Trade Law, 1976
UNCLOS	United Nations Convention on the Law of the Sea, 1982
USD	U.S. Dollar
Valuation Date	17/18 March 2014

PART 1 - BACKGROUND

1. On 22 February 2019, the majority of the Arbitral Tribunal (Professor Maja Stanivuković dissenting) issued a partial award (the "**Partial Award**") in this matter, which is brought under 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 (the "**Treaty**" or the "**BIT**"). The dispositive part of the Partial Award reads as follows:

> For the reasons set out above, the Tribunal by majority rules:
>
> (a) that the Tribunal has jurisdiction over the claims:
>
> (b) that the Claimants have established a violation of Article 5 (expropriation) and Article 2(1) (full and unconditional legal protection) and Article 3(1) (most favored nation treatment) of the BIT.
>
> The Tribunal will therefore proceed to the quantum phase of the arbitration.

2. The Tribunal noted in paragraph 175 of the Partial Award that "[t]he Treaty [itself] is not without temporal limitations. Article 12 restricts protection to investments made 'on or after January 1, 1992'." Accordingly Procedural Order No. 8 stated "subject matter jurisdiction was affirmed only in respect of investments made after that date." Thus, the Tribunal stated, "[t]he quantification phase will only deal with investments made after that date."

3. The Respondent, the Russian Federation, which had until then declined to participate, sought (and was granted) leave to intervene in the subsequent arbitral proceedings concerning quantum. The Russian Federation then applied *inter alia* to submit a "full argument" on the jurisdictional issues. In light of the Russian Federation's refusal to participate in the jurisdictional phase of the hearing, the request for "full argument" was denied by Procedural Order No. 7, dated 21 August 2019. However, the Russian Federation was invited to address any jurisdictional "*issues not already dealt with in the Partial Award*" and made relevant submissions dated 6 September 2019. Subsequently, by Procedural Order No. 8 dated 6 October 2019, the Tribunal held unanimously that the issues sought to be raised had already been canvassed by the Tribunal and dealt with in both the majority and dissenting opinions.

4. In its Amended Counter-Memorial on Quantum, dated 24 January 2020 ("**Amended Counter-Memorial**"), the Russian Federation emphasized that the Partial Award had already

excluded investments made before 1 January 1992. The Russian Federation acknowledged that the Tribunal had addressed and had limited jurisdiction *ratione temporis*, as follows:

> Moreover, as emphasized by the Tribunal in the Partial Award dated 22 February 2019 (the "**Partial Award**") and reconfirmed by the Tribunal in Procedural Order No. 8, Article 12 of the BIT limits the temporal scope of application of the BIT to investments made or carried out "as of January 1, 1992." The Claimants therefore bear the burden of proving that each and every alleged investment for which they are claiming compensation was carried out on or after 1 January 1992.[1]

5. Concurrently with the application to the Tribunal, the Russian Federation on 21 June 2019 initiated "set aside" proceedings for annulment of the entire Partial Award before The Hague Court of Appeal. In its submissions to that Court, the Russian Federation took the contrary position that the Tribunal had **not** dealt with the 1 January 1992 issue. In its Judgment of 19 July 2022, The Hague Court of Appeal ("**Judgment of The Hague Court of Appeal**") held that:

> 5.7.6 Since the consequences of Procedural Order No. 8 are not clear, to be certain the Partial Award will be set aside, **but only to the extent that the Arbitral Tribunal has held that it has jurisdiction to adjudicate all claims**, since it only has jurisdiction to adjudicate investments made on or after January 1, 1992.
>
> The Court therefore
>
> Annuls the Partial Award of February 22, 2019 **insofar as the Arbitral Tribunal found that it had jurisdiction to adjudicate all claims**, as it only had jurisdiction to adjudicate investments made on or after January 1, 1992;
>
> Orders the Russian Federation, as the party mainly found against, to pay the costs of the proceedings… (emphasis added)

6. The Tribunal accepts, of course, the Court's direction that it "only had jurisdiction to adjudicate investments made on or after 1 January 1992." The merits hearing, which took place on 14-17 May 2018, was about jurisdiction and liability. No evidence was raised during that hearing about the assets themselves or when the investments were made. The parameters of

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[1] Amended Counter-Memorial on Quantum, dated 24 January 2020 (hereinafter "**AmCM**"), ¶¶ 3, 302. ¶ 302 reads as follows:

> As correctly pointed out by the Tribunal in the Partial Award:
>
> "*The Treaty is not without temporal limitations. Article 12 restricts protection to investments made 'on or after January 1, 1992' being the date of the break-up of the Soviet Union*".

jurisdiction having been settled, the Tribunal is in a position to determine what investments fall within the BIT's scope of protection.

PART 2 - THE CLAIMANT INVESTORS

7. On the **Valuation Date**, namely 17/18 March 2014 (the "**Valuation Date**"), NJSC Naftogaz, CNG, UTG, UGV, UTN, and Gaz Ukraiiny (hereinafter sometimes collectively referred to as "Naftogaz" or the "**Claimants**"), and Likvo LLC were engaged in a range of oil and gas related activities in Crimea:

(i) National Joint Stock Company Naftogaz of Ukraine ("**NJSC Naftogaz**"), registered at 6, B. Khmelnitskogo Str., Kyiv, Ukraine, 01601, is Ukraine's national oil and gas company.[2] NJSC Naftogaz's primary business involves importing gas into Ukraine, the wholesale trading of gas, and the supply of gas to consumers[3] including investments in its subsidiaries, selling gas to consumers and local distribution companies,[4] exploring prospects in the Black Sea under three Special Permits (the "**Special Permits**"),[5] financing the construction of gas distribution pipelines[6] and leasing gas distribution pipelines to PJSC Krymgaz;

(ii) National Joint Stock Company Chornomornaftogaz ("**CNG**"), registered at 26, B. Khmelnitskogo Str., office 505, Kyiv, Ukraine, 01030, is the primary wholly owned subsidiary of NJSC Naftogaz and, on the Valuation Date, it was a vertically integrated oil and gas company operating exclusively in Crimea. Its operations included gas, condensate and oil exploration and production, both onshore and offshore,[7] direct gas sales to industrial customers and indirect sales to other consumers and local distribution companies via NJSC Naftogaz,[8] direct sales of

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2 Cabinet of Ministers of Ukraine, Resolution No. 747, 25 May 1998 (**CE-28**).

3 Naftogaz 2014 Annual Report, 64 (**CE-145**) (hereinafter "**2014 Annual Report**").

4 2014 Annual Report, 64 (**CE-145**).

5 *See* First Expert Report of Gaffney, Cline & Associates, dated 15 September 2017 (hereinafter "**First GCA Report**"), Table 7.

6 *See* First GCA Report, Appendix IX.G.

7 Naftogaz 2016 Annual Report, 97 (**CE-366**) (hereinafter "**2016 Annual Report**").

8 2014 Annual Report, 77 (**CE-145**).

condensate and oil to refiners and trading companies, operating and maintaining high-pressure gas pipelines, and operating and maintaining a gas storage facility;

(iii) Joint Stock Company Ukrtransgaz ("**UTG**"), registered at 9/1, Kloskiy Uzviz, Kyiv, Ukraine, 01021, is a gas-transmission and storage company that operates 38,600 kilometers of pipeline and maintains a system of underground-gas-storage facilities.[9] With respect to Crimea specifically, as of February 2014, UTG operated a 429-kilometer gas-transportation pipeline system in the region.[10] This pipeline system was connected to a larger pipeline system that UTG operated in continental Ukraine;[11]

(iv) Joint Stock Company Ukrgasvydobuvannya ("**UGV**"), registered at 26/28, Kudriavska Str., Kyiv, Ukraine, 04053, is a wholly owned subsidiary of NJSC Naftogaz. On the Valuation Date, UGV's primary activity in Crimea was its participation in a joint activity agreement with Choronomornaftogaz to develop offshore gas condensate fields in the Black Sea and Sea of Azov;[12]

(v) JSC Ukrtransnafta ("**UTN**"), registered at 18/7, Kutuzova Str., Kyiv, Ukraine, 01133, is a wholly owned subsidiary of NJSC Naftogaz and a gas-transmission and storage company. On the Valuation Date, UTG activities in Crimea consisted of operating, maintaining and building high-pressure gas pipelines and gas distribution pipelines;

(vi) Subsidiary Company Gaz Ukraiiny ("**Gaz Ukraiiny**"), registered at 1, Sholudenka Str., Kyiv, Ukraine, 04116, had been a gas-distribution company before being privatized by Ukraine in 2012.[13] After 2012, its focus shifted to collecting debts

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9 2016 Annual Report, 174 (**CE-366**); 2014 Annual Report, 78 (**CE-145**); Charter of PJSC "Ukrtransgaz", Art. 1.9, 25 December 2012 (**CE-122**).

10 Witness Statement of Petr F. Slesar (hereinafter "**WS Slesar**"), ¶ 4; Agreement No 19/2 between Naftogaz and Ukrtransgaz, 17 June 1999 (transferring obligation to operate pipelines to UTG) (**CE-34**).

11 WS Slesar, ¶ 3.

12 Agreement No. 1 on the Joint Venture in the Sea of Azov Between Choronomornaftogaz and Ukrgasvydobuvannya, 20 October 2000 (**CE-43**).

13 Charter of "Gaz Ukraiiny" Subsidiary Company of "Naftogaz of Ukraine", 25 January 2011 (**CE-85**).

for Naftogaz and maintaining large-diameter gas-transport pipelines. It leased storage space for these assets, which included a tractor, an excavator, transport vehicles, and office equipment.[14]

(vii) Likvo Limited Liability Company ("**Likvo**"), which was terminated and merged into UBV effective 29 April 2020, provided emergency services such as firefighting for Naftogaz's oil and gas operations.[15] Likvo was registered in Kharkiv, in continental Ukraine, and in February 2014 maintained a branch office with 15 employees in the town of Chornomorske, on Crimea's northwestern coast, as well as a gas-distribution station near the town's harbor, where it stored emergency-response equipment.[16] Likvo's assets included specialized firefighting equipment, materials used in emergency-response operations and pipeline and well repairs, and vehicles that it used to provide these emergency services in the region, as well as a gas compressor and a vehicle that its affiliate Ukrgasvydobuvannya had transferred to it under a property management agreement;

8. NJSC Naftogaz, CNG, UTG and UGV held various assets in relation to these oil and gas related activities, which were expropriated by the Russian Federation. The oil and gas assets are divided into four categories:

(i) **Upstream Assets**. These assets include CNG, UGV and NJSC Naftogaz's interests in Special Permits under which CNG, UGV and NJSC Naftogaz were permitted to develop and exploit the underlying oil and gas fields and prospects ("**Upstream Assets**");

(ii) **Midstream Assets**. These assets include CNG, UTG and NJSC Naftogaz's interests in operating gas pipelines (including fill gas in those pipelines), a gas

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[14] Agreement No. 17/10-100 with the Municipal Public Utility Enterprise for Heat Networks of the City of Armiansk, as amended, 18 March 2010 (**CE-80**); Agreement No. 17-17/12-443 with N.V. Kolnoguz, 1 October 2012 (**CE-119**).

[15] Articles of Association of Likvo (Restated), 23 February 2016 (**CE-370**).

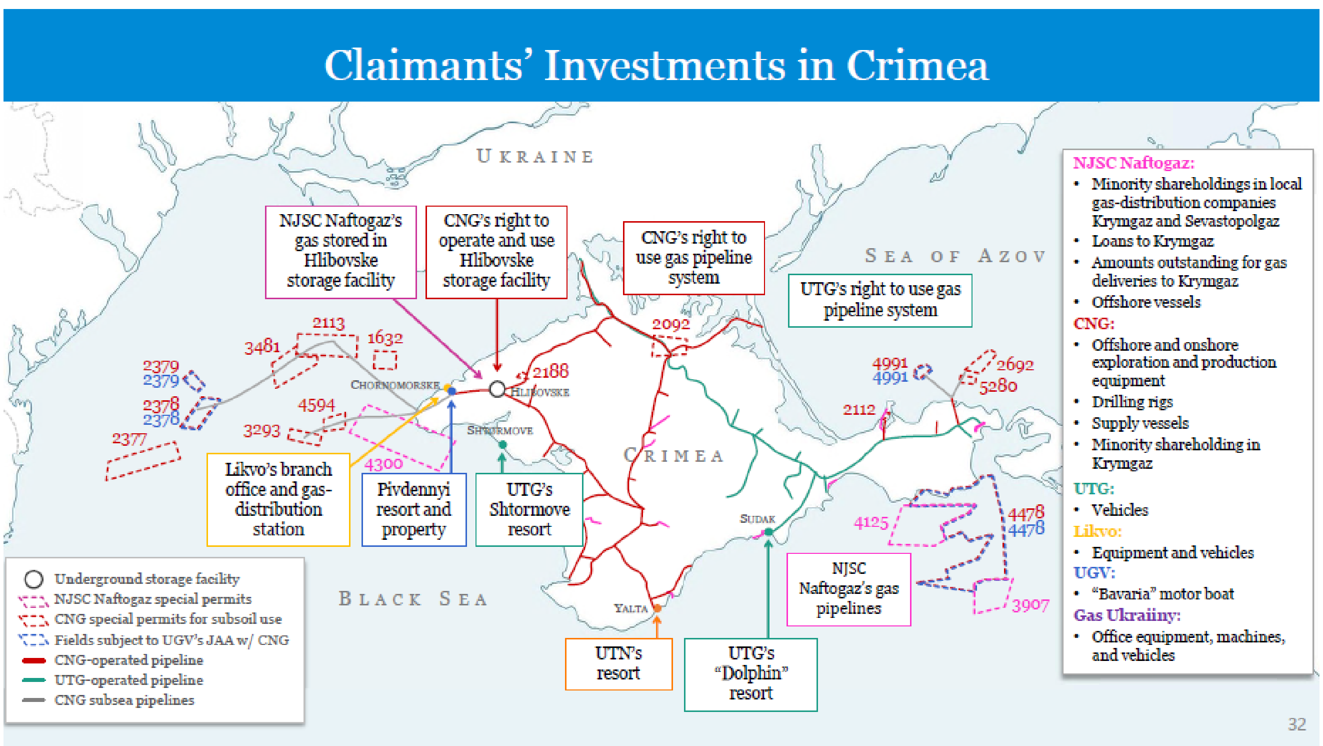
[16] Charter of Subsidiary Company "Paramilitary (Gas) Emergency Rescue Services 'Likvo' of Naftogaz of Ukraine", 9 July 2012 (**CE-112**); Likvo Order No. 144-п, 22 September 2014 (**CE-309**); Witness Statement of Danylo V. Rymchuk (hereinafter "**WS Rymchuk**"), ¶¶ 3-4.

storage facility (including cushion gas stored in that facility) and associated equipment (“**Midstream Assets**”);

(iii) **Service Assets**. These assets include CNG’s four jack-up drilling rigs, 22 marine vessels and three helicopters, which were used to explore and develop offshore oil and gas resources (“**Service Assets**”);

(iv) **Local Distribution Companies** (the “**LCDs**”). These assets include NJSC Naftogaz and CNG’s minority shareholding in two local distribution companies (PJSC Krymgaz (“**Krymgaz**”) and PJSC Sevastopologaz (“**Sevastopolgaz**”)).

9. The following is the Claimants’ depiction of their investments in Crimea before the expropriation:[17]



[17] Claimants’ Opening Presentation, Hearing on Jurisdiction and Liability, slide 32.

10. In the current phase of the arbitration, the Claimants are represented by:

Mr. David Z. Pinsky Ms. Paris Aboro Mr. Alexander Gudko	Covington & Burling LLP The New York Times Building 620 8th Avenue New York, NY 10018 U.S.A.
Ms. Marney L. Cheek Mr. William T. Lowery Ms. Clovis Trevino	Covington & Burling LLP One CityCenter 850 Tenth Street, NW Washington, DC 20001 U.S.A.
Mr. Jeremy X. Wilson Mr. Ramon Luque	Covington & Burling LLP 22 Bishopsgate London EC2N 4BQ United Kingdom

PART 3 - THE RESPONDENT

11. The Respondent in this arbitration is the Russian Federation, a sovereign State ("**Russia**" or the "**Respondent**" and together with the Claimants, the "**Parties**").

12. In the current phase of the arbitration, the Respondent is represented by:

Mr. Mikhail Vinogradov	Prosecutor General's Office of the Russian Federation Bolshaya Dmitrovka, 15a GSP-3 Moscow 125993 Russia
Mr. Elliott Geisinger Mr. Christopher Boog Dr. Anna Kozmenko Ms. Julie Raneda Ms. Anne-Carole Cremades	Schellenberg Wittmer (from August 2019 till March 2022) Rue des Alpes 15bis 1201 Geneva Switzerland
Mr. Khristofor Ivanyan Mr. Baiju Vasani Mr. Andrey Gorlenko Ms. Elena Burova	Ivanyan & Partners (from August till June 2021) Kadashevskaya nab., 14, bldg.3 Moscow 119017 Russia

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

PART 4 - PROCEDURAL HISTORY

1. *Constitution of the Tribunal and Communications From the Respondent*

13. By letter dated 15 February 2016 (the "**Notice of Dispute**"), the Claimants notified the Respondent, pursuant to Article 9(1) of the Treaty, of the existence of a dispute between the Parties. The Respondent did not respond to the Claimants' Notice of Dispute.

14. On 17 October 2016, the Claimants commenced these arbitral proceedings by serving on the Respondent the **Notice of Arbitration**, dated 14 October 2016, pursuant to Article 9(2)(c) of the Treaty and the United Nations Commission on International Trade Law, 1976 (the "**UNCITRAL Rules**").

15. In their Notice of Arbitration, the Claimants appointed Dr. Charles Poncet, a Swiss national, as the first arbitrator in these proceedings pursuant to Article 7(1) of the UNCITRAL Rules. Dr. Poncet's address is Rue Saint-Leger 6, P.O. Box 5271, 1211 Geneva 11, Switzerland.

16. On 22 November 2016, following the Respondent's failure to appoint an arbitrator within 30 days of the Claimants' notification of the appointment of the Claimants' party-appointed arbitrator, the Claimants requested the Secretary-General of the Permanent Court of Arbitration (the "**PCA**") to designate an appointing authority to appoint an arbitrator on behalf of the Respondent pursuant to Article 7(2) of the UNCITRAL Rules.

17. On 19 December 2016, in response to the Claimants' request, and having sought comments from the Respondent but having received no reply, the Secretary-General of the PCA designated Dr. Michael Hwang SC as the **Appointing Authority** in these proceedings for all purposes under the UNCITRAL Rules.

18. By letter dated 22 January 2017, the Claimants requested Dr. Hwang to appoint an arbitrator on behalf of the Respondent, in accordance with Article 7(2)(b) of the UNCITRAL Rules, due to the Respondent's failure to appoint an arbitrator.

19. On 3 February 2017, the PCA received a letter dated 19 January 2017 from Ms. O.V. Zentsova, Deputy Director of the Department of International Law and Cooperation of the Ministry of Justice of the Russian Federation (the "**Russian Objection**"), objecting to the constitution of an arbitral tribunal to hear the present dispute, to the jurisdiction of the Tribunal, and to the admissibility of the Claimants' claims.

20. In the Russian Objection, Ms. Zentsova stated:

> According to item 1 of Article 1 of the [Treaty] the term "investments" shall mean any kind of tangible or intangible assets which are invested by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with its legislation. The property, which is the subject of the dispute, is located in the territory of the Republic of Crimea and the city of Sevastopol, which had previously been a part of the Ukraine. The assets of claimants are not investments, because they have not been made in the territory of the Russian Federation, and, if ever made, they have been made prior to the accession of the Republic of Crimea and the city of Sevastopol to the Russian Federation and not in accordance with the legislation of the Russian Federation. No taxes have been collected on these assets in accordance with the legislation of the Russian Federation and they have not contributed to the economic development of the Russian Federation.
>
> On the basis of the foregoing, the Russian Federation does not recognize the jurisdiction of the international arbitration at the Permanent Court of Arbitration to hear the present dispute.[18]

21. By letter dated 8 February 2017, Dr. Hwang provided the Claimants with a copy of the Russian Objection and invited them to comment thereon.

22. By letter dated 13 February 2017, the Claimants disagreed with the contentions in the Russian Objection. The Claimants maintained that the Respondent's jurisdictional objections could only be raised once the tribunal has been constituted and reiterated their request that Dr. Hwang appoint an arbitrator on behalf of the Respondent.

23. On 14 February 2017, Dr. Hwang, on behalf of the Respondent, appointed Professor Dr. Maja Stanivuković, a Serbian national, as the second arbitrator, pursuant to Article 7(2)(b) of the UNCITRAL Rules. Professor Stanivuković's address is Radnička 26, 21000 Novi Sad, Republic of Serbia.

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[18] Letter No. 06-5928/17 from the Ministry of Justice of the Russian Federation to the Permanent Court of Arbitration, dated 19 January 2017 (**CE-383**).

24. On 13 April 2017, in response to a request from the Claimants, and having sought comments from the Respondent but having received no reply, Dr. Hwang appointed Judge Ian Binnie, C.C., K.C., a Canadian national, as the presiding arbitrator in these proceedings pursuant to Articles 7(3) and 6(3) of the UNCITRAL Rules. Judge Binnie's address is c/o Lenczner Slaght, 130 Adelaide Street West, Suite 2600, Toronto, Ontario, Canada, M5H 3P5.

2. *Fixing of the Procedural Timetable*

25. By letter dated 1 May 2017, the Tribunal communicated draft Terms of Appointment and the draft Rules of Procedure to the Parties, inviting them to comment thereon. By letter dated 22 May 2017, the Claimants submitted their comments. The Respondent did not provide any comments.

26. On 19 July 2017, having considered the comments which it had received, the Tribunal issued the document previously circulated to the Parties under the title "Terms of Appointment" as its **Procedural Order No. 1**, in which the Tribunal, *inter alia*, appointed the PCA to act as registry in these arbitral proceedings.

27. On the same day, the Tribunal issued **Procedural Order No. 2**, in which it fixed The Hague, the Netherlands as the place of arbitration and established, in Section 2.1, a Procedural Timetable for the proceedings on the basis that all issues of jurisdiction, admissibility, liability, and quantum would be heard together. Pursuant to the timetable, the Claimants were required to file their Statement of Claim by 15 September 2017, after which the Respondent would have until 5 January 2018 to file a Statement of Defence or any objections to jurisdiction or admissibility. In the event the Respondent were to fail to file its Statement of Defence, Section 2.2 of Procedural Order No. 2 established an accelerated timetable.

28. By letter dated 11 August 2017, the Claimants requested the Tribunal to issue a confidentiality order, enclosing therewith a draft of its Proposed Confidentiality Order.

29. On 14 August 2017, the Tribunal circulated the Claimants' Proposed Confidentiality Order and requested the Respondent to comment thereon by 21 August 2017. The Respondent did not submit any comments.

30. By letter dated 30 August 2017, the Tribunal issued its **Confidentiality Order** to the Parties.

3. *Filing of the Statement of Claim; Respondent's Failure to Submit a Statement of Defence; Bifurcation; and Amendments to the Timetable*

31. On 15 September 2017, in accordance with the timetable established in Procedural Order No. 2, the Claimants submitted their **Statement of Claim**, together with factual exhibits CE-1 to CE-605, legal authorities CLA-1 to CLA-103, eight witness statements, and three expert reports. Under separate cover, the Claimants also submitted a request for designation of certain exhibits as "Highly Confidential Information," in accordance with the Tribunal's Confidentiality Order.

32. On 25 September 2017, the Tribunal, having invited the Parties' comments, issued **Procedural Order No. 3**, whereby the Tribunal amended the Procedural Timetable contained in Section 2.2 of Procedural Order No. 2, moving the date of the hearing on jurisdiction, admissibility, and merits (including quantum) to 14-18 May 2018.

33. On 31 October 2017, in response to the Claimants' request to file "Highly Confidential" documents without disclosure to the Respondent, the Tribunal expressed "great concern receiving into the arbitral record documents relevant to issues before the Tribunal, which might potentially lead to an Award against the Respondent, while withholding disclosure of the documents to the Respondent." As most documents sought to be classified as Highly Confidential related only to quantum, the Tribunal invited the Claimants to consider applying for bifurcation of the proceedings so that jurisdiction and liability would be dealt with first, and the Tribunal would only address quantum, if necessary, at a subsequent date.

34. By letter dated 9 November 2017, the Claimants requested the Tribunal to bifurcate the proceedings into two phases, *i.e.*, jurisdiction and liability, on the one hand, and quantum, on the other hand.

35. On 8 December 2017, having sought the Respondent's comments on the Claimants' bifurcation request but having received no response, the Tribunal issued its **Procedural Order No. 4**, bifurcating jurisdiction and liability to be dealt with at a hearing on 14-18 May 2018, and quantum to be addressed, if necessary, at a subsequent date.

36. By letter dated 12 December 2017, in accordance with Section 3.2 of Procedural Order No. 4, the Claimants withdrew from the record: (i) those sections of the Statement of Claim that address the Claimants' quantum of loss; (ii) all exhibits and authorities submitted exclusively in support of the Claimants' quantum of loss, including all exhibits designated as Highly Confidential Information; and (iii) the Expert Witness Statement of Gaffney, Cline & Associates ("**GCA**"). By the same letter, the Claimants submitted an **Amended Statement of Claim**, an Amended Exhibit Index, and an Amended Table of Authorities, deleting those sections of the three documents that pertained exclusively to quantum.

37. The Respondent failed to submit its **Statement of Defence** by 5 January 2018, the deadline fixed by the Tribunal in Section 2.1 of Procedural Order No. 2.

38. By letter dated 9 January 2018, after noting the Respondent's failure to file its Statement of Defence, the Tribunal ordered the proceedings to continue pursuant to Article 28(1) of the UNCITRAL Rules.

39. On 12 January 2018, as a result of the Respondent's failure to file its Statement of Defence, the Tribunal posed **Questions to the Parties** with respect to issues of jurisdiction and liability, in accordance with the timetable established in Section 2.2 of Procedural Order No. 2.

40. On 23 February 2018, the Claimants submitted their Answers to the Tribunal's Questions (the "**Claimants' Answers**"), together with factual exhibits CE-606 to CE-794, legal authorities CLA-104 to CLA-171, amendments of previously submitted factual exhibits and legal authorities, and two supplemental expert reports. The Respondent filed no responses to the Tribunal's questions.

41. On 15 March 2018, the PCA informed the Parties that it had received copies of the following documents from the Embassy of Ukraine in The Hague: (i) *Note Verbale* from the Embassy of Ukraine to the PCA, dated 14 March 2018; (ii) a letter from the Ministry of Foreign Affairs of Ukraine to the Tribunal, dated 13 March 2018; and (iii) Submission of Ukraine as Non-Disputing Party to the Treaty, dated 13 March 2018 (the "**Submission of Ukraine**"). The PCA also provided the Parties and the Tribunal with copies of the first two items and, on behalf of the

Tribunal, requested the Parties' comments on whether the third item should be admitted into the record.

42. On 29 March 2018, the Claimants submitted their comments on Ukraine's request to admit its Submission into the record in this arbitration. The Respondent filed no comments.

43. On 4 April 2018, the Tribunal convened a pre-hearing conference call with the Parties to discuss organizational matters related to the merits hearing, scheduled for 14-18 May 2018. The Claimants participated in the call. The Respondent did not participate despite having been duly notified.

44. On 5 April 2018, the Tribunal issued its **Procedural Order No. 5**, in which it, *inter alia*, admitted the Submission of Ukraine into the record and granted the Parties until 19 April 2018 to submit comments thereon. The Claimants submitted their comments on that date. The Respondent did not submit any comments.

45. By letter dated 7 May 2018, the Claimants advised the Tribunal "that Limited Liability Company Likvo ha[d] succeeded to the claims of Subsidiary Company Likvo asserted in this proceeding" and requested "that the Tribunal recognize Likvo LLC as a party in this arbitration, in place of Subsidiary Company Likvo."

46. On 11 May 2018, the Claimants sought leave to submit into the record in this arbitration the award on the merits in *Everest Estate LLC et al. v. The Russian Federation*, PCA Case No. 2015-36. By letter of the same date, the Tribunal granted the Claimants' request.

4. *Hearing on Jurisdiction and Liability*

47. The merits hearing, covering issues of jurisdiction and liability, was held on 14-17 May 2018 in The Hague, the Netherlands ("**Hearing on Jurisdiction and Liability**"). The Respondent, although duly notified of the schedule and having been invited to participate, did not take part in the hearing. The following individuals were in attendance:

Tribunal:

Judge Ian Binnie, C.C., K.C.	President
Dr. Charles Poncet	Arbitrator
	Arbitrator

Professor Dr. Maja Stanivuković

Claimants:

Mr. Yaroslav V. Teklyuk Ms. Olga Khoroshylova Ms. Olga Ivaniv Mr. Vladyslav Byelik	NJSC Naftogaz of Ukraine

Counsel for the Claimants:

Ms. Erin Thomas Mr. David Z. Pinsky Mr. Daniel P. Allman Mr. Joshua B. Picker	Covington & Burling LLP The New York Times Building 620 8th Avenue New York, New York 10018 United States of America
Mr. Jeremy X. Wilson Ms. Paris Aboro	Covington & Burling LLP 265 Strand London WC2R 1BH United Kingdom
Ms. Marney L. Cheek Mr. William Lowery Mr. Dean Acheson	Covington & Burling LLP One City Center 850 Tenth Street, NW Washington, DC 20001 United States of America
Mr. Denis Lysenko Mr. Pavlo Byelousov Ms. Myroslava Savchuk	Aequo Law Firm Attorney at Law Association 4 A, Behkterevskyi Lane, n/p 19 Kyiv, Ukraine, 04053

Fact Witnesses:

Ms. Svetlana V. Nezhnova
Mr. Andriy Kobolyev

Expert Witnesses:

Dr. Irina Paliashvili
Professor Paul B. Stephan

For the Permanent Court of Arbitration:

Dr. Levent Sabanogullari
Mr. Byron Perez
Ms. Willemijn van Banning

Court Reporter:
Mr. Trevor McGowan

Interpreter:
Mr. Yuri Somov

48. On 15 May 2018, in accordance with Section 2.5 of Procedural Order No. 5, the Tribunal issued its **Questions to the Parties** for their respective closing statements.

49. On 17 May 2018, the Parties' closing statements were delivered to the Tribunal.

50. An electronic transcript of the hearing was delivered to the Parties at the end of each hearing day. By letter dated 18 May 2018, the PCA circulated the audio recording of the hearing to the Parties and sent hard copies of the complete transcript to the Respondent. By the same letter the PCA, on behalf of the Tribunal, invited the Parties to propose any corrections. The Claimants submitted their proposed corrections by letter dated 8 June 2018. The Respondent submitted no comments on the transcript.

5. *Post-Hearing Proceedings on Jurisdiction and Liability and Issuance of Partial Award*

51. By letter dated 18 May 2018, the Tribunal granted the Claimants' request that it recognize Likvo LLC as a party in this arbitration, in place of Subsidiary Company Likvo.[19]

52. By letter dated 22 May 2018, the Claimants requested that the Tribunal grant the Parties an opportunity to provide short written submission in response to a question posed by the Chairman during the Claimants' closing statement at the Hearing on Jurisdiction and Liability.[20] By letter dated 25 May 2018, the Tribunal rejected the Claimants' request, as it did not consider that further submissions on this question were required.

53. By letter dated 23 May 2018, the Claimants provided the Tribunal and the PCA with electronic copies of the following materials distributed in hard copies by the Claimants to the

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19 Transcript of the Hearing (hereinafter "**Tr.**"), Hearing on Jurisdiction and Liability, 193:16-19.
20 Tr., Hearing on Jurisdiction and Liability, 374:19-375:2.

Tribunal at the hearing: (i) the award on the merits issued in *Everest Estate LLC et al. v. Russian Federation*, PCA Case No. 2015-36;[21] (ii) an article titled "What Constitutes a Taking of Property under International Law" by Professor George C. Christie;[22] (iii) an updated version of Annex C to the Claimants' Answers to the Questions of the Tribunal, dated 23 February 2018;[23] and (iv) an Amended Exhibit Index, an Amended Table of Authorities, and errata sheets for typographical errors in the witness statements of Svetlana V. Nezhnova and the expert reports of Irina Paliashvili and Paul B. Stephan. On 25 May 2018, the Tribunal confirmed receipt of the enclosures and stated that the Claimants would provide the Respondent with hard copies of the enclosures if the Respondent so requested.

54. By letter dated 19 June 2018, enclosing factual exhibits CE-797 to CE-805, the Claimants informed the Tribunal that, due to recent amendments to the laws of Ukraine, the names of Claimants CNG, UTG, UTN, and UGV had changed, and requested that the Tribunal update the caption in this arbitration to take account of the above Claimants' new names.

55. On 22 June 2018, the Tribunal invited the Respondent to provide any comments on this request. No comments were received from the Respondent within the time limit specified by the Tribunal.

56. By letter dated 10 July 2018, the Tribunal granted the Claimants' request and changed the style of cause in this arbitration to reflect the above Claimants' new names.

57. By letter dated 11 September 2018, the Claimants informed the Tribunal that one of the persons who submitted a witness statement in support of the Claimants' claims, Ms. Anastasia Tsybulska, had pleaded guilty to criminal charges in her role to inflate the purchase price of two drilling rigs that Chornomornaftogaz purchased in 2011.[24] In the same letter, the Claimants

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21 *Everest Estate LLC et al. v. Russian Federation*, PCA Case No. 2015-36, Award on the Merits, 2 May 2018 (**CLA-174**) (hereinafter "***Everest Estate***").

22 George C. Christie, *What Constitutes a Taking of Property under International Law?* 38 BRIT. Y.B. INT'L. L. 307 (1962) (**CLA-175**).

23 Revised Annex C to Claimants' Answers to the Questions of the Tribunal, dated 23 February 2018 (hereinafter "**Claimants' Answers**") (**CE-795**).

24 Letter from the Claimants, dated 11 September 2018, *referring to* Sentence, Case No. 761/43004/17, Proceeding No. 1-кп/761/962/2018, 25 July 2018 (**CE-807**).

indicated that the charges "do not relate to the testimony Ms. Tsybulska provided in this arbitration."

58. By letter dated 13 September 2018, the Tribunal invited the Respondent's comments on the Claimants' letter of 11 September 2018. The Respondent did not provide any comments.

59. By letter dated 5 October 2018, the Tribunal, noting the Respondent's failure to provide any response to the Tribunal's letter of 13 September 2018, admitted the Claimants' correspondence of 11 September 2018 into the record.

60. On 8 November 2018, the Claimants sought leave from the Tribunal to submit two judgments and an accompanying press release issued by the Swiss Federal Supreme Court in connection with *PJSC Ukrnafta v. Russian Federation*, PCA Case No. 2015-34, and *Stabil LLC et al. v. Russian Federation*, PCA Case No. 2015-35, together with English translations, into the record of this arbitration. Alternatively, the Claimants requested that the Tribunal take judicial notice of these judgments.

61. By letter dated 23 November 2018, the Tribunal invited the Respondent to provide any comments on this request by 7 December 2018. The Respondent did not submit any comments.

62. By letter dated 18 December 2018, the Claimants noted that the Swiss Federal Supreme Court issued opinions explaining its full reasoning in reaching the aforementioned judgments and sought leave from the Tribunal to submit the opinions into the record, together with English translations. Alternatively, the Claimants requested that the Tribunal take judicial notice of these opinions.

63. On 7 January 2019, the Tribunal advised the Parties that it was in the final stage of its deliberations and, on this basis, declined to receive further submissions or case law, rejecting the Claimants' request.

64. On 22 February 2019, the Tribunal rendered its Partial Award, accompanied by the Dissenting Opinion of Professor Dr. Maja Stanivuković, dated 13 February 2019.

65. In its Partial Award the Tribunal by majority ruled:

> (a) that the Tribunal has jurisdiction over the claims:
>
> (b) that the Claimants have established a violation of Article 5 (expropriation) and Article 2(1) (full and unconditional legal protection) and Article 3(1) (most favored nation treatment) of the BIT.

66. In paragraph 275 of the Partial Award, the Tribunal also decided that it would proceed to the quantum phase of the arbitration.

6. *The Respondent's Request to Participate in the Proceedings; Amendments to the Timetable*

67. By letter dated 10 July 2019, the Respondent addressed the Tribunal for the first time in this arbitration to express "its willingness to appear in this Arbitration," and made three separate but connected requests, namely:

> (i) to permit the Respondent to present written and oral argument in support of its jurisdictional objections;
>
> (ii) subject to (i), to order a stay of the Arbitration until the Dutch courts have irrevocably decided upon the Respondent's request for setting aside the Partial Award; and
>
> (iii) if jurisdiction were maintained subsequent to (i) or (ii), to grant the Respondent the opportunity to raise objections to the claim on the merits and in relation to quantum including a proper opportunity to challenge (via its own evidence and cross-examination) the Claimants' factual and expert evidence.

68. By letter dated 11 July 2019, the Tribunal invited the Claimants to provide any comments in relation to the Respondent's letter dated 10 July 2019.

69. By letter of 2 August 2019, the Claimants opposed the Respondent's requests of 10 July 2019 in their entirety and requested that the Tribunal maintain the existing procedural timetable. The Claimants' letter was accompanied by factual exhibits CE-1020 to CE-1021, and legal authorities CLA-197 to CLA-203.

70. By letter dated 8 August 2019, the Claimants requested that the Tribunal require the Respondent to pay its share of the deposit to the PCA in the amount of EUR 250,000.

71. By letter of 13 August 2019, the Tribunal requested the Respondent to pay its share of the deposit that was previously paid by the Claimants, in the amount of EUR 250,000, as evidence of its "willingness to appear in the Arbitration."

72. On 21 August 2019, the Tribunal issued **Procedural Order No. 7**, in which the Tribunal, *inter alia*, directed that the Respondent file a formal application by 6 September 2019 to address the Tribunal's authority to entertain further submissions in respect of jurisdictional "issues not already dealt with in the Partial Award" if the Respondent wished to contest the issue of jurisdiction. Noting that "the merits stage of the arbitration was closed by the Partial Award", the Tribunal also invited the Respondent to submit its Counter-Memorial by 18 October 2019 in accordance with Section 1.1 of Procedural Order No. 6. Lastly, the Tribunal rejected the Respondent's request for a stay of the proceedings.

73. By letter dated 28 August 2019, the law firms Schellenberg Wittmer Ltd and Ivanyan & Partners informed the Tribunal that they had been instructed to represent the Respondent in these arbitral proceedings. In the same letter, the Respondent requested "a reasonable extension of time for the filing of the Counter-Memorial on Quantum" (the "**First Extension Request**") and proposed a revised procedural timetable.

74. On 6 September 2019, as foreseen in Procedural Order No. 7, the Respondent filed its Request for the Tribunal to use its Authority to Entertain Further Submissions on Jurisdiction, together with legal authorities RLA-1 to RLA-32 (the "**Request to Entertain Further Submissions**").

75. By letter dated 9 September 2019, arguing that the Request to Entertain Further Submissions contains "inappropriately submitted substantive arguments on matters on jurisdiction", the Claimants requested that the Tribunal strike from the record of this proceeding Part III of the Request to Entertain Further Submissions and allow the Claimants to respond to the Request.

76. Also on 9 September 2019, the Tribunal granted the Respondent an opportunity to respond, by 13 September 2019, "very briefly" to the Claimants' objections to Part III of the Request to Entertain Further Submissions. The Claimants were granted an opportunity to respond to the

Request to Entertain Further Submission and any supplemental "very brief" comments from the Respondent on Part III of the Request to Entertain Further Submissions by 27 September 2019.

77. By letter dated 13 September 2019, the Respondent commented on the Claimants' objection to Part III of the Request to Entertain Further Submissions and asked for an extension until 10 October 2019 to pay its share of the deposit.

78. On 13 September 2019, the Tribunal denied the Claimants' request to strike Part III of the Request to Entertain Further Submissions and directed the Claimants to address the entirety of the Request. Moreover, the Tribunal invited the Claimants to submit their own proposed revised timetable in the event an extension for the filing of the Counter-Memorial on Quantum was granted. The Tribunal further granted the Respondent's request for an extension until 10 October 2019 to pay its share of the deposit.

79. On 18 September 2019, the Claimants proposed a revised timetable.

80. On 26 September 2019, the Claimants submitted their response to the Request to Entertain Further Submissions, together with factual exhibit CE-1022, and legal authorities CLA-205 to CLA-215.

81. By letter of 27 September 2019, the Respondent provided its comments on the Claimants' revised timetable.

82. By letter dated 1 October 2019, the Claimants provided their comments to the Respondent's letter of 27 September 2019 with respect to the revised timetable.

83. On 2 October 2019, the Respondent submitted its comments on the Claimants' letter of 1 October 2019.

84. On 6 October 2019, having considered the comments from the Parties with respect to the First Extension Request and the Request to Entertain Further Submissions, the Tribunal issued **Procedural Order No. 8**, rejecting the Request to Entertain Further Submissions on the basis that all of the issues addressed by the Respondent in the Request had "already been canvassed by the Tribunal and dealt with in both the majority and dissenting opinions." The Tribunal further denied the Respondent's request to reopen the hearing on jurisdictional objections and stated that it would

proceed directly to the quantum phase. With respect to the First Extension Request, the Tribunal amended the procedural timetable for the quantum phase of the proceedings, modifying the time limits for the filing of the Parties' written submissions.

85. By letter dated 10 October 2019, the Respondent requested a further extension, until 24 October 2020, to the deadline for the payment of its share of the deposit. On 13 October 2019, the Tribunal granted the request.

86. On 21 October 2019, the PCA acknowledged receipt of EUR 250,000 in payment of the Respondent's share of the deposit.

7. *Written Proceedings on Quantum; Removal of Likvo LLC as Claimant; Filing of Additional Documentary Evidence; and Appointment of Litigation Assistant*

87. On 27 June 2019, the Claimants submitted their **Memorial on Quantum** (the "**Memorial on Quantum**"), together with an Expert Report on the Fair Market Value of Naftogaz's Oil and Gas Assets by Gaffney, Cline & Associates, dated 27 June 2019 (the "**First GCA Report**"), factual exhibits CE-13-Am, CE-43-Am, CE-50-Am, CE-52-Am, CE-56-Am, CE-69-Am, CE-117-Am, CE-126-Am, CE-141-Am, CE-473-Am, CE-474-Am, CE-477-Am, CE-811 to CE-1019, and legal authorities CLA-160-Am, CLA-169-Am, CLA-176 to CLA-196.

88. On 6 December 2019, the Respondent filed its **Counter-Memorial on Quantum** (the "**Counter-Memorial on Quantum**"), together with an Expert Report of FTI Consulting ("**FTI**"), dated 6 December 2019 (the "**First FTI Report**"), factual exhibits RE-1 to RE-141, and legal authorities RLA-33 to RLA-92.

89. By letter dated 18 December 2019, arguing that the issues raised in Sections V to VIII of the Counter-Memorial on Quantum contained jurisdictional and liability arguments precluded by the Partial Award, the Claimants requested that the Tribunal strike Sections V to VIII of the Counter-Memorial on Quantum and the new legal authorities and exhibits that the Respondent cited therein, or, in the alternative, that the Tribunal order and declare that it would not adjudicate the issues raised in those sections (the "**First Request to Strike**"). The Claimants' letter was accompanied by legal authority CLA-216.

90. On 19 December 2019, the Tribunal invited the Respondent to provide, by 30 December 2019, any comments in response to the First Request to Strike.

91. On 30 December 2019, the Respondent provided its comments in response to the First Request to Strike, requesting that the Tribunal dismiss the Request. The Respondent's letter was accompanied by legal authorities RLA-93 to RLA-94.

92. On 9 January 2020, the Tribunal issued **Procedural Order No. 9**, striking paragraphs in the Counter-Memorial on Quantum pertaining to "exceptional circumstances"[25] and principle of reciprocity.[26] The Tribunal, however, did not strike paragraphs relevant to the temporal limitation under the BIT, noting that "[t]he issue is an important one and will not be decided in a summary way." In addition, the Tribunal did not strike paragraphs pertaining to the issue of illegality of certain assets on the ground that it was relevant to the determination of the specific assets eligible for compensation. Lastly, the Tribunal ordered that the Respondent file an amended Counter-Memorial taking into account the Tribunal's aforementioned decisions.

93. On 24 January 2020, in accordance with Procedural Order No. 9, the Respondent submitted its **Amended Counter-Memorial on Quantum** with redactions as directed by the Tribunal, together with an amended list of exhibits and authorities, withdrawing the exhibits and authorities cited exclusively in the redacted paragraphs.

94. On 14 February 2020 the Claimants submitted their **Reply on Quantum** (the "**Reply on Quantum**"), together with the Second Expert Report on the Fair Market Value of Naftogaz's Oil and Gas Assets by Gaffney, Cline & Associates, dated 14 February 2020 (the "**Second GCA Report**") and an Expert Report of Evgeny Zhilin, dated 14 February 2020 (the "**First Zhilin Report**"), factual exhibits CE-7-Am, CE-52-Am, CE-71-Am, CE-1023 to CE-1129, and legal authorities CLA-183-Am, CLA-217 to CLA-251.

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[25] Counter-Memorial on Quantum, dated 6 December 2019 (hereinafter "**Counter-Memorial on Quantum**"), ¶¶ 7, 17, 38, 276-299, 557.

[26] Counter-Memorial on Quantum, ¶¶ 2, 16, 320-365, 556.

95. By letter dated 7 April 2020, the Respondent requested that the Tribunal extend the deadline for the filing of the Rejoinder on Quantum, from 17 April 2020 to 19 June 2020, on account of the COVID-19 pandemic (the "**Second Extension Request**").

96. On 14 April 2020, at the Tribunal's invitation, the Claimants requested that the Tribunal reject the Respondent's application for a nine-week extension and order instead an extension not exceeding two and a half weeks, accompanied by factual exhibits CE-1130 to CE-1132.

97. By letter dated 16 April 2020, the Respondent, after being granted leave from the Tribunal to "file a very short response" on the Claimants' letter dated 14 April 2020, submitted its comments on the Claimants' objection to the Second Extension Request.

98. By letter dated 16 April 2020, the Claimants submitted their reply to the Respondent's letter of the same date.

99. Also on 16 April 2020, the Tribunal, in light of the Claimants' submission that "an extension of two and a half weeks would sufficiently account for" the impact of the COVID-19 pandemic on the Respondent's work, granted the Second Extension Request on consent to that extent. The Tribunal further noted that it would deliberate on the manner of granting a longer extension once the submissions were complete.

100. By e-mail communication dated 17 April 2020, the Respondent requested leave to file brief comments to address one statement in the Claimants' reply dated 16 April 2020.

101. Also on 17 April 2020, the Tribunal denied the Respondent's request for leave to file comments on the Claimants' letter of 16 April 2020, noting that it considered itself sufficiently briefed on the relevant issues.

102. On 22 April 2020, the Tribunal issued **Procedural Order No. 10**, extending the deadline for the filing of the Respondent's Rejoinder on Quantum to 22 May 2020.

103. By letter dated 1 May 2020, the Claimants alleged that the Respondent breached the confidentiality obligations by disclosing the Expert Report of Dr. Irina Paliashvili, dated 14 September 2017 (the "**First Paliashvili Report**") in a different Crimea-related arbitration, *JSC DTEK Krymenergo v. The Russian Federation* (the "**DTEK Arbitration**") and in a set-aside

proceeding of another Crimea-related case before the Court of Appeal in The Hague (the "**Belbek Set-Aside Proceedings**"). Accordingly, the Claimants requested that the Tribunal order the Respondent to immediately withdraw the First Paliashvili Report from the two proceedings and award the Claimants the cost of their application (the "**Application on Confidentiality Breach**").

104. On 4 May 2020, the Tribunal invited the Respondent to provide, by 8 May 2020, any comments in response to the Claimants' letter of 1 May 2020.

105. On the same date, the Respondent informed the Tribunal that, due to two public holidays in Russia, the 8 May 2020 time limit left the Respondent with only three working days to file its comments, which was "manifestly insufficient". On 7 May 2020, the Respondent requested that the Tribunal extend the time limit to comment on the Claimants' Application on Confidentiality Breach to 15 May 2020.

106. On 8 May 2020, the Tribunal, after receiving Claimants' response that they would not object to an extension for the Respondent to file its comments by 13 May 2020, granted the Respondent's request to extend the time limit to file its comments on the Claimants' Application on Confidentiality Breach to 15 May 2020.

107. By letter dated 15 May 2020, the Respondent submitted its response to the Claimants' Application on Confidentiality Breach.

108. On the same date, the Respondent filed an application to further extend the deadline for the filing of the Rejoinder on Quantum from 22 May 2020 to 10 June 2020 (the "**Third Extension Request**").

109. Also on the same date, the Tribunal invited the Claimants to submit any comments on the Respondent's Third Extension Request by 20 May 2020 and the Respondent's response to the Claimants' Application on Confidentiality Breach by 22 May 2020.

110. On 17 May 2020, the Respondent noted that the length of time given to the Claimants to prepare a reply on the Third Extension Request could create logistical problems for the Respondent, suggesting that the time permitted to the Claimants be abbreviated.

111. On 18 May 2020, the Tribunal, while maintaining the time limit for the Claimants to file their response to the Third Extension Request by 20 May 2020, granted an interim extension of one week to the Respondent's time limit to file its Rejoinder on Quantum to 29 May 2020.

112. By letter dated 19 May 2020, the Claimants submitted their comments in response to the Respondent's Third Extension Request, enclosing factual exhibits CE-1133 to CE-1135 and legal authorities CLA-252 and CLA-253.

113. On 21 May 2020, the Tribunal issued **Procedural Order No. 11**, in which the Tribunal further extended the deadline for submission of the Respondent's Rejoinder on Quantum to 3 June 2020.

114. By letter dated 22 May 2020, the Claimants submitted their comments on the Respondent's letter of 15 May 2020 on the Claimants' Application on Confidentiality Breach, along with legal authorities CLA-254 and CLA-255.

115. By letter dated 29 May 2020, the Respondent submitted its comments on the Claimants' letter of 22 May 2020. The Respondent, *inter alia*, "without any acknowledgement or admission or wrongdoing" confirmed that it had filed (i) a letter from the Ukrainian Ministry of Foreign Affairs to the Tribunal requesting to file a Non-Disputing Party Submission in the Belbek Set-Aside Proceedings and in setting aside proceedings in relation to *JSC CB PrivatBank v. The Russian Federation* (the "**PrivatBank Set-Aside Proceedings**"), and (ii) the First Paliashvili Report in setting aside proceedings in relation to *Everest Estate LLC et al. v. The Russian Federation* (the "**Everest Set-Aside Proceedings**").

116. On 3 June 2020, in accordance with Procedural Order No. 11, the Respondent submitted its **Rejoinder on Quantum** (the "**Rejoinder on Quantum**"), together with the Expert Report on Technical Analysis and Economic Assessment of the Upstream Assets by Vygon Consulting, dated 29 May 2020 (the "**First Vygon Report**"), the Expert Report of Professor Oleksandr Vygovskyy, dated 1 June 2020 (the "**First Vygovskyy Report**"), the Expert Report of Professor Vitaly D. Melgunov, dated 29 May 2020 (the "**First Melgunov Report**"), and the Second Expert Report of Dr. Stuart Amor, Matthias Cazier-Darmois, Carter Davis, and Dr. Boaz Moselle, dated 3 June 2020

(the "**Second FTI Report**"), factual exhibits RE-142 to RE-169, and legal authorities RLA-95 to RLA-147.

117. On 10 June 2020, the Tribunal issued **Procedural Order No. 12** on the Application on the Confidentiality Breach. The Tribunal, by majority, *inter alia* (i) acknowledged the Respondent's undertaking to withdraw the First Paliashvili Report from its submissions in the DTEK Arbitration and the Belbek Set-Aside Proceedings; (ii) ordered the Respondent to withdraw the First Paliashvili Report from its submissions in the Everest Set-Aside Proceedings and the letter from the Ukrainian Ministry of Foreign Affairs to the Tribunal requesting to file a Non-Disputing Party Submission from its submission in the Belbek Set-Aside Proceedings and the PrivatBank Set-Aside Proceedings; and (iii) awarded the Claimants the costs of the Application on the Confidentiality Breach.

118. By letter dated 18 June 2020, arguing that the Respondent introduced new arguments and evidence in the Rejoinder on Quantum that were not responsive to fresh matters raised in the Reply, the Claimants requested to strike from the record: "(1) the [First Vygon Report]; (2) the [First Vygovskyy Report]; (3) Sections III and V of the [First Melgunov Report];[27] and (4) the portions of the Rejoinder on Quantum[28] and of the [Second FTI Report],[29] […] together with all of the new legal authorities and exhibits that Russia cites therein" (the "**Second Request to Strike**"). The Claimants' letter was accompanied by legal authority CLA-256.

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27 Together with certain portions of the Executive Summary; namely, First Expert Report of Professor Vitaly D. Melgunov (hereinafter "**First Melgunov Report**"), ¶¶ 19, 21.

28 Namely, Rejoinder on Quantum, dated 3 June 2020 (hereinafter "**Rejoinder on Quantum**"), ¶¶ 144-155, 211, 315-319, 598-605, 807 in full; all arguments and references in ¶¶ 16, 21, 352, 353, 483, 595, 811 pertaining to the Expert Report on Technical Analysis and Economic Assessment of the Upstream Assets by Vygon Consulting, dated 29 May 2020 (hereinafter "**First Vygon Report**"); ¶¶ 35-84, 89-90, 93, 102, 106-107, 112, 121-122, 211, 434, 448, 454-455, 461-463, 465-467 in full; all arguments and references in ¶¶ 16, 29 (footnote 15), 30 (footnote 17), 32 (footnote 18), 104, 111, 123, 126, 136, 437, 447, 456, 470 pertaining to the Expert Report of Professor Oleksandr Vygovskyy, dated 1 June 2020 (hereinafter "**First Vygovskyy Report**"); and ¶ 647 pertaining to certain portions of the First Melgunov Report.

29 Namely, Second Expert Report of Dr. Stuart Amor, Matthias Cazier-Darmois, Carter Davis, and Dr. Boaz Moselle, dated 3 June 2020 (hereinafter "**Second FTI Report**"), ¶¶ 2.38, 3.79, 5.9, 5.13(1), 5.15-5.19, 5.24 in full, as well as all arguments and references in ¶¶ 2.46(1), 3.80, 5.10, 5.22, 5.27(3), 5.41, 5.55(1) pertaining to certain portions of the First Melgunov Report.

119. On the same date, the Tribunal invited the Respondent to provide, by 3 July 2020, any comments in response to the Second Request to Strike.

120. By letter dated 22 June 2020, enclosing factual exhibits CE-1136 to CE-1141, the Claimants informed the Tribunal that the Claimant, Likvo LLC, had been terminated and merged into another Claimant, JSC Ukrgasvydobuvannya, effective 29 April 2020. The Claimants accordingly requested that the Tribunal remove Likvo LLC as a claimant in this arbitration and from the case caption, and recognize JSC Ukrgasvydobuvannya as the legal successor to Likvo LLC with the right to pursue the claims of that entity in this arbitration.

121. On 23 June 2020, the Tribunal invited the Respondent to submit any comments in respect of the Claimants' letter of 22 June 2020 by 30 June 2020.

122. On 1 July 2020, following the Respondent's confirmation on 30 June 2020 that it had no comment on the Claimants' request to remove Livko LLC as claimant from the arbitration, the Tribunal granted the Claimants' request to remove Likvo LLC as a claimant in this arbitration and updated the case caption accordingly.

123. By letter dated 3 July 2020, the Respondent submitted its comments on the Second Request to Strike, enclosing legal authorities RLA-148 to RLA-152.

124. By letter dated 7 July 2020, the Claimants submitted an accounting of the costs the Claimants incurred in connection with its Application on the Confidentiality Breach and requested that the Tribunal order the Respondent to immediately pay the costs in the amount of U.S. dollar ("**USD**") 30,164.95 in satisfaction of Procedural Order No. 12.

125. On 8 July 2020, the Tribunal invited the Respondent to provide any comments in respect of the Claimants' application on costs by 15 July 2020.

126. On 9 July 2020, the Respondent requested an extension of the deadline for the filing its comments on the Claimants' application on costs dated 7 July 2020.

127. On the same date, the Tribunal granted the Respondent's request and extended the deadline for its response on the Claimants' application on costs to 22 July 2020.

128. By letter dated 15 July 2020, the Claimants submitted their reply comments on the Respondent's letter of 3 July 2020. The Claimants' letter was accompanied by legal authority CLA-257.

129. By letter dated 22 July 2020, the Respondent submitted its comments on the Claimants' submission on costs, enclosing legal authorities RLA-150-Am and RLA-153. In the same letter, the Respondent confirmed that it had complied with the directions of the Tribunal majority in Procedural Order No. 12 and had withdrawn (i) the First Paliashvili Report from its submissions in the Everest Set-Aside Proceedings, Belbek Set-Aside Proceedings, and the DTEK Arbitration; (ii) the letter from the Ukrainian Ministry of Foreign Affairs to the Tribunal requesting to file a Non-Disputing Party Submission from the PrivatBank Set-Aside Proceedings, the Belbek Set-Aside Proceedings, and the DTEK Arbitration; and (iii) Ukraine's Non-Disputing Party Submission from the DTEK Arbitration. The Respondent further confirmed that it had not filed any other confidential documents from the record in this arbitration in any other proceedings.

130. On 27 July 2020, the Respondent submitted its rejoinder comments on the Claimants' letter of 15 July 2020 *inter alia* requesting that the Tribunal grant the Respondent a right to file additional evidence and comments, should the Claimants be allowed to do so themselves.

131. By letter dated 29 July 2020, the Claimants submitted their reply comments on the Respondent's letter of 22 July 2020, enclosing legal authorities CLA-256-Am, CLA-258 to CLA-261.

132. By letter dated 5 August 2020, the Respondent submitted its rejoinder comments on the Claimants' reply letter on costs of 29 July 2020, enclosing legal authorities RLA-93-Am, RLA-150-Am, RLA-151-Am, and RLA-154 to RLA-157.

133. On 10 August 2020, the Tribunal, having considered the Parties' submissions on the Claimants' application on costs dated 7 July 2020, deferred the bill of costs for USD 30,164.92, together with the Parties' respective submissions on its reasonableness, until the Tribunal issued its award.

134. Also on 10 August 2020, the Tribunal by majority issued **Procedural Order No. 13** concerning the Claimants' Second Request to Strike, (i) determining that there was no need to

consider striking out portions of the Respondent's Rejoinder on Quantum and (ii) granting the Respondent's request that it be given an opportunity to file a "surrebuttal" in the event the Claimants were given opportunity to file responsive evidence and submissions. Accordingly, the Claimants were ordered to submit their response limited to matters raised in the Rejoinder by 7 September 2020, while the Respondent was ordered to file its "surrebuttal" limited to matters raised by the Claimants in their reply to the Respondent's Rejoinder on Quantum by 5 October 2020.

135. On 11 August 2020, the Tribunal requested a supplementary deposit in the amount of EUR 250,000 (*i.e.*, EUR 125,000 from each side) in accordance with Article 41(2) of the UNCITRAL Rules.

136. By letter dated 13 August 2020, the Respondent *inter alia* requested that the Tribunal reconsider Procedural Order No. 13, grant the Respondent an extension until 11 December 2020 to file its surrebutal.

137. On 14 August 2020, the Claimants, noting the possible logistical difficulties arising due to 7 September 2020 being a federal holiday, sought a two-day postponement of the Claimants' deadline to file a response to matters raised in the Rejoinder on Quantum. The Tribunal denied the Claimants' request on the same date.

138. On 19 August 2020, the Claimants submitted their comments on the Respondent's request for consideration dated 13 August 2020.

139. On 2 September 2020, the Tribunal issued **Procedural Order No. 14**, whereby the Tribunal deferred the Respondent's request for additional time to file its third submission until after the Claimants filed their material on or before 7 September 2020.

140. On 7 September 2020, the Claimants submitted the **Claimants' Response to Matters Raised in the Rejoinder on Quantum** (the "**Response to Matters Raised in the Rejoinder**"), along with the Third Expert Report of Dr. Irina Paliashvil, dated 7 September 2020 (the "**Third Paliashvili Report**"), the Third Expert Report in Response to the Expert Report of Vygon Consulting on Technical Analysis and Economic Assessment of the Upstream Assets by Gaffney, Cline & Associates, dated 7 September 2020 (the "**Third GCA Report**"), the Second Expert

Report of Evgeny Zhilin, dated 7 September 2020 (the "**Second Zhilin Report**"), factual exhibits CE-7-Am, CE-53-Am, CE-54-Am, CE-71-Am, CE-123-Am, CE-128-Am, CE-239-Am, CE-1024-Am, CE-1060-Am, CE-1142 to CE-1286, and legal authority CLA-262.

141. By letter dated 16 September 2020, the Respondent requested an extension, to 30 September 2020, to the deadline for the payment of its share of the supplementary deposit. On the same date, the Tribunal granted the Respondent's request.

142. Also on 16 September 2020, the PCA acknowledged receipt of EUR 125,000 in payment of the Claimants' share of the supplementary deposit.

143. By letters dated 17 September 2020, the Respondent requested (i) leave to submit into the record a letter from Public Joint-Stock Company "Gazprom" ("**Gazprom**"), dated 15 July 2020 (the "**Gazprom letter**") and (ii) an extension of the deadline to file its surrebuttal to 11 December 2020.

144. On 21 September 2020, at the Tribunal's invitation, the Claimants submitted their comments on the Respondent's requests of 17 September 2020.

145. On 25 September 2020, the Tribunal notified the Parties of its view that it would determine the status of the Gazprom letter and, in particular, whether it could be taken as evidence to establish the truth of its contents in the absence of a witness statement from someone with knowledge of the facts, once the Tribunal has had the opportunity to review the Gazprom letter itself. The Tribunal also invited the Claimants to advise, by 2 October 2020, whether they wished to respond to the Respondent's submission of the Gazprom letter, and, if so in what way.

146. On 27 September 2020, the Tribunal extended the deadline for the Respondent's filing of its surrebuttal to 16 November 2020.

147. On 30 September 2020, the Respondent filed the Gazprom letter into the record as factual exhibit RE-170.

148. On 2 October 2020, the PCA acknowledged receipt of EUR 125,000 in payment of the Respondent's share of the supplementary deposit.

149. By letter dated 2 October 2020, the Claimants informed the Tribunal of their intention to address the Gazprom letter at the hearing on quantum.

150. On 7 October 2020, the Tribunal admitted the Gazprom letter into the record as an addition to the Respondent's document production.

151. On 21 October 2020, the Tribunal issued **Procedural Order No. 15**, in which the Tribunal *inter alia* extended the time limit for the Respondent to file its surrebuttal until 16 November 2020.

152. On 16 November 2020, in accordance with Procedural Order No. 15, the Respondent submitted its **Sur-Rebuttal on Quantum** (the "**Sur-Rebuttal on Quantum**"), together with the Second Expert Report of Professor Vitaly D. Melgunov, dated 16 November 2020 (the "**Second Melgunov Report**"), the Second Expert Report on Technical Analysis and Economic Assessment of the Upstream Assets by Vygon Consulting, dated 16 November 2020 (the "**Second Vygon Report**"), the Second Expert Report of Professor Oleksandr Vygovskyy, dated 16 November 2020 (the "**Second Vygovskyy Report**"), factual exhibit RE-170, and legal authorities RLA-158 to RLA-165.

153. By letter dated 5 March 2021, the Respondent informed the Tribunal that Schellenberg Wittmer Ltd no longer acted as its co-counsel and requested that Schellenberg Wittmer Ltd be removed from the record and not included in any further correspondence in this matter.

154. On 12 March 2021, the Tribunal, taking note of the Respondent's letter of 5 March 2021, removed Schellenberg Wittmer from the record and distribution list.

155. On 23 April 2021, the Respondent requested the Tribunal's leave to introduce into the record the English translation and the French original of the Paris Court of Appeal's judgment of 30 March 2021 in set aside proceedings between the Russian Federation and JSC Oschadbank (the "**Oschadbank Set Aside Judgment**"), indicating that the Claimants had consented to the addition of that Judgment into the record.

156. On 25 April 2021, the Tribunal, upon the Claimants' confirmation of their agreement, admitted the Oschadbank Set Aside Judgment into the record. The Respondent submitted the Oschadbank Set Aside Judgment as RLA-166 on the following day.

157. By e-mail dated 23 July 2021, the Respondent informed the Tribunal that, as of 1 July 2021, the Russian Federation had transferred the authority regarding its legal representation from the Ministry of Justice to the Prosecutor's General Office. The Respondent also informed the Tribunal that, effective from 23 July 2021, Schellenberg Wittmer Ltd would be representing the Respondent in the present proceedings, whilst Ivanyan & Partners no longer acted as its counsel.

158. On 13 August 2021, the Tribunal invited the Parties' comments on its proposal to retain Mr. David Campbell of Arbitration Place, Toronto, as a litigation assistant in this arbitration in the interest of reducing the overall cost of proceedings and increased efficiency in the document organization and technical support in the quantum phase of these proceedings.

159. By letter dated 27 August 2021, the Claimants confirmed their agreement to Mr. Campbell's appointment as a litigation assistant in this arbitration. By letter of the same date, the Respondent submitted that it had no objection to the Tribunal's proposal as a matter of principle, subject to (i) certain clarifications as to the exact role and status of the proposed litigation assistant and (ii) any necessary disclosures by Mr. Campbell.

160. On 6 September 2021, the Tribunal provided the requested clarifications and disclosures to the Parties.

161. On 15 September 2021, the Respondent confirmed that it did not object to the proposed appointment of Mr. David Campbell as a litigation assistant in this arbitration.

162. On 12 October 2021, the Tribunal circulated Mr. Campbell's signed statement of impartiality and independence and declaration of confidentiality.

8. *Hearing on Quantum*

163. By letter dated 27 February 2019, at which point the Respondent was yet to request to participate in these proceedings, the Tribunal invited the Parties to comment on the schedule for the quantum phase of the proceedings.

164. On 13 March 2019, the Claimants provided their comments on the schedule for the quantum phase of the proceedings, including a proposed procedural timetable. The Respondent did not provide any comments.

165. By letter dated 29 March 2019, the Tribunal informed the Parties that it intended to adopt certain amendments to the procedural timetable proposed by the Claimants, subject to any comments that the Parties may have on the Tribunal's amendments.

166. On 12 April 2019, the Claimants submitted their comments on the Tribunal's amendments to the procedural timetable. The Respondent did not submit any comments.

167. On 16 April 2019, having sought the Parties' views but having received no response from the Respondent, the Tribunal issued **Procedural Order No. 6**, establishing the procedural timetable for the quantum phase of the arbitration. In the event the Respondent failed to state by 2 August 2019 that it intended to submit its Counter-Memorial on Quantum, Section 1.2 of Procedural Order No. 6 foresaw an accelerated procedural timetable.

168. By letter dated 18 June 2019, the Claimants, due to an unforeseen scheduling conflict, requested that the Tribunal, after consultation of the Respondent, amend the dates for the hearing on quantum set forth in Section 1.1 of Procedural Order No. 6 in the event the Respondent participated in the quantum phase of the proceedings.

169. By letter of 20 June 2019, the Tribunal confirmed its availability to hear the quantum evidence in this arbitration on 8-10 April 2020 and invited the Respondent's comments on the proposed dates for the hearing.

170. Also on 20 June 2019, the Claimants indicated that they were unavailable to proceed with a hearing on quantum on 8-10 April 2020.

171. By letter dated 26 June 2019, the Tribunal proposed 11-13 May 2020 and, alternatively, 14 and 15 May 2020 as the dates of the hearing on quantum and invited the Parties to confirm their availability.

172. By letter dated 8 July 2019, the Claimants confirmed their availability for a hearing on quantum on 12-14 May 2020.

173. By correspondence dated 10 July 2019, the Respondent also confirmed its availability for a hearing on quantum from 11-15 May 2020.

174. By letter dated 11 July 2019, at which point the Respondent had requested to participate in these proceedings, the Tribunal, noting that the Parties had confirmed their availability, fixed 12-14 May 2020 for an oral hearing on quantum at The Hague, the Netherlands.

175. By e-mail communication dated 31 March 2020, the Respondent, writing on behalf of both Parties, informed the Tribunal that the Parties were in consultation with regard to the postponement of the hearing on quantum scheduled for 12-14 May 2020 in light of the COVID-19 pandemic. On the same day, the Claimants confirmed their agreement with the Respondent's e-mail communication.

176. By e-mail communication dated 5 April 2020, the Respondent, writing on behalf of both Parties, informed the Tribunal of the Parties' joint request to postpone the hearing on quantum to 9-13 November or 16-20 November 2020 and asked the Tribunal to confirm its availabilities.

177. On 9 April 2020, at the Parties' joint request, the Tribunal postponed the hearing to 16-20 November 2020.

178. On 11 August 2020, the Tribunal, noting its preference not to further delay the hearing on quantum, then scheduled for 16-20 November 2020, invited the Parties to confer and revert to the Tribunal with possible alternative arrangements for the hearing in view of directions in Procedural Order No. 13.

179. By letter dated 13 August 2020, the Respondent requested that the Tribunal reconsider Procedural Order No. 13 and postpone the hearing scheduled for 16-20 November 2020 to a later date.

180. On 14 August 2020, the Claimants sought a two-day postponement of the Claimants' deadline to file a response to matters raised in the Rejoinder on Quantum.

181. On the same date, the Tribunal denied the Claimants' request for a two-day postponement.

182. On 19 August 2020, the Claimants requested that the Tribunal maintain the filing schedule set out in Procedural Order No. 13, and maintain the 16-20 November 2020 hearing dates.

183. By letters dated 21 September 2020, pursuant to the Tribunal's directions, the Parties respectively submitted their notifications of witnesses and experts that they intended to call for cross-examination at the hearing on quantum.

184. On 25 September 2020, the Tribunal, given the Respondent's request of 13 August 2020 to postpone the quantum hearing and subsequent communications from the Tribunal, including Procedural Order No. 14, notified the Parties of its view that it would no longer be practicable to hold the hearing on quantum as scheduled on 16-20 November 2020, proposing an adjournment to the weeks commencing 1 February 2021 or 12 April 2021.

185. By letter dated 9 October 2020, the Claimants informed the Tribunal of their availability for the hearing on quantum during the weeks commencing 1 February 2021 or 12 April 2021.

186. On the same date, the Respondent requested that the Tribunal grant an extension, until 13 October 2020, to allow the Parties to discuss dates for the quantum hearing.

187. On 11 October 2020, the Tribunal granted an extension until 13 October 2020.

188. On 13 October 2020, the Tribunal granted a joint request from the Parties for a further extension to 16 October 2020 to provide the Tribunal with a report on the outcome of the Parties' discussions regarding the hearing dates.

189. On 14 October 2020, the Parties inquired as to whether the Tribunal would be available during the week of 21 June 2021 for a five-day hearing.

190. On 15 and 16 October 2020, the Tribunal consulted the Parties in respect of a five-day hearing in the week of 21 June 2021.

191. On 21 October 2020, the Tribunal issued Procedural Order No. 15, in which the Tribunal *inter alia* adjourned the hearing on quantum to the week commencing 21 June 2021 as agreed by the Parties.

192. By letter dated 2 March 2021, the Claimants requested that the Tribunal direct the PCA, in consultation with the Parties, to make contingency plans for a hybrid or virtual hearing and instruct the Parties to reserve the weekend days surrounding the hearing as potential hearing days.

193. On 9 March 2021, at the Tribunal's invitation, the Respondent provided comments on the Claimants' letter of 2 March 2021, asking the Tribunal to reject the Claimants' requests as premature and proposing that the Tribunal seek the Parties' views on the hearing format during the first full week of May 2021 and render its decision thereafter.

194. On 12 March 2021, with leave from the Tribunal, the Claimants provided a response to the Respondent's letter of 9 March 2021.

195. By joint letter dated 29 April 2021, the Parties requested that the Tribunal proceed with an in-person hearing from 21-25 June 2021 in The Hague. The Respondent suggested that the Tribunal consider London as an alternative venue if it became apparent that an in-person hearing in The Hague was not feasible.

196. On 5 May 2021, the Tribunal confirmed its availability for a remote or "virtual" hearing from 21-25 June 2021. The Tribunal also noted the possibility of a "hybrid hearing" and requested the Parties to confer and revert.

197. By letter dated 7 May 2021, the Respondent proposed that the Tribunal adjourn the hearing on quantum to a later date in the window of October to December 2021.

198. By letter dated 13 May 2021, the Claimants opposed the Respondent's proposal to postpone the hearing on quantum, enclosing factual exhibits CE-1287 and CE-1288, and legal authorities CLA-210-AM and CLA-263.

199. On 14 and 15 May 2021, the Respondent and the Claimant provided further comments in respect of the potential postponement of the hearing.

200. On 19 May 2021, the Tribunal issued **Procedural Order No. 16**, adjourning the hearing on quantum from 21-25 June 2021 to the first available date after the beginning of October 2021, to be determined in consultation with the Parties on the explicit condition that, if an in-person hearing proved not to be practicable on the adjourned date, the hearing would nevertheless proceed "virtually" at that time.

201. By letter dated 22 May 2021, the Claimants inquired as to the Tribunal's availability between the months of October to December 2021, such that the hearing on quantum could be held

as soon as possible, noting that, as a backup, they would in parallel confer with the Respondent about potential dates in early 2022.

202. By letter dated 28 May 2021, at the Tribunal's invitation, the Respondent provided its comments on the Claimants' letter of 22 May 2021 and informed the Tribunal that both Parties would be available during the weeks of 7, 14 and 28 February 2022. On the same date, the Claimants confirmed that they would be available during the weeks of 21 and 28 February 2022, while indicating a preference for the earlier weeks in February.

203. By letter dated 30 May 2021, the Tribunal ordered that the hearing on quantum be held in the week commencing 21 February 2022 and hold itself available on 28 February and 1 March 2022.

204. On 8 June 2021, the Tribunal issued **Procedural Order No. 17**, recording the dates of the hearing on quantum as 21-25 February 2022 and holding 28 February to 3 March 2022 in reserve. The Tribunal indicated that whether the hearing would be held "virtually" would be decided no later than the pre-hearing conference, scheduled to take place during the week of 24 January 2022.

205. On 10 January 2022, the Tribunal invited the Parties' response on (i) their availability, joint agenda and a list of expected attendees for a pre-hearing conference which was to be held in the week of 24 January 2022, and (ii) some outstanding issues in respect of the hearing format.

206. On 16 January 2022, the Tribunal circulated the draft Health Protocol to the Parties and invited their comments by 24 January 2022.

207. On 19 January 2022, the Parties confirmed their availability to hold the pre-hearing conference on 26 January 2022 and provided their list of attendees for the conference.

208. On 21 January 2022, the Tribunal acknowledged the Parties' availability for the pre-hearing conference and informed the Parties that the conference was scheduled for 26 January 2022.

209. On the same date, the Tribunal invited the Parties' comments on certain administrative and logistical arrangements for the hearing. The Parties submitted their respective comments on 25 January 2022.

210. On 25 January 2022, the Tribunal circulated certain technical details for the pre-hearing conference.

211. On the same date, the Parties submitted the joint agenda for the pre-hearing conference, as well as their comments on the draft hearing protocols and the draft Health Protocol.

212. On 26 January 2022, the pre-hearing conference was held via videoconference.

213. On 28 January 2022, the Tribunal issued **Procedural Order No. 18**, in which it provided directions as to the outstanding issues concerning hearing arrangements, invited the Parties to confer and seek agreement on a hearing schedule, and adopted the Health Protocol.

214. On the same date, the Tribunal requested a supplementary deposit in the amount of EUR 300,000 (*i.e.*, EUR 150,000 from each side) in accordance with Article 41(2) of the UNCITRAL Rules.

215. On 1 February 2022, the Tribunal circulated certain administrative and logistical arrangements for the hearing to the Parties and invited their comments by 14 February 2022.

216. On 1 February 2022, the Claimants sought the Tribunal's leave to introduce additional documents into the record in support of expert testimony to be provided at the hearing, in accordance with paragraph 7.2 of Procedural Order No. 2 and paragraph 5.1 of Procedural Order No. 18.

217. On 2 February 2022, the Tribunal invited the Respondent to provide its comments on the Claimants' letter of 1 February 2022 by 8 February 2022.

218. On 4 February 2022, the Respondent informed the Tribunal that it required additional time to effect the supplementary deposit requested in the Tribunal's letter of 28 January 2022 and requested permission to pay its share of the supplementary deposit by 15 April 2022. The Tribunal granted this extension request on 7 February 2022.

219. On 7 February 2022, the Respondent submitted its comments on the Claimants' letter of 1 February 2022, objecting to the Claimants' request to introduce additional documents into the record.

220. On the same date, the Parties submitted to the Tribunal an indicative hearing schedule and provided responses to several logistical matters indicated in the Tribunal's letter of 1 February 2022.

221. On 9 February 2022, the Tribunal endorsed the Parties' agreed indicative hearing schedule.

222. On 10 February 2022, the Tribunal issued **Procedural Order No. 19**, dismissing the Claimants' application to admit the additional documents into the record.

223. On 14 February 2022, the Claimants submitted their comments on certain administrative and logistical arrangements for the hearing, as per the Tribunal's letter of 1 February 2022.

224. On 15 February 2022, the Respondent submitted its comments on certain administrative and logistical arrangements for the hearing, as per the Tribunal's letter of 1 February 2022.

225. On 16 February 2022, the Tribunal acknowledged receipt of the Parties' correspondence regarding certain administrative and logistical arrangements for the hearing. By the same letter, the Tribunal noted that, pursuant to paragraph 2.5 of Procedural Order No. 18, each side has made an application for the remote participation of some of the members of its delegation, which the Tribunal would authorize, in the absence of the reasoned objection on the part of the other side, within the two days that followed the issuance of the Tribunal's letter.

226. On 18 February 2022, the Tribunal circulated further administrative and logistical arrangements for the hearing to the Parties and invited their comments by the close of business of that same day.

227. On 19 February 2022, the Tribunal circulated certain technical details concerning the hearing. By the same letter, the Tribunal noted that neither side had objected to the remote participation of certain members of the other side's delegation and that the Parties were therefore authorized to share the technical details with their remote participants.

228. On 21 February to 2 March 2022, a hearing was held at the premises of the PCA in The Hague, the Netherlands (the "**Hearing on Quantum**"). The following persons were present or participated remotely via videoconference:

Tribunal:

Judge Ian Binnie, C.C., K.C.	President
Dr. Charles Poncet	Arbitrator
Prof. Dr. Maja Stanivuković	Arbitrator

Litigation Assistant to the Tribunal:

Mr. David Campbell

Claimants:

Mr. Yuriy Vitrenko Ms. Olga Z. Ivaniv Ms. Olha Kotlyarska Ms. Olena Melnyk Mr. Ivan Karpenko	NJSC Naftogaz of Ukraine

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Mr. Denis Lysenko Mr. Pavlo Byelousov Ms. Ksenia Koriukalova Mr. Oleksandr Kushch	Aequo Law Firm Attorney at Law Association Senator Business Center, 15th floor 32/2 Moskovska St. Kyiv 01010 Ukraine

***Respondent*:**

Mr. Mikhail Vinogradov
Mr. Andrey Kondakov
Mr. Denis Grunis
Mr. Sergey Morozov
Mr. Oleg Afanasyev
Ms. Zoya Usoltseva
Mr. Konstantin Ksenofontov

***Counsel for the Respondent*:**

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Expert Witnesses:

Mr. Evgeny Zhilin
Mr. Maxim Mezentsev
Dr. Irina Paliashvili
Mr. William Cline
Mr. Robert George
Mr. Stuart Traver
Mr. Rawdon Seager
Dr. Oleksandr Vygovskyy
Dr. Grigorii Vygon
Prof. Vitalii Melgunov
Mr. Carter Davis
Dr. Boaz Moselle
Dr. Stuart Amor
Mr. Sanjeev Bahl
Mr. Matthew Burt
Mr. Daniel George
Dr. Maria Belova
Dr. Sergey Klubkov
Dr. Sergey Ezhov

For the Permanent Court of Arbitration:

Dr. Levent Sabanogullari
Ms. Jinyoung Seok
Ms. Bojana Ristić
Ms. Willemijn van Banning

Court Reporter:

Mr. Trevor McGowan
Ms. Anne-Marie Stallard

Interpreters:

Ms. Irina van Erkel
Mr. Hildo Bos

229. On 27 February 2022, the Tribunal circulated to the Parties a list of questions to assist counsel in preparing post-hearing submissions.

230. On the same date, the Claimants informed the Tribunal that they would not be able to complete the payment of their share of the supplementary deposit requested in the Tribunal's letter of 28 January 2022 by 28 February 2022, due to restrictions on cross-border money transfers and foreign currency payments imposed by the Board of the National Bank of Ukraine. The Claimants, therefore, requested permission to pay their share of the supplementary deposit by 15 April 2022. The Tribunal granted this extension request on 28 February 2022.

9. *Post-Hearing Proceedings*

231. On 3 March 2022, the Tribunal circulated a revised version of the questions submitted to the Parties on 27 February 2022 and invited the Parties to propose any corrections to the hearing transcript. By the same letter, the Tribunal noted that the Parties should file two rounds of simultaneous post-hearing briefs and issued a schedule for their submission.

232. On 18 March 2022, the Parties requested an extension of the deadline for submission of proposed transcript corrections to 25 March 2022. The Tribunal granted the request on consent on 19 March 2022.

233. On 23 March 2022, the Claimants requested an extension of the deadline for payment of their share of the supplementary deposit to 15 May 2022, due to the extension of the restrictions on cross-border money transfers and foreign currency payments imposed by the Board of the National Bank of Ukraine. The Tribunal granted their request for such an extension on 24 March 2022.

234. On 25 March 2022, the Claimants circulated the Parties' agreed transcript corrections. The Respondent confirmed its agreement with the Claimants' communication on 28 March 2022.

235. On 11 April 2022, the law firm Schellenberg Wittmer Ltd informed the Tribunal that it no longer represented the Respondent in the present case and circulated the e-mail addresses of the Respondent for future correspondence.

236. On 12 April 2022, the Tribunal acknowledged receipt of Schellenberg Wittmer Ltd's letter of 11 April 2022 and invited the Claimants to provide any comments on the letter by 18 April 2022. By the same letter, the Tribunal invited the Respondent to respond to any comments provided by the Claimants by 22 April 2022.

237. On 18 April 2022, the Claimants submitted their comments on Schellenberg Wittmer Ltd's letter of 11 April 2022, noting that the schedule for submission of post-hearing briefs as per the Tribunal's letter of 3 March 2022 should be maintained. The Claimants also enclosed factual exhibits CE-1289 to CE-1292.

238. On 22 April 2022, the Respondent submitted its comments on the Claimants' letter of 18 April 2022, requesting an extension of the deadline for the submission of both rounds of the Parties' post-hearing briefs to 30 September 2022 and 27 November 2022 respectively. The Respondent also enclosed legal authorities RLA-167 to RLA-170.

239. On 25 April 2022, the Claimants objected to the Respondent's request for an extension of the deadline for the submission of the Parties' post-hearing briefs and requested the Tribunal's leave to provide comments, by 27 April 2022, on the Respondent's letter of 22 April 2022.

240. On 26 April 2022, the Respondent asserted that if the Tribunal granted the Claimants' request for leave submitted on 25 April 2022, the Respondent would request the Tribunal's leave to provide its own further comments by 29 April 2022.

241. On the same date, the Tribunal granted the Claimants' request to respond to the Respondent's letter by 27 April 2022, as well as the Respondent's request to submit any further comments by 29 April 2022. By the same letter, the Tribunal noted that the deadlines for post-hearing submissions would be suspended, pending the Tribunal's decision on the Respondent's application for an extension of the deadline for post-hearing submissions.

242. On 27 April 2022, the Claimants provided their comments on the Respondent's letter of 22 April 2022, *inter alia*, requesting that the Tribunal dispense with the post-hearing submissions. The Claimants also enclosed factual exhibits CE-1293 to CE-1304, and legal authority CLA-264.

243. On 28 April 2022, the Tribunal acknowledged receipt of the Claimants' letter of 27 April 2022 and invited the Respondent to address the Claimants' suggestion that the Tribunal should dispense with the post-hearing submissions.

244. On 29 April 2022, the Respondent provided its comments on the Claimants' letter of 27 April 2022, noting that it did not object to dispensing with the post-hearing submissions.

245. On 10 May 2022, the Tribunal issued **Procedural Order No. 20**, in which it ordered the deletion of the post-hearing submissions and all associated steps and procedures. The Tribunal also invited the Parties to confer and seek agreement on the format and timing of submissions on costs and to inform the Tribunal of the outcome of their discussions by 24 May 2022.

246. On 12 May 2022, the Claimants requested an extension of the deadline for payment of their share of the supplementary deposit to 15 July 2022, due to the extension of the restrictions on cross-border money transfers and foreign currency payments imposed by the Board of the National Bank of Ukraine. The Tribunal granted the request for extension on 13 May 2022.

247. On 24 May 2022, the Claimants informed the Tribunal that the Parties had agreed on a deadline of 17 June 2022 on a single round of simultaneous submissions on costs, and to the provision, by each party, of an affidavit or equivalent attestation that their respective costs are

accurate. By the same e-mail, the Claimants informed the Tribunal that the Parties were unable to agree on a common format for the breakdown of costs, noting that each party would submit its own breakdown of costs, and leave it to the Tribunal to decide whether it needed further clarifications.

248. By letter dated 27 May 2022, the PCA acknowledged receipt, on 26 May 2022, of EUR 150,000 from the Claimants, representing their share of the supplementary deposit requested by the Tribunal on 28 January 2022.

249. On 28 May 2022, the Tribunal acknowledged receipt of the Claimants' e-mail of 24 May 2022 regarding the Parties' agreement on the timing and format of submissions on costs and invited the Respondent to confirm its agreement by 31 May 2022.

250. On 31 May 2022, the Respondent confirmed its agreement on the timing and format of submissions on costs.

251. On the same date, the Tribunal approved the Parties' agreement on the timing and format of submissions on costs.

252. On 17 June 2022, the Parties simultaneously submitted their respective submissions on costs. The Claimants enclosed legal authorities CLA-265 to CLA-272.

253. By letter dated 30 June 2022, the PCA acknowledged receipt, on 29 June 2022, of EUR 150,000 from the Respondent, representing its share of the supplementary deposit requested by the Tribunal on 28 January 2022.

254. On 6 July 2022, the Claimants requested the Tribunal to invite the Respondent to confirm whether its submission on costs excluded certain costs allocated by the Tribunal in Procedural Orders Nos. 9, 13, 14, and 15.

255. On 13 July 2022, the Tribunal invited the Respondent to confirm, by 20 July 2022, that certain costs allocated by the Tribunal in Procedural Orders Nos. 9, 13, 14, and 15 were excluded from its submission on costs, or alternatively to indicate what portion of the costs claimed were attributable to (i) the Claimants' motion to strike parts of Russia's Counter-Memorial on Quantum that dealt with issues resolved by the Tribunal in the Partial Award (Procedural Order No. 9);

(ii) the Claimants' motion to strike parts of Russia's Rejoinder on Quantum that dealt with issues resolved by the Tribunal in the Partial Award (Procedural Order No. 13); and (iii) the Respondent's requests for extension for the filing of its sur-rebuttal submission on quantum and adjournment of the quantum hearing (Procedural Orders Nos. 14 and 15).

256. On 19 July 2022, the Claimants informed the Tribunal that a Judgment of The Hague Court of Appeal had been issued in annulment proceedings initiated by the Respondent against the Partial Award, partially setting aside the Partial Award. The Claimants also requested leave to submit an English translation of the Judgment of The Hague Court of Appeal, together with brief comments, by 26 July 2022.

257. On the same date, the Tribunal invited the Parties to submit an agreed translation of the Judgment of The Hague Court of Appeal and any comments they may wish to make thereon by 5 August 2022.

258. On 20 July 2022, the Respondent provided its comments on the exclusion of certain costs allocated by the Tribunal in Procedural Orders Nos. 9, 13, 14, and 15.

259. On 27 July 2022, the Respondent requested an extension until 31 August 2022 to submit its comments on the Judgment of The Hague Court of Appeal.

260. On the same date, the Tribunal invited the Claimants to provide, by 3 August 2022, any comments they might have on the Respondent's request of 27 July 2022.

261. On 2 August 2022, the Claimants informed the Tribunal that they did not object to the Respondent's request for an extension to 31 August 2022 on the understanding that the Respondent's request left in place the 5 August 2022 deadline for the submission of an agreed translation of the Judgment of The Hague Court of Appeal.

262. On 4 August 2022, the Tribunal confirmed its preference to receive the agreed translation of the Judgment of The Hague Court of Appeal by 5 August 2022, extending the time limit for the filing of the Parties' comments on the Judgment to 31 August 2022.

263. On 6 August 2022, the Claimants submitted the Parties' agreed translation of the judgment of The Hague Court of Appeal.

264. On 8 August 2022, the Tribunal invited the Respondent to confirm, by 12 August 2022, that the translation was agreed by the Parties.

265. On 11 August 2022, the Respondent confirmed that the Parties agreed on the English translation of the judgment of The Hague Court of Appeal.

266. On 31 August 2022, the Parties submitted their respective comments on the judgment of The Hague Court of Appeal. In its comments, the Respondent *inter alia* requested that the Tribunal reopen the jurisdictional phase of the arbitration, adopt a new procedural schedule for further submissions from the Parties on this issue, and grant the Respondent leave to file additional comments on Dutch law by 30 September 2022.

267. On 1 September 2022, the Tribunal invited the Claimants to provide, by 8 September 2022, any comments on the Respondent's requests.

268. On 8 September 2022, the Claimants submitted their comments on the Respondent's requests of 31 August 2022. In their comments, the Claimants *inter alia* stated that they did not object to the Respondent's request to file additional comments on Dutch law, if the Tribunal considered that such comments would be helpful and the Claimant were granted an equal opportunity to reply to the Respondent's additional comments.

269. On 13 September 2022, the Respondent requested that the Tribunal confirm that it had no objection to the submission of additional comments on Dutch law by the Respondent.

270. On the same date, the Claimants clarified their position with regard to the submission of additional comments on Dutch law from the Respondent as set out above.

271. On 14 September 2022, the Tribunal granted the Respondent an opportunity to file additional comments on Dutch law by 30 September 2022 and the Claimants to respond to the Respondent's comments by 14 October 2022.

272. On 30 September 2022, the Respondent submitted its additional comments.

273. On 14 October 2022, the Claimants submitted their comments on the Respondent's additional comments, accompanied by an affidavit of the Claimants' Dutch counsel, Ms. Mirjam van de Hel-Koedoot.

274. On 5 December 2022, the Tribunal issued **Procedural Order No. 21**, by which it dismissed the Respondent's application for a re-hearing of its jurisdictional objections without prejudice to the entitlement of the Respondent to have the impact of the Article 12 of the BIT limitations considered by the Tribunal in all relevant aspects of its consideration of its determination of the proper quantum of compensation.

275. On the same date, the Claimants requested that the Tribunal grant them leave to file a supplemental submission on costs by 12 December 2022 to include costs of legal representation and assistance incurred since June 2022.

276. On 6 December 2022, the Tribunal granted the Claimants' request for the Parties to file a supplemental submission on costs and invited the Parties to supplement their submissions on costs by 12 December 2022.

277. On 12 December 2022, the Parties simultaneously submitted their respective supplemental submissions on costs.

278. By letter dated 23 December 2022, the Tribunal requested the Parties to establish a supplementary deposit in the amount of EUR 100,000 (*i.e.*, EUR 50,000 from each side) in accordance with Article 41(2) of the UNCITRAL Rules.

279. On 18 January 2023, further to paragraph 9.5 of Procedural Order No. 1, the Claimants notified the Tribunal that the Aequo firm was no longer serving as representatives of the Claimants.

280. On 20 January 2023, the Tribunal acknowledged receipt of the Claimants' notification.

281. Also on 20 January 2023, the PCA acknowledged receipt of EUR 50,000 in payment of the Claimants' share of the supplementary deposit.

282. On 28 March 2023, the PCA acknowledged receipt of EUR 50,000 in payment of the Respondent's share of the supplementary deposit.

PART 5 - THE QUANTUM CLAIM

283. The Parties agree that:

(a) the standard of compensation is "full reparation" under the principle articulated in the *Chorzów Factory* case;[30]

(b) Fair Market Value ("**FMV**") contemplates a hypothetical transaction between a willing buyer (the "**Willing Buyer**") and a willing seller (the "**Willing Seller**") even where no actual market exists because "market value is not an existing fact, but instead a legal construct."[31] More particularly,

> ...the price, expressed in terms of cash equivalents, at which property would change hands between a hypothetical willing and able buyer and a hypothetical willing and able seller, acting at arms length in an open and unrestricted market, when neither is under compulsion to buy or sell and when both have reasonable knowledge of the relevant facts.[32]

(c) the Valuation Date is 17 March 2014 or early in the day on 18 March 2014,[33] being the day before the expropriation.[34] This was about a month after the Russian invasion of Crimea in February 2014 (although the Claimants say the Tribunal is nevertheless required to exclude any diminution of value between mid-February 2014 and 17 March 2014 caused by Russia's "unlawful" military action).[35]

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30 *Case Concerning the Factory at Chorzów* (*Germany v. Poland*), P.C.I.J., Series A, No 17, Judgment (Merits), 13 September 1928, 47 ("…reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.") (hereinafter "***Chorzów Factory***") (**CLA-191**). *See also* Rejoinder on Quantum, dated 3 June 2020 (hereinafter "**Rejoinder on Quantum**"), ¶ 509 ("that being said, the Respondent does not dispute that, in case of an unlawful expropriation, the applicable standard of compensation is that of full reparation."); AmCM, ¶ 399 ("The Respondent does not dispute, in principle, the applicability of the concepts of "full reparation" and "fair market value."); Respondent's Opening Presentation, Hearing on Quantum, slides 34, 60; Claimants' Opening Presentation, Hearing on Quantum, slides 55-59.

31 Claimants' Opening Presentation, Hearing on Quantum, slide 75¸ *referring to* Rejoinder on Quantum, ¶ 534.

32 First GCA Report, 4; American Society of Appraisers, International Glossary of Business Valuation Terms, "Fair Market Value", 44 (**CE-912**).

33 Claimants' Opening Presentation, Hearing on Quantum, slide 60.

34 AmCM, ¶ 407.

35 Claimants' Opening Presentation, Hearing on Quantum, slides 67-69.

284. According to the Claimants, the "value" was lost on the following dates in the following percentages:

(a) 18 March 2014, through the Annexation Treaty between the Russian Federation and the Autonomous Republic of Crimea (the "**Annexation Treaty**") (giving effect to the Nationalization Resolution 1758), which took approximately 89 percent of the value of the Claimants' damages;[36]

(b) 11 April 2014, through Resolutions 2032, 2033 and 2034, which took approximately 10 percent of the value of the Claimants' damages; and

(c) 30 April 2014, through Resolution 2085, which took approximately 1 percent of the value of the Claimants' damages.

285. The Claimants filed the following demonstrative exhibit showing the staging of the expropriations and the assets involved:[37]

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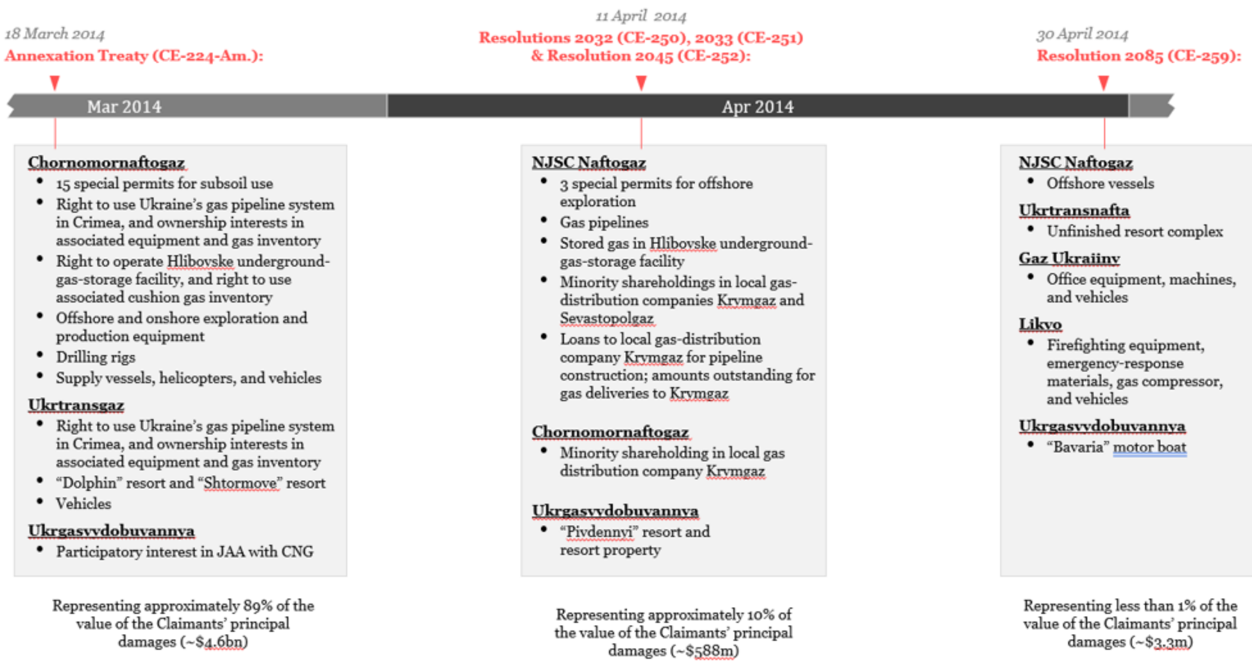
[36] State Council of Republic of Crimea, Resolution No. 1758-6/14, Art. 1, 17 March 2014 (**CE-202**) (hereinafter "**Nationalization Resolution**").

[37] *See* Claimants' Opening Presentation, Hearing on Quantum, slide 66.



286. The main areas of disagreement between the Parties (and within the Tribunal) are:

(a) the effect of **Article 12** of the BIT on the scope of protected investments and in particular the level of "activity" required to "make" an investment;

(b) whether Naftogaz actively "made" investments on Russian soil (the **passive investment** issue) and if so, when;

(c) whether the Claimants could have made "investments" before their incorporation in 1998, *i.e.*, the **corporate personality** issue;

(d) whether compensation in respect of assets acquired by the Claimants by "legal succession" from the state through the Charter capital or otherwise, must be discounted by:

(i) the Respondent's theory that the transfer of state assets was not a transfer of the property in such assets but just a transfer of operating authority (the "**legal succession**" issue);

(ii) the estimated expenditures by predecessors in title prior to 1 January 1992 (the "**historical contribution**" issue);

(e) as to the **Upstream Assets**, viewed from the perspective of the hypothetical "Willing Buyer":

(i) whether during the "Transition Period" between 18 March 2014 and 31 December 2014 and thereafter, it is probable (or not) that operations would be governed by Ukrainian law (the "**Ukrainian Scenario**") or, instead, whether the Willing Buyer would have expected Russian law to govern all matters after 18 March 2014 (the "**Russian Scenario**");

(ii) whether, to the extent Naftogaz "made" the expropriated investments, they should (or not) be valued according to the Ukrainian Scenario or the Russian Scenario;

(iii) whether the Russian Federation is entitled to have compensation with respect to Upstream Assets discounted because of the risk of non-renewal of permits, competition law complications or designation of Subsurface Plots of Federal Importance ("**SPFI**");

(iv) whether the Willing Buyer would reasonably expect that after 18 March 2014 it could:

(A) sell gas at or approaching international prices; and

(B) decline to sell gas to local Crimean households, or obtain subsidies to do so?

(f) with respect to **Midstream Assets**, the key issue is whether the loss-making domestic pipelines should be valued at zero, based on:

(i) a Discounted Cash Flow ("**DCF**") Value (as FTI says); or

(ii) according to the "income approach"; or

(iii) their Depreciated Replacement Cost ("**DRC**") (as GCA says);

(g) with respect to the **Service Assets**, which involve dozens of "market valuations", whether GCA's values should be accepted despite deficiencies in GCA's data, as alleged by FTI, who, however, does not provide its own alternatives;

(h) with respect to the **LDCs**, whether they are worth little (FTI says "a small amount") or, as GCA argues, substantial compensation based on the respective audited financial statements;

(i) with respect to **Krymgaz's debts owed to Naftogaz**;

(j) with respect to **non-oil and gas assets** [book value]; and

(k) finally, with respect to the Claimants' alleged **consequential losses** (Gazprom gas).

287. In their Memorial on Quantum, the Claimants contend that:

(a) Naftogaz's expropriated oil and gas investments should be assessed at USD 4.793 billion as of the Valuation Date;

(b) based on historic records and accounting data, Naftogaz is also owed compensation in the amount of USD 24,919,342 for debts owed to Naftogaz that were cancelled by the Russia Federation;

(c) in addition, Naftogaz has valued its expropriated investments not directly related to its oil and gas activities at USD 6,364,019 as of the Valuation Date; and

(d) compensation is finally owed for consequential losses reasonably caused by Russia's unlawful actions including the stored gas in Crimea, which required NJSC Naftogaz to purchase replacement gas that it would not have otherwise purchased. In total, these consequential losses amount to USD 331 million.

288. Naftogaz alleges, and the Russian Federation denies, that the FMV of the above expropriated assets and consequential losses, justifies an award in their favour against the Russian Federation of **USD 5,185,687,450**:[38]

Compensation for Oil and Gas Assets:	USD 4,822,500,000[39]
Compensation for Debts Owed by Krymgaz:	USD 24,919,342
Compensation for Non-Oil and Gas Assets	USD 6,364,019
Consequential Losses for Replacement Gas:	USD 331,904,089[40]
Total:	**USD 5,185,687,450**

289. In addition, the Claimants seek compound interest at a rate at least equal to Naftogaz's cost of borrowing. At the Valuation Date, Naftogaz contends that it paid a weighted-average rate of interest of 9 percent, compounded at monthly intervals. The Russian Federation argues that if interest is to be awarded, it should be based on appropriate international measures (such as the London Interbank Offered Rate ("**LIBOR**")).

290. In its opening presentation slide, the Russian Federation depicted the "inflated claims" as follows:[41]

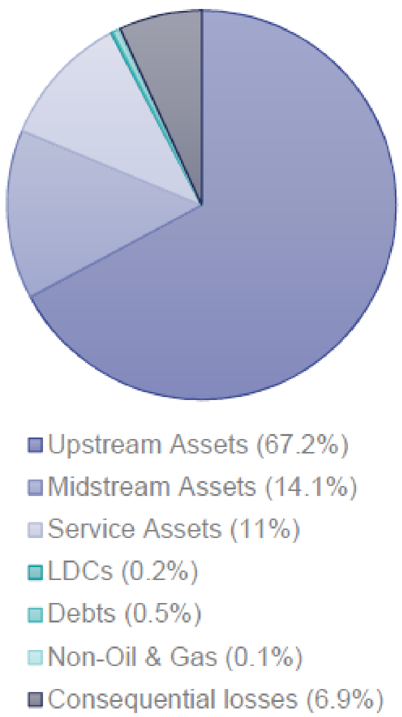
[38] This figure is showing as amended at Reply on Quantum, dated 14 February 2020 (hereinafter "**Reply on Quantum**"), ¶¶ 202, 261; Memorial on Quantum, dated 27 June 2019 (hereinafter "**Memorial on Quantum**"), ¶ 27.

[39] Second Expert Report of Gaffney, Cline & Associates, dated 14 February 2020 (hereinafter "**Second GCA Report**"), ¶ 33 (amending GCA's Ukrainian valuation from USD 4,793.5 million to USD 4,822.5 million).

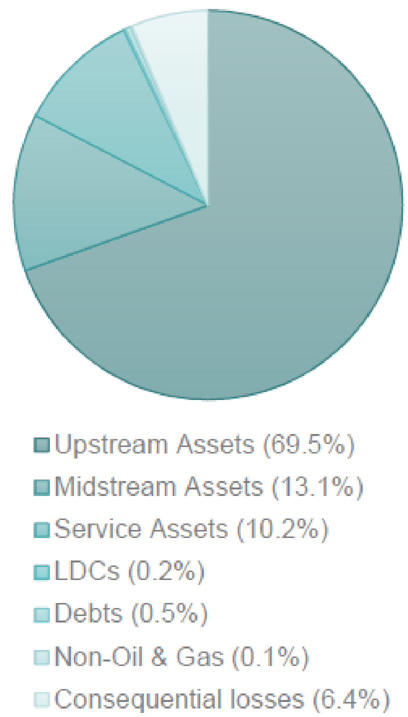
[40] Reply on Quantum, ¶ 180 (amending the pleading for this head of damages from USD 327,406,854 to USD 331,904,089).

[41] Respondent's Opening Presentation, Hearing on Quantum, slide 55.

Russian scenario (USD 4,810m)



Ukrainian scenario (USD 5,185m)



PART 6 - THE PARTIES' REQUESTS FOR RELIEF

The Claimants' Request for Relief

291. In the Memorial on Quantum, the Claimants request that the Tribunal render an award:

> (a) Ordering the Russian Federation to pay compensation for the injury to Naftogaz equal to USD 5,152,190,215, payable to each Claimant in the amount specified at paragraph 110 [of the Memorial on Quantum];
>
> (b) Ordering the Russian Federation to pay interest on any amount awarded at 9 percent, compounding monthly, from 18 March 2014 until the date of payment;
>
> (c) Ordering the Russian Federation to pay Naftogaz's costs in these arbitration proceedings, including all attorneys' fees and expert witness fees, in an amount to be specified at a later date, together with interest thereon;
>
> (d) Ordering the Russian Federation alone to bear the responsibility for compensating the Tribunal, the Appointing Authority, and the Permanent Court of Arbitration, and reimburse Naftogaz for any compensation that it has advanced to the Tribunal, the Appointing Authority, and/or the Permanent Court of Arbitration, with interest thereon; and
>
> (e) Ordering any other relief that the Tribunal may deem appropriate, including, but not limited to, any additional consequential losses for which Naftogaz in this

> submission has reserved the right to claim and arising as a result of the Russian Federation's unlawful expropriation of Claimants' investments.[42]

292. In both the Reply on Quantum and the Response to Matters Raised in the Rejoinder, the Claimants request that the Tribunal render an award:

> (a) Ordering the Russian Federation to pay USD 5.185 billion to fully compensate Naftogaz for its loss;
>
> (b) Ordering the Russian Federation to pay interest on this amount at a rate of 9 percent compounded monthly from 18 March 2014 (the expropriation date) until payment is made;
>
> (c) Ordering the Russian Federation to pay Naftogaz's costs in the arbitration, including attorneys' fees, expert witness fees, the Tribunal's fees, the appointing authority's fees, and the PCA fees; and
>
> (d) [Ordering] any additional relief that the Tribunal finds appropriate. [43]

The Respondent's Request for Relief

293. In the Amended Counter-Memorial, the Rejoinder on Quantum, and the Sur-Rebuttal on Quantum the Respondent requests that the Tribunal render an award:

> (a) Dismissing the Claimants' claims; and
>
> (b) Ordering the Claimants to pay all costs incurred in connection with this arbitration including their own costs, the fees and expenses of the Tribunal and of the Permanent Court of Arbitration, along with all costs and expenses incurred by the Russian Federation including the fees and expenses of its legal counsel, experts and consultants, plus interest thereon as of the date of the final award at such commercial rate as the Tribunal thinks fit and on a compound basis.[44]

PART 7 - DEFINITION OF INVESTMENT

294. The BIT provides the following definition for the term "investment":[45]

> For the purposes of this Agreement:
>
> 1. **The term "investments" means any kind of tangible and intangible assets which are invested** by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with its legislation, **including**:

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42 Memorial on Quantum, ¶ 112.

43 Reply on Quantum, ¶ 261; Claimants' Response to Matters Raised in the Rejoinder, dated 7 September 2020 (hereinafter "**Response to Matters Raised in the Rejoinder**"), ¶ 72.

44 AmCM, ¶ 563; Rejoinder on Quantum, ¶ 866; Sur-Rebuttal on Quantum, dated 16 November 2020 (hereinafter "**Sur-Rebuttal on Quantum**"), ¶ 202.

45 Agreement between the Russian Federation and the Cabinet of Ministers of Ukraine on the Encouragement and Mutual Protection of Investments, Art. 1(1), 27 November 1998 (**CLA-99/CLA-169**) (hereinafter "**BIT**").

> a) **movable and immovable property**, as well as any other related property rights;
>
> b) monetary funds, as well as securities, commitments, stock and other forms of participation;
>
> c) intellectual property rights, including copyrights and related rights, trademarks, rights to inventions, industrial designs, models, as well as technical processes and knowhow;
>
> d) **rights to engage in commercial activity, including rights to the exploration, development and exploitation of natural resources**.
>
> Any alteration of the type of investments in which the assets are invested shall not affect their nature as investments, provided that such alteration is not contrary to legislation of a Contracting Party in the territory of which the investments were made. (emphasis added)

295. Thus, "investments" are defined as "assets" (of which a non-exhaustive list of examples is given after the key word "including") but subject to Article 12 of the BIT which reads as follows:[46]

> **Article 12**
>
> **Application of the Agreement**
>
> This Agreement shall apply to all investments made by investors of one Contracting Party in the territory of the other Contracting Party, on or after January 1, 1992.

Thus, protection is given only to:

(a) those assets which are invested by an investor of a Contracting Party;

(b) in the territory of the other Contracting Party;

(c) in accordance with the legislation of the other Contracting Party;

(d) after 1 January 1992.

296. The Hague Court of Appeal determined that assets had indeed been invested by the Claimants being investors of a Contracting Party, in the territory of the other Contracting Party in

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46 BIT, Art. 12 (**CLA-99/CLA-169**).

accordance with the legislation of the other Contracting Party[47] without, as stated, "passing judgment on the issue of which investments are eligible for protection."[48]

---

[47] Judgment of The Hague Court of Appeal, dated 19 July 2022 (hereinafter "**Judgment of The Hague Court of Appeal**"), which concluded that:

> 5.8.8. The investments of Naftogaz et al., even though they were initially made in Ukraine, fall within the notion of *investments* as defined in Article 1 paragraph 1 of the [BIT].
>
> 5.8.8.2 In the opinion of the Court of Appeal, Fortuin's expert opinion shows that it does not follow from the wording of the authentic language versions, grammatically and/or syntactically, that the investment made on the territory of the other contracting party should take place simultaneously with the initial investment act;
>
> 5.8.8.3 That the investments made before January 1, 1992, do not fall under the protection of the treaty seems obvious to the extent that both Ukraine and the Russian Federation were part of the Soviet Union until January 1, 1992. The treaty thus contains a "*hard*" limit, a backstop, in time: investments made before that date do not qualify for protection. The fact that the treaty does not speak of the mere "*holding or possessing of investments*" is in line with the intention that **properly acquired during the Soviet period should fall outside the scope of the treaty**, which intention, in the Court of Appeal's opinion, is embodied in the BIT.

(a) The Hague Court of Appeal concluded that Naftogaz was an "Investor" within the scope of Article 1(2) of the BIT:

> 5.9.6 The requirement in Article 1(2) of the [BIT] that the natural person or the legal entity is competent in accordance with its legislation to make investments in the territory of the other Contracting Party means (only) that the investor must be competent under the laws of its own country to make investments in the territory of the other Contracting Party. That Naftogaz et al. were entitled to do so is not in dispute. Furthermore, the Court is of the opinion that holding the investments in Crimea after the incorporation of Crimea is not contrary to regulations of Ukraine. The fact that Ukraine does not formally consider these investments to be foreign investments does not make Naftogaz et al. unauthorized to hold these investments. As discussed above, Ukraine recognizes that the Russian Federation exercises de facto control over Crimea and, in that regard, Ukraine assumes that it is the Russian Federation that bears responsibility for these investments in the sense that the obligation - for example - not to proceed to expropriation without adequate compensation now rests with the Russian Federation.

(c) Did Naftogaz Act Illegally in Making Their Investments?

> 5.10.1 The Russian Federation withdrew its appeal to the lack of jurisdiction of the Arbitral Tribunal on account of the illegality of some of the investments made by Naftogaz et al. at the pleading stage (pleading note, nr. 22). Therefore, this part does not require further consideration.

The Partial Award, 22 February 2019, held in part as follows:

* * * * *

> 182. Accordingly, the Claimants are entitled to invoke the protection of the BIT (jurisdiction *ratione personae*) as legally constituted corporate entities under Ukrainian law legally authorized under Ukrainian law to invest both in Ukraine and Russia and at the time of the seizure effective 18 March 2014 they all held assets in the territory of Russia.

* * * * *

> The uncontradicted evidence of Dr. Palishvili [*sic*], the Claimants' expert on Ukrainian law, is that the investments were in accordance with Ukrainian legislation when they were originally made, and thereafter so long as Ukraine controlled Crimea; and the investments were made in accordance with Russian legislation applicable to Crimea when Russia annexed Crimea effective 18 March 2014.

[48] Judgment of The Hague Court of Appeal, ¶ 5.7.7.

PART 8 - THE EFFECT OF ARTICLE 12 OF THE BIT ON THE SCOPE OF THE PROTECTED INVESTMENTS

297. The principal battleground in relation to the protection (or lack thereof) of the Claimants' assets turns on Article 12 of the BIT which for convenience is reproduced below:

> **Article 12**
>
> **Application of the Agreement**
>
> This Agreement shall apply to all investments made by investors of one Contracting Party in the territory of the other Contracting Party, on or after January 1, 1992.

298. The Hague Court of Appeal ruled:

> 5.7.5.1 The Court of Appeal is of the opinion that Article 12 [BIT] should be interpreted in such a way that only investments made on or after 1 January 1992 fall within the scope of protection of the [BIT].

299. As stated, the Tribunal's earlier Partial Award held that:

> 141. Article 12 of the BIT limits protection to "investments" made by investors of one Contracting Party in the territory of the other Contracting Party, on or after 1 January 1992.[49]

300. By way of further elaboration, the Judgment of The Hague Court of Appeal summarised the opposing positions of the Claimants and the Russian Federation in part as follows:

> *The Position of the Russian Federation*
>
> 5.7.2 **The Russian Federation** considers that the correct interpretation of Article 12 [BIT] is to protect only investments **actively *made* on or after**

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[49] The Partial Award by majority also held:

> 175. The Treaty is not without temporal limitations. Article 12 restricts protection to investments made "on or after January 1, 1992," being date of the breakup of the Soviet Union. Other than 1 January 1992, the parties chose not to impose any further temporal limit on protected investments, leaving it to a claimant to establish that Crimea was Russian "territory" at the time of the alleged treaty breach by Russia and at the time of the initiation of arbitration.
>
> * * * * *
>
> 199. Moreover, to hold that the circumstances of the original investment control the application of the BIT undermines the purpose of the Treaty which is not only to *attract* foreign investments but to *protect* existing investments which, at the time of seizure, our "foreign investments" at the mercy of the state which effects the compulsory acquisition.

> **January 1, 1992, and thus not investments that simply *existed* at the time of a violation of the [BIT]** committed on or after January 1, 1992, and an arbitration commenced after that date. In doing so, the Russian Federation takes the position that Article 12 [BIT] must also be interpreted pursuant to Article 31 VCLT on the basis of (i) the ordinary meaning and context of Article 12 and (ii) the object and purpose of the [BIT] and the good faith interpretation.
>
> *The Position of Naftogaz*
>
> 5.7.3 Naftogaz et al. took the position that their investments were made on the territory of the Russian Federation on March 18, 2014, and thus after January 1, 1992;
>
> 5.7.3.2 The fact that assets forming the basis of the investments were created, discovered or acquired before January 1, 1992 does not mean that there was already an investment [in the territory of the other contracting party] at that point in time. The Russian Federation's assertion that there must be a capital injection before there can be an investment finds no support in the broad asset-based definition of the [BIT], nor does the requirement that there be an active investment.
>
> 5.7.3.3 Prior to 1 January 1992, there could be no Ukrainian or Russian investors or investments in the territory of either the Russian Federation or Ukraine.
>
> 5.7.3.4 The Russian Federation's interpretation would result in Soviet-era assets not being protected by the [BIT]. This "would **dramatically narrow the BIT's application**" and also contradicts the position taken by Russian state-owned enterprises and state bodies in other arbitrations, such as Gazprom and Tatneft, Russian state energy companies. (emphasis added)

301. The Hague Court of Appeal then stated its opinion:

> 5.7.5.7 In light of the intention of the parties and the background to the provision, the text of Article 12 [BIT] should be interpreted to mean that **only investments actually made after January 1, 1992 are subject to the scope of the [BIT]**. The interpretation favoured by Naftogaz c.s., which protects investments regardless of when they are made once they meet all the requirements, makes the provision redundant, and cannot have been the intention.
>
> 5.7.5.8 Therefore, the [BIT] does not apply to investments made before 1 January 1992, meaning that **Naftogaz et al. cannot obtain protection under the [BIT] if they** [*i.e.*, the Claimant Naftogaz, *et al*.] **made their investments before that date.** It should be borne in mind, however, that **investments may count as having been made after 1 January 1992 if after 1992 Naftogaz c.s. bought (parts of) investments made by others or if after January 1, 1992 they made an expansion to investments made by others. In the latter case, [BIT] applies only to the expansion made after 1 January 1992**.

302. In the result, The Hague Court of Appeal rejected both the initial position of Naftogaz that "investments" are "made" only when all BIT requirements were met (which could not have been

before annexation on 18 March 2014),[50] as well as the Russian Federation's position that investments originally made in Ukraine as "domestic" could not qualify as "foreign" investments under the BIT.[51] Moreover, according to the Russian Federation, assets developed in the Soviet-

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[50] The Hague Court of Appeal stated:

> 5.7.5.5 In the interpretation favoured by Naftogaz et al. in which investments are only "made" when all the requirements for "investments" are met, including therefore possibly investments for which actions have already been taken before 1992, but which at that time did not yet meet other requirements (such as on the "territory" of the other state), the backstop in Article 12 would become meaningless (no *effet utile*), because in this way all "old" investments can eventually come under the scope of protection.
>
> 5.7.5.6 The described background to Article 12 is also evident from the *travaux préparatoires*, as outlined by the Russian Federation and as such not contradicted by Naftogaz et al. and as confirmed by the non-disputing party submission of Ukraine. The letter of 11 July 2008 on the BIT with Azerbaijan cited by the Russian Federation states, inter alia:
>
> > "Russia presumes it is more reasonable to apply the treaty only to those investments of investors of both countries which had been carried out on the territory of Russia and Azerbaijan since these countries gained their sovereignty after the dissolution of the USSR, i.e. since their emergence on the international stage as new subjects of international law. To this end, we have suggested a specific date - 1 January 1992 (…)."
>
> In the same manner, Ukraine expressed itself in its non-disputing party submission in the arbitration proceedings that are the subject of these setting aside and revocation proceedings. Ukraine there states (RF 10 (N), para. 36):
>
> > "Like most bilateral investment treaties of its era, the Treaty was written to protect pre-existing investments (covering the period from 1992, shortly after the dissolution of the USSR, to 1998, when the Treaty was concluded. (...) Under the Treaty, so long as the investment was made after 1 January 1992, it is irrelevant whether the Treaty applied at the time."

[51] The Hague Court of Appeal held:

> 5.8.8.5 Thus, although investments made before January 1, 1992, are excluded from the treaty, the wording of the treaty does not allow to read into it any temporal requirements for investments made after that date. In other words, **it does not follow from the literal wording of the treaty that, in order to qualify for protection, investments must already have been in the territory of the other contracting state at the time of the investment**.
>
> * * * * *
>
> 5.8.9 Given the object and purpose of the 1998 BIT as discussed above, the fact that the investments must have been made in accordance with the legislation of the host state **does not entail a requirement of simultaneity**. The determination of whether the investments comply with Russian legislation can be made with the date of incorporation of Crimea by the Russian Federation as the time of assessment. This assessment was also made by the majority of the Arbitral Tribunal as per this date in its *Partial Award* of February 22, 2019, guided by the expert opinions of Dr. Paliashvili and Prof. Paul B. Stephan. Prof. Stephan indicated - in brief - that permits granted under Ukrainian law remained valid in Crimea after Russia annexed that territory. Russian law further required Ukrainian firms to eventually organize as Russian entities or register as branches of foreign firms operating on Russian territory.
>
> 5.8.10 The Court of Appeal agrees with the judgments of the Swiss Federal Supreme Court of 16 October 2018 which held:
>
> > "We cannot concur with the appellant when it argues that the very wording of Art. 1(1) IPA 1998 indicates that the agreement only protects investments that, at the time of their making, were made

era but not acquired by the Claimants until after 1 January 1992 could not be the subject of compensation.

303. It is significant, in the majority view, that The Hague Court of Appeal said "Naftogaz cannot obtain protection under the BIT if **they** made **their** investments before that date."[52] The focus is on acquisition by the Claimants (none of which were incorporated before 1998), not the preceding history of owners and licenses.

304. It is significant, in the majority view, that The Hague Court of Appeal refers in paragraph 5.7.5.1 to "investments made" not "assets created" or "assets developed".

305. Following its general discussion of jurisdiction, The Hague Court of Appeal identified the task now before this Tribunal:

> 5.7.7 Naftogaz et al. argued in the alternative that all investments were made after 1992. This was disputed by the Russian Federation. In the course of the oral argument the Russian Federation invoked the principle of unity of investment which would mean that the entire investment of Naftogaz et al. in the gas and oil group had been made before January 1, 1992. Both parties submitted documents from the quantum phase of the arbitration in support of their positions.
>
> Since this shows that **the discussion of when the investments were made is still being conducted in the arbitration proceedings, the court will refrain from passing judgment on the issue of which investments are eligible for protection**. (emphasis added)

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

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by an investor from one Contracting State on the territory of another Contracting State: while by contrast, investments that were originally made in the investor's home country and "are located in the territory of the host country at a later time only due to a boundary change" do not fall under the protection of the 1998 Investment Protection Agreement."

5.8.11 The cases that do contain a direct analogy with the present case are the arbitrations instituted by other Ukrainian investors as a result of the events in Crimea. In those cases, arbitral tribunals with different compositions have, without exception, held that the [BIT] applies to (originally domestic) Ukrainian investments that, due to the incorporation of Crimea have come to lie within the territory of the Russian Federation.

52 Judgment of The Hague Court of Appeal, ¶ 5.7.5.8.

307. In Procedural Order No. 21, dated 5 December 2022, the majority of the Tribunal held:

> 4.4 …the bifurcation of the arbitral proceedings ensured that the Partial Award dealt with Article 12 in terms of jurisdiction and did not discuss Article 12 in terms of quantum because quantum issues had been excluded from that stage of the proceedings. Professor Stanivuković indicates at paragraph 1.3 of her concurring reasons that […] in its quantum award, the Tribunal must "decide which assets are eligible for protection." We are all agreed on that point.

If an asset does not meet the definition of a protected investment within the scope of Articles 1 and 12 of the BIT, it is non-compensable.

308. Accordingly, the principal Article 12 issues are:

(a) whether the Claimants could have "made" investments before 1 January 1992 if the Claimants themselves did not exist until 1998;

(b) whether the Claimants simply "acquired" assets by inheritance rather than "making" investments;

(c) whether the Russian Federation is correct that Article 12 excludes the Upstream Assets discovered or initiated in the Soviet-era by Soviet entities;

(d) whether it is correct that the "corporatization" of the Claimants as State-owned companies left the beneficial ownership of the transferred assets with the State, rather than with the joint stock companies themselves;

(e) whether the FMV of the Claimants' corporate assets must be apportioned between the Claimants and their predecessors in title, and, if so, whether only the portion allocated to the Claimants should be awarded.

1. *The Claimants Could Not Have "Made" Investments Before 1 January 1992 Since None of Them Existed Before 1998*

309. The Claimants argue that they necessarily made all the expropriated investments after they came into existence in 1998. As stated in their Reply on Quantum:

> 229. Logically, the Claimants, as investors, could not have made their investments before their formation. To the extent that any of the assets underlying Naftogaz's

> expropriated investments existed before the Claimants' formation, they were **owned by different legal entities**. As a result, such assets could not be regarded as the Claimants' "investments," since before 1998, the Claimants simply did not exist."[53] (emphasis added)

310. The Claimants are joint-stock companies created no earlier than 1998 to develop businesses formerly operated by Soviet-era State entities. The Claimants contend that they are "different legal entities" from their predecessors in title. The whole point of incorporation is to create a new and distinct corporate personality separate from its shareholders. As such, the new corporations were the sole owners of the assets they acquired. The process was described by the Claimants' legal expert, Dr. Paliashvili, as follows:

> Also the new joint stock company acquires all kind of legal rights: it acquires permits, licences. In our case those were subsoil permits, those were pipeline licences, those were gas storage licences. Mr Geisinger yesterday mentioned the legal rights to permits and licences. And I just want to point out that **under Ukrainian law, the permits are issued only specifically to the applicant, and only the holder of the permits can operate this permit**; they cannot be operated by any third parties. So the legal rights in the permits are in the name of the joint stock company. **When the permit is obtained and when the permit is operated by the holder, by the permit-holder, there is the whole array of payments, mandatory payments that the holder of the permit has to make to the state budget.**[54] (emphasis added)

311. The Respondent's legal expert, Professor Vygovskyy, testified that despite "corporatization", each of the Claimants was not "in fact a new legal entity" but "part of the same legal entity though in a new corporate form":

> Following corporatisation, corporate enterprises did not become the owners of the assets obtained from the state. The state remained the owner of the assets assigned to such enterprises, usually assigned for their use in economic activities. Transfer of the state property of the charter capital of newly created joint stock companies, in particular those created by means of corporatisation, did not constitute alienation of this property from the state property into the private ownership. And if the state property was assigned to a corporatised state enterprise based on the right of economic authority, so this property usually, after corporatisation, was operated on the basis of this right. Therefore, **I concluded that State Joint Stock Company Chornomornaftogaz, which was founded on the basis of the assets of State Production Enterprise Chornomornaftogaz, was not in fact a new**

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53 Reply on Quantum, ¶ 229.
54 Tr., Hearing on Quantum, Day 2, 13:6-20.

> **legal entity, created from scratch in 1998, but part of the same legal entity, though in a new corporate form.**[55] (emphasis added)

The Ruling of the Tribunal Majority on the Effect of Incorporation

312. The Tribunal majority does not accept Professor Vygovskyy's position that the Claimants are not "new legal entities" **but** "**part of the same [Soviet-era] legal entity** though in new corporate form." (emphasis added) Such a novel proposition, for which Professor Vygovskyy cited no persuasive authority, contradicts the basic theory of incorporation and would destroy most of the advantages of incorporation. As explained by Dr. Paliashvili:

> So the joint stock companies where the state was the sole shareholder, as any other joint stock company, can own assets or can operate assets under different legal regimes. And here I have several buckets and I just want to explain each of them. So we already established that the state contributed to joint stock company, into its charter capital, certain assets. **So the joint stock company is the owner of these assets that were contributed to its charter capital unless specifically designated otherwise.** That's the first bucket. Then the joint stock company starts operations. It makes money, it produces revenues, and then **is using these revenues to acquire new assets or to enhance the assets it received from the state**, like make them more modern, modernise, et cetera. So these new assets are in this bucket.[56]

313. Moreover, as explained by Dr. Paliashvili, while the State is the regulator of the new corporations, the State neither retains nor enjoys corporate benefits beyond the usual shareholder rights and remedies.[57] There is no evidence of a "special designation otherwise" (to use

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55 Tr., Hearing on Quantum, Day 2, 98:20-99:14.

56 Tr., Hearing on Quantum, Day 2, 12:14-13:5.

57 Tr., Hearing on Quantum, Day 2, 70:20-71:24:

> THE PRESIDENT: My question is whether, in the circumstances that are being discussed here, the state has any authority other than as shareholder unless it exercises some kind of regulatory power. Is there anything special about the state when it is acting as the sole shareholder?
>
> A. The state wears two hats which are very distinct. One hat is a sovereign, where the state exercises its sovereign rights: it legislates, it establishes regulatory regime, it issues permits, et cetera. And then the other hat is when the state is acting in the civil law sphere, or in this case specifically in the corporate law sphere. So this other hat grants the state the same rights as it would grant to any other shareholder. So when the state exercises its corporate governance rights, it exercises them through the system of corporate governance legislation. And the Ministry of Justice letter said that there is no law that regulates how the state should exercise its corporate governance powers; it's just said it's a general regime for all joint stock companies. Now, when the state wears the hat of a sovereign, the state adopts the laws that can influence Naftogaz, as any other legal entity, through the legislation or through the regulatory normative acts or through all kinds of regulatory actions. So the state wears two hats, but in the law they are very distinguished from each other: they are in separate systems.

Dr. Paliashvili's expression) when the State assets were transferred to the Naftogaz entities in exchange for shares. The benefits of share ownership do not include ownership of the corporation's assets.

314. The most basic principle of corporate law is that the corporation, once established, has a legal personality separate from its shareholders. The Russian Federation relied on the principle of separate corporate personality in *Vladimir Berschader and Moïse Berschader v. Russian Federation*[58] although it takes a contrary position in this case.

315. The assets of the corporation belong to the corporation (unless, as Dr. Paliashvili testified, there is some "special designation" or arrangement not present here). Corporate assets are not owned by the shareholders. Thus, the corporation is not liable for the debts of the shareholders and the shareholders' assets cannot be seized to satisfy the debts of the corporation. The Claimants' legal expert, Dr. Paliashvili, testified in her first report that each Claimant is truly a separate "legal entity":

> 51. Based on my review of the documents available in public sources, and of the documents provided by Claimants, I conclude that **each Claimant is a legal entity**, constituted in accordance with the legislation in force in the territory of Ukraine. Each Claimant has been duly incorporated, and has satisfied the requirements for **operating as a legal entity**, in accordance with the laws of Ukraine in effect at the time of its incorporation and at the material time, and continues to be validly incorporated and in compliance with the said requirements until the present time.[59] (emphasis added)

316. As the Claimants were only created in 1998 and onwards, Dr. Paliashvili expressed the view that their investments could not have been "made" at an earlier date. The Claimants could not have "made" investments before their creation.

> I want to start with the imperative rule of Ukrainian law. Legal capacity of a legal entity arises as of the moment of its establishment. And under Ukrainian law, legal capacity means the capacity of a legal entity to acquire rights and obligations. It

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58 *Vladimir Berschader and Moïse Berschader v. Russian Federation*, SCC Case No. 080/2004, Award, 21 April 2006 (**RLA-107**). Here, the claimants owned shares in a Belgian company that had property expropriated in Russia. The tribunal found that the company may have a cause of action, but that the company's right to pursue a cause of action did not extend to its shareholders.

59 First Expert Report of Dr. Irina Paliashvili, dated 14 September 2017 (hereinafter "**First Paliashvili Report**"), ¶ 51.

> doesn't matter through which mechanism the legal capacity was acquired, but it only arises from the moment the company was established.[60]

317. The majority accepts Dr. Paliashvili's expert evidence. The Claimants were constituted as "new legal entities" and are not "part of the same legal entity" as their predecessors in title.

2. *The "Legal Succession" Issue*

318. The Claimants acquired assets (including Special Permits) from the State and other sources from 1998 until 2014. In part, State assets were acquired at the outset as part of the Claimants' "Charter Capital" for which they paid the Government in shares. The investment was "made" within the meaning of Article 12 of the BIT when the Claimants paid for the assets with their shares. Additional assets were acquired in the ordinary course of business. Orthodox corporate law suggests these assets became protected investments within the scope of Article 1 of the BIT at the time of the investment.

319. The Russian Federation questions whether the Claimants actually acquired any property interest from the State as a result of "legal succession" as described by Professor Vygovskyy, or just some sort of ill-defined operating authority:

> State Joint Stock Company Chornomornaftogaz was created on the basis of pre-existing property and pre-existing scope of rights and obligations **to which it succeeded from its legal predecessor**.[61] (emphasis added)

320. Professor Vygovskyy expanded on what he meant by legal "succession" in his opening presentation in terms of a "complete" transfer to the "legal successor":[62]

> (Slide 9) Universal legal succession was the predominant feature of corporatization, where the **complete scope of rights and obligations is transferred to the legal successor**. And since the moment of the state registration of a joint stock company established within the process of corporatization, **the assets and liabilities of a corporatized entity were transferred to this newly formed joint stock company and that joint stock**

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[60] Tr., Hearing on Quantum, Day 2, 14:9-16.
[61] Tr., Hearing on Quantum, Day 2, 99:14-18.
[62] Tr., Hearing on Quantum, Day 2, 95:9-19.

> **company became the legal successor in respect to such rights and obligations of the corporatized enterprise**. (emphasis added)

321. Despite this general description (with which the Claimants agree), Professor Vygovskyy advanced the view that a different rule applies where the "corporatized entity" is owned by the State. In that case, the State-owned entity does not acquire ownership of "transferred assets". Ownership remains with the State and the corporations only operate the assets by delegation of the State's "economic authority".

322. The Claimants contend that Professor Vygovskyy's theory of "legal non-succession succession" is contradicted by the relevant Ukrainian case law, which establishes that once the State transferred assets to the Joint Stock Company, the State no longer had a proprietary interest in those assets.[63] Thus, in cross-examination, Professor Vygovskyy was asked about an apparent

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[63] *See, e.g.*, Judgment of the Commercial Court of Kyiv City in Case No. 910/10255/13, 27 June 2013, T-0005-T-0006 (**CE-1263**):

> From the time of the transfer of property contributions to the company, the founders of the joint-stock company cease being the owners of the property that makes up their contributions and instead become owners of shares issued by the company.
>
> * * * * *
>
> [A] joint-stock company in which the state owns 100% of the company shares the state - of an acquired property rights - is entitled to participate in the management of NJSC Naftogaz … and receive dividends from its operations; however, **the owner of the property contributed to the authorized capital of NJSC Naftogaz of Ukraine is the latter, except for the property made available to it by the state for use and which has not been contributed to the authorized capital of the company**.
>
> * * * * *
>
> [T]he property contributed by the defendant named in the original claim [Naftogaz] as well as the property acquired, manufactured, or obtained by [UGV] from other sources … Is under the ownership of [UGV], while…Naftogaz of Ukraine in turn owns only corporate rights in the authorized capital of [UGV].

See also Commercial Court of Kyiv, Judgment in Case No. 910/18227/13, 25 December 2013 (**CE-1231**), which shows the same discussion about ownership found in Judgment of the Commercial Court of Kyiv City in Case No. 910/10255/13, 27 June 2013 (**CE-1263**).

See finally Ruling of the High Administrative Court of Ukraine in Case No. 826/4842/14, 31 March 2015, T-0004 (**CE-1265**):

> **[S]ince 1998 these premises are not under state ownership** because the building in dispute became the property of [NJSC] Naftogaz of Ukraine after being contributed to its authorized capital stock and later [it] became the property of PJSC [UGV] after being contributed to the authorized capital stock of JSC [UGV]

inconsistency between his evidence of "legal non-succession succession" and his academic writing where he wrote:[64]

> The main function of the charter capital, as follows from Part 1 of Art. 14 of the Law [on Joint Stock Companies], is to determine the minimum size of the company's property, which guarantees the interests of its creditors. It should be emphasized that the national legislation has adopted the nominal concept of charter capital, where it is primarily an indicator, the value of which is associated with certain legal consequences, rather than a set of real property that must be owned by the company during its existence; **the property that the founders (shareholders) transfer to a joint stock company as a payment for the shares, becomes the property owned by this company, which it has the right to dispose of at its own discretion**. (emphasis added)

323. Professor Vygovskyy was cross-examined on his text as follows:

> Q. Well, this is a chapter on the "Capital of Joint-Stock Companies." Is there anywhere in this paragraph where you specifically refer to this exception that you state to this for when the state is sole shareholder of the JSC?
>
> A. Well, you see, this law -- this book in particular was commentary of the existing provisions in the Law on Joint Stock Companies. **And since there are no and there were no specific provisions as to the legal regime of property used by state joint stock companies**, so there is nothing in this book, there is no commentaries in this book on this issue.
>
> Q. Okay, thank you.[65] (emphasis added)

324. However, Professor Vygovskyy's acknowledgment that "[t]here were no specific legislative provision as to the legal regime of property used by State joint stock companies" left his opinion essentially bereft of any supporting authority.

325. Professor Vygovskyy agreed that ordinarily when founders transfer assets to a corporation in exchange for shares, there is a presumption the founders intended "the property" to pass. However, he testified that in the case of State entities there is no such presumption.[66] Where the

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64 O Vygovskyy, *Novelties of Corporate Legislation: Academic and Practical Commentary on the Law of "on Joint Stock Companies"* (2009) (**CE-1267**).

65 Tr., Hearing on Quantum, Day 2, 136:21-137:8.

66 Tr., Hearing on Quantum, Day 2, 155:15-156:11:

> A. Yes. I meant that if we speak about establishment of an ordinary, let's say, joint stock company by private persons, by legal entities, for example, by individuals, so these relations are covered by Law on Commercial Entities, then applicable by Civil Code, Commercial Code of Ukraine. So these are civil law relations, because in this case ordinary, standard joint stock companies are established by private entities. In case of

State is the sole shareholder, civil law relations do not apply. Rather, the situation should be looked at through the lens of either public law or administrative law.

326. In effect, Professor Vygovskyy characterizes the post-Soviet situation in the case of State-owned corporations in terms used by Dr. Paliashvili to describe the Soviet system where "all the assets were owned by the state … and mostly operated by state enterprises."[67]

The Tribunal Majority Ruling on "Legal Succession" of Property Acquired by the Claimants from the State

327. The Tribunal majority accepts the evidence of Dr. Paliashvili that the "legal succession" of the Claimants to State property by way of exchange for shares was a real transfer of the complete "property interest".

328. The Tribunal majority rejects Professor Vygovskyy's view that the purported "legal succession" was not in fact a "succession" but essentially a transfer of operating rights. As Dr. Paliashvili testified, "the joint stock company is the owner of these assets that were contributed to its charter capital unless specifically designated otherwise"[68] and, as mentioned, here there are no designations otherwise.

329. Professor Vygovskyy's theory of "legal succession" is in fact a denial of "succession" because the property interest allegedly transferred remains with the State transferor and does not "succeed" to the joint stock company. But this argument, in the majority view, is:

> Naftogaz Group, in particular in relation to state joint stock companies which were established on the basis of resolution of Cabinet of Ministers of Ukraine or other competent state authorities within the administrative order, within the regulatory powers of the state, I think that in this case we deal not with civil law relations. These are public law relations, because these companies were established by the will of the state, within the public powers and authorities of the state. So I think that this is a case for public law relations, and there is no such presumption in this relation, presumption of presence of this express willingness [to transfer this property into ownership].

[67] Tr., Hearing on Quantum, Day 2, 7:19-24: "Until 30-plus years ago, under the Soviet system, all the commercial assets in the Soviet Union were owned by the state. In this included everything: land, real estate, vehicles, machinery, absolutely everything was owned by the state. Private entrepreneurship was a crime." *See also* Tr., Hearing on Quantum, Day 2, 8:3-10: "Locally, this property was assigned to the so-called "state enterprises" and I'm now pointing at those state enterprises. The state enterprises did not own anything; they only operated the assets which were assigned to them by the state. I started my career in the late 1980s in Kyiv as an in-house lawyer with one of such state enterprises, so I'm very familiar with this system."

[68] Tr., Hearing on Quantum, Day 2, 12:21-23.

(a) inconsistent with Professor Vygovskyy's own general description of legal principle;

(b) not supported by legal authority;

(c) a denial of the basic doctrine of separate corporate personality but only in cases where the state is the shareholder; and/or

(d) a theory that the "investments" acquired by the Claimants were bereft of any investment value at the time of acquisition because, according to Professor Vygovskyy, value continues to be attributed to the State and not to the joint stock company, despite the fact (accepted by Professor Vygovskyy) that the joint stock company is the legal owner.[69]

330. In the majority view, the Naftogaz corporations "bought" the Soviet-era assets with their shares. The State exchanged ownership rights for shareholder rights. At that stage, and not before, the assets became protected investments within the scope of Article 1 of the BIT.

331. The Russian Federation in its Sur-Rebuttal on Quantum states:

> The Respondent's case is that, since the creation of the Claimants was simply a state-controlled restructuring of state-owned property, **the Claimants *themselves* did not "make" any investment when they received property from this state upon their establishment**. To use the analogy made in the Rejoinder on Quantum, when this state merely moves assets **from its right pocket to its (newly created) left pocket, the left pocket cannot claim to have made an investment**.[70] (emphasis added)

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

333. There is no evidence of any "specific designations" in the case of the Claimants' assets acquired from the State to upset the usual rule of transfer of ownership. Professor Vygovskyy's

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69 Tr., Hearing on Quantum, Day 2, 12:14-13:20.

70 Sur-Rebuttal on Quantum, ¶ 67.

general theory of "legal non-succession succession" is at odds with the authorities on which he relied, as illustrated in his cross-examination:

> Q. Professor Vygovskyy, you quoted this case. You quoted this case to support your view that there needs to be express willingness [of the state to part with ownership]. And in this same case, the court, literally in the same sentence, said that that express willingness is presumed. So I guess we could at least agree that in this court case that you cite, it says that there is presumption of the willingness of the founders to transfer such property directly into the company's ownership; correct?
>
> A. This presumption exists only in case of civil law relations, but not in case of public law relations related to establishment of state entities.[71]

Nevertheless, Professor Vygovskyy was unable to point to any relevant legislative provision in the area of public law to support his proposed differentiation.

334. On the other hand, Dr. Paliashvili's evidence is corroborated by the corporate charters of the Claimants—for example, see:

> 4.2. The Company is **the successor** to the Chornomornaftogaz state production enterprise for oil and gas production, storage, and transportation.
>
> 4.3. **The Company's property consists of fixed assets and working capital owned by it** as well as assets whose value is reflected on the independent balance sheet of the Company.
>
> 4.4. **The Company owns:**
>
> − **property transferred into its ownership by the Founder;**
>
> − products made by the Company in the course of commercial operations;
>
> − income generated by its own commercial operations (including foreign trade provided for by these Articles of Association);
>
> − dividends accrued on shares (membership interests, equity units) that have been transferred to or are owned by the Company;
>
> − inventions, patents, or technologies resulting from the operations of the Company;
>
> − other property acquired in a way that does not contravene the law.
>
> The risk associated with damage to or loss of its own property as well as property made available to it for use shall be borne by the Company. The Company shall

[71] Tr., Hearing on Quantum, Day 2, 141:19-142:6.

> possess, use, and dispose of property belonging to it under the right of ownership in accordance with its purpose and objects.[72] (emphasis added)

335. In the view of the Tribunal majority, Dr. Paliashvili's testimony on these points should be preferred to that of Professor Vygovskyy because:

(a) he offers no support from the legislation or the case law for his "non-succession succession" theory;

(b) his theory is contradicted by the documents incorporating the Claimants;

(c) his concept of continuing State ownership contradicts the fundamental premise of corporate personality, which is that the transferor gets shares and the company owns the property in the transferred assets;

(d) there is no evidence that the transfer of assets to the joint stock companies was a sham nor that as a matter of law the property interest remained in the State transferor and rely on an "operating authority" conferred on the joint stock company.

336. Accordingly, looking only to assets acquired by the Claimants since their incorporation, and with full recognition of the 1 January 1992 "backstop" provided by Article 12 of the BIT, the Tribunal majority proceeds to the issue of quantification.

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[72] Charter of National Joint-Stock Company "Chornomornaftogaz", 18 August 1998, T-0003 (**CE-1229**). *See also* Charter of PJSC "State Joint-Stock Company "Chornomornaftogaz", Arts. 3.1, 3.6, 6 March 2013 (**CE-128-Am**):

> 3.1. **The Company is considered established and acquires the rights of a legal entity** from the date of its state registration.
>
> * * * * *
>
> 3.6. **The Company is the owner of:**
>
> - **property transferred to it by the founder and shareholder into ownership, as a contribution to the charter capital**;
>
> - products produced by the Company as a result of economic activity;
>
> - income received from own economic activity (including foreign economic activity provided by this Statute);
>
> - inventions, industrial designs, names, other objects of intellectual property rights, including technologies obtained as a result of the Company's activities. (emphasis added)

PART 9 - QUANTIFICATION OF UPSTREAM ASSETS

337. The Upstream Assets represent about 70 percent of the value of the Claimants' claims. The Claimants assess their value at USD 3,606,000,000 (Ukrainian Scenario) or USD 3,321,000,000 (Russian Scenario).[73]

338. The Upstream Assets consist of "rights to engage in commercial activity" within the scope of Article 1.1(d), specifically:

(a) Naftogaz's Special Permits [74] acquired between 24 December 1999 and 27 December 2013;[75] and

(b) UGV's participatory interest in Joint Venture with CNG, between 24 December 1999 to 27 December 2013.[76]

339. As stated, the Upstream Assets are defined by the Claimants as (1) "interests in special permits" and (2) "investments in the underlying oil and gas fields and prospects."[77]

The Ruling of the Tribunal Majority on the Relevance of Sunk Costs

340. Our colleague, Professor Stanivuković, takes the view that Upstream Assets should be valued by apportioning as between the Claimants and their State predecessors in title the sunk costs in their historic exploration and development. She points out that under the Ukrainian Constitution, the land, its subsoil, and other natural resources within the territory of Ukraine, as well as its continental shelf and the exclusive maritime economic zone, are owned by the people of Ukraine.[78] State ownership of the assets is also confirmed in the Special Permits for the use of the Upstream Assets:

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[73] Respondent's Opening Presentation, Hearing on Quantum, slide 59.
[74] *See, e.g.*, Special Permit No. 4125, 5 April 2012 (**CE-109**).
[75] Claimants' Opening Presentation, Hearing on Quantum, slide 24.
[76] Claimants' Opening Presentation, Hearing on Quantum, slide 25.
[77] Memorial on Quantum, iii, 21, ¶ 53.
[78] First Paliashvili Report, ¶ 67.

> The subsoil belongs to the exclusive property of the people of Ukraine and shall be transferred to other parties for use only.[79]

341. The majority agrees that the underlying resources are owned by the State. However, it notes that the Claimants make no claim to the underlying assets. Their "Upstream" investments are permits "for use only", to exploit the resource and to profit thereby, as well as to invest pursuant to the licenses in developing the "underlying oil and gas fields and prospects." The experts agree that the appropriate valuation methodology for Upstream Assets is the DCF method, derived from the analysis of present and future net income. In the view of the Tribunal majority, the source of past "sunk costs" is of no relevance to the quantification of current and future net income and the other steps in the DCF valuation.

342. The Claimants' claim with respect to the Upstream Assets is based squarely on Article 1.1(d) of the BIT which explicitly protects:

> d) rights to engage in commercial activity, including rights to the exploration, development and exploitation of natural resources.

343. In buying from the Government the rights to "exploration and development" of the oil and gas reserves, the Claimants sought to generate profits from their "exploitation"; it is the anticipated income stream from that "exploitation" which is at the basis of the valuation of the claim. The "rights" were purchased in the way typical of the extractive industries, namely by fees and royalties and other terms of the respective licenses.

344. Our colleague, Professor Stanivuković, provides a list of economic activities which she states "can be considered as 'making an investment' in an oil and gas field":[80]

(a) regional geological exploration works (involving basin analysis, play analysis and prospect analysis),

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[79] *See, e.g.*, Special Permit No. 3907 (Palasa Area), Art. 6(1), 22 December 2010 (**CE-83**).

[80] Dissenting Opinion of Professor Maja Stanivuković, dated 8 February 2023 (hereinafter "**Dissenting Opinion**"), ¶ 23.

(b) drilling wells (prospecting or exploration drilling and appraisal drilling),

(c) development (drilling additional wells, constructing platforms, laying of intra-field pipelines, pipelines to shore, constructing compressor stations, onshore and offshore gas processing facilities, etc.), [81] and

(d) production (management and control).[82]

345. The evidence established that the Claimants, since 1998, have invested in the development of the resource (which is what the Special Permits contemplated). However, with respect, the approach adopted by our colleague conflates a claim for the value of the Special "Use" Permits with a claim to the value of the underlying resource itself.

346. The Claimants' quantum expert, GCA, valued the Upstream Assets based on their estimate of the future net income to be derived from the production and sale of hydrocarbons produced in those oil and gas fields, using a DCF analysis.[83] GCA observes that exploration costs are meaningless. For example, in 1982, BP spent USD 1 billion exploring and developing in Alaska and never got a drop of oil, resulting in a total write-off.[84]

347. Our colleague points out in the Dissenting Opinion of Professor Dr. Maja Stanivuković to the Final Award, dated 8 February 2023 (the "**Dissenting Opinion**"), that the GCA approach proceeded:

> without specifying the value of the interests in special permits on the one hand, and the value of the investments in the underlying oil and gas fields, and prospects, on the other hand. GCA's valuation fails to distinguish between the value of these two categories. It also fails to distinguish between the value of investments made before and after 1 January 1992. As a matter of fact, GCA's valuation does not value the Claimants' investments in oil and gas fields and prospects at all, but rather the value of the Upstream Assets as a package, *i.e.*, the estimate of the future net income to be derived from the estimated production and sale of hydrocarbons produced in those oil and gas fields, based on a DCF analysis. There is no

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81 Presentation of Dr. Grigory Vygon, Hearing on Quantum, slide 8; First GCA Report, ¶¶ 160, 200, Appendix 7, ¶¶ 6, 65, 73, 134, 151, 152, 325.

82 First Expert Report of Vygon Consulting, dated 29 May 2020 (hereinafter "**First Vygon Report**"), 14.

83 First GCA Report, ¶ 14.

84 First GCA Report, ¶ 43.

> indication of the value of the investments made to enable such production or of the amount paid by the Claimants to acquire the right to such production.[85]

348. In the majority view, there were not "two categories" and there was no need to make the differentiation our colleague suggests. GCA assessed the present value of the "Use" permits as of the Valuation Date. There was no independent quantification of development costs incurred by them or their predecessors in title because such costs were incurred under the terms of the Special "Use" Permits. A separate claim for "sunk costs" under the "Use" permits would have been double counting.

The Ruling of the Tribunal Majority on Dr. Vygon's Concern About Lack of Evidence of Exploration Costs

349. In pursuit of his "historical cost" theory, Dr. Vygon looked at Soviet-era costs relying on undisclosed records of Rosgeolfond,[86] the accuracy of which is challenged by the Claimants. His position is that the Claimants' predecessors incurred development costs and these should be deducted from the present value of the "Use" Permits. The Respondent argues that in the absence of proof of the precise portion properly allocated post-1992 to the Claimants, the Claimants have failed to discharge their burden of proving the quantum of their claim. However, as noted above, the Claimants seek the FMV of the Special "Use" Permits as of the Valuation Date. Russia does not deny the existence of the Special Permits. Their quantum experts agree that the proper

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85 Dissenting Opinion, ¶ 20. *See* Rejoinder on Quantum, ¶ 353; Sur-Rebuttal on Quantum, ¶¶ 7, 143.

86 First Vygon Report, 83. Here, Dr. Vygon says that:

> Exploration works performed before 01.01.1992 can be divided into two groups:
>
> Exploration surveys, which are aimed at understanding the geological structure of sedimentary basins and their parts, identifying oil and gas potential and priority areas for prospect analysis and detailed surveys carried out with a view to preparing the identified structure for prospecting drilling […];
>
> Prospecting and appraisal drilling. This stage of exploration works could be allocated to the specific fields […].

Furthermore, he states:

> The actual costs of exploration works in Soviet roubles are converted into US dollars at the official average exchange rate during the year of work performance;
>
> The costs of these works in US dollars are then revaluated in prices as of the VD, by indexing the costs in US dollars to account for inflation.

methodology to assess their value is the DCF method, which is based on expected future income, not on past "sunk costs".

350. In the majority view, the entire "historical cost" argument is misconceived, and the fact the Tribunal lacks the evidence to make such an apportionment in precise terms between Soviet and post-Soviet expenditures is irrelevant to the correct issue; that question, rather, is what were the Special "Use" Permits worth in an open and unrestricted market on the Valuation Date, 17/18 March 2014?

In the Majority View, the Claimants Actively "Made" an Investment in the Special Permits

351. It will be recalled that The Hague Court of Appeal declared the effect of Article 12 of the BIT to be as follows:

> 5.7.5.8 Therefore, the [BIT] does not apply to investments made before 1 January 1992, meaning that Naftogaz et al. cannot obtain protection under the [BIT] if they [*i.e.*, the Claimants Naftogaz, *et al*.] made their investments before that date. It should be borne in mind, however, that investments may count as having been made after 1 January 1992 if after 1992 Naftogaz c.s. bought (parts of) investments made by others or if after January 1, 1992 they made an expansion to investments made by others. In the latter case, the [BIT] applies only to the expansion made after 1 January 1992.

352. The Claimants make no claim to having "made" investments before 1 January 1992. Their claim relates to the permits issued after 1998 that were valid and existing at the date of the unlawful expropriation.[87] Listed below (a list whose accuracy is agreed to by colleague Professor

[87] The evidence accepted by our colleague Professor Stanivuković is as follows:

		Circumstances of Acquisition	Date of Acquisition
NJSC Naftogaz			
	Palasa structure	Application for special permit and acquisition of special permit	22 December 2010
	Luchytskoho	Application for special permit and acquisition of special permit	5 April 2012

	Albatros and Prybiina	Application for special permit and acquisition of special permit	17 January 2013
Chornomornaftogaz			
	Shmidta	Application for special permit and acquisition of special permit	11 April 2001
	Dzhankoy	Application for special permit and acquisition of special permit	24 December 1999
	Semenivske	Application for special permit and acquisition of special permit	6 January 2000
	Holitsynske	Application for special permit and acquisition of special permit	6 January 2000
	Zadornenske	Application for special permit and acquisition of special permit	24 March 2000
	Hubkina	Application for special permit and acquisition of special permit	12 August 2003
	Odeske	Application for special permit and acquisition of special permit	12 August 2003
	Bezimenne	Application for special permit and acquisition of special permit	12 August 2003
	North Kerchenske	Application for special permit and acquisition of special permit	29 December 2004
	Shtormove	Application for special permit and acquisition of special permit	9 December 2003
	West Holitsynske	Application for special permit and acquisition of special permit	21 January 2009

Stanivuković) are all of the licenses and permits which were acquired post-1998 by "an array of payments". As Dr. Paliashvili put it:

> When the permit is obtained and when the permit is operated by the holder, by the permit-holder, there is the whole array of payments, mandatory payments that the holder of the permit has to make to the state budget.[88]

353. The fees for the Special Permits were paid. The Claimants' investments in Upstream Assets were therefore paid and "made" after 1 January 1992.

The Tribunal Majority on Compliance with Article 12 of the Treaty

354. It is true as the Russian Federation contends, that the date of 1 January 1992 was inserted as a backstop,[89] "chosen in order to exclude investments made during Soviet times, in accordance with the Russian Federation's general BIT practice with former USSR states."[90] The Russian Federation cites the *traveaux préparatoires* dealing with the Russian Federation's BITs with Uzbekistan and Azerbaijan. The Russian Federation contends, and our colleague Professor Stanivuković agrees, that unless the Tribunal discounts the present value of the Special

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	Subbotina	Application for special permit and acquisition of special permit	27 December 2013
	Arkhanhelske	Application for special permit and acquisition of special permit	18 December 2007
	East Kazantypske	Application for special permit and acquisition of special permit	21 July 2009
	North Buhanatske	Application for special permit and acquisition of special permit	13 January 2011
Ukrgasvydobuvannya	Conclusion of the joint activity agreement with Chornomornaftogaz	24 October 2000	

88 Tr., Hearing on Quantum, Day 2, 13:17-20.
89 Rejoinder on Quantum, ¶¶ 215 *et seq*.
90 Rejoinder on Quantum, ¶ 251.

Permits to account for development costs incurred in the Soviet-era and between 1992 and their acquisition by the Claimants, there is non-compliance with Article 12 and the Tribunal deprives itself of jurisdiction *ratione materiae*.

355. The Tribunal accepts as accurate the Respondent's explanation of the intent of Article 12 of the BIT. However, in the majority view, Article 12 does not require an artificial disaggregation of an asset's present day value into slices of various past contributions to the underlying resources because the Claimants make no claim to the underlying resources. The Russian Federation's own expert, Dr. Vygon, testified that in the real world, oil and gas assets are valued for **what they are worth at the time of acquisition** without regard to their cost history:

> THE PRESIDENT: Alright. Dr Vygon, I just have one fairly basic question about the approach here, because I understand that your firm does a lot of consulting work in the oil industry. If, in the ordinary case, big oil company A wishes to purchase upstream assets from big oil company B, in making that valuation, do you look at the history or just the value of the assets as they are?
>
> DR. VYGON: In case, **in the market conditions**, company A would be buying assets from company B, then naturally the value of those assets will be estimated at the valuation date, **without the history**.[91] (emphasis added)

356. In the view of the Tribunal majority, FMV requires a *hypothetical* transaction under "market conditions". The question is how much would a Willing Buyer pay for the assets (*e.g.*, for the Special "Use" Permits) to a Willing Seller in an "open and unrestricted market",[92] which is the "hypothetical" situation contemplated by the Tribunal's question and Dr. Vygon's answer. The Claimants' investment in the Upstream Assets must be valued "without the history" in accordance with orthodox FMV methodology and the acknowledgment of Dr. Vygon.

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91 Tr., Hearing on Quantum, Day 3, 70:18-71:5.

92 American Society of Appraisers, International Glossary of Business Valuation Terms, "Fair Market Value", 44 (**CE-912**):

> …the price, expressed in terms of cash equivalents, at which property would change hands between a hypothetical willing and able buyer and a hypothetical will and able seller, acting at arms length in an open and unrestricted market, when neither is under compulsion to buy or sell when both have reasonable knowledge of the relevant facts.

357. In pursuit of discounting present "use" value by subtracting earlier development costs, the Russian Federation relies on the analogy of a house built before 1992 but improved thereafter. Specifically, it says:

> 309. For instance, if the construction of a house commenced in 1991 was completed in 1993, the house as a whole cannot qualify in its entirety as a protected investment. What could potentially qualify as a protected investment in such a scenario is only the parts of the house built after 1 January 1992 (provided the new injections of money made after that date are sufficiently identified and proven, and provided, of course, that all other conditions of a protected investment under the BIT are met), to the exclusion of what was made before 1 January 1992. Put differently, any "fresh" post-1992 investment would not have the effect of transforming the entire investment (including the pre-1992 portion thereof) into a protected investment. In order for the investment to qualify in its entirety as a protected investment under the BIT, it must begin after 1 January 1992, and not only be completed after this date.[93]

358. Of course, in terms of the Upstream Assets, the Claimants are not "buying" the house, they are renting the use of it. The cost of building or re-modeling the house and who paid what and when is not relevant to its present **lease** value in the eyes of the potential leaseholder. The "Use" assets were acquired after 1998. The limiting provisions of Article 12 have no relevance to the Upstream Assets, in the majority view.

359. Since the house analogy is based on the reasoning in *Gold Reserve*, it is worth recalling that in *Gold Reserve* itself, the claimant's USD 300 million investment triggered BIT protection valued in an award of USD 713 million (plus costs and interest) against Venezuela,[94] *i.e.*, more

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[93] Rejoinder on Quantum, ¶ 309. If the house burns down, the insurance company on the Russian Federation's theory need only pay the homeowner the value of his or her improvements, not the present FMV of the asset.

[94] *Gold Reserve Inc. v. The Bolivarian Republic of Venezuela* [2016] EWHC 153 (Comm), Judgment, 2 February 2016, ¶ 50 (**RLA-108**) (hereinafter "***Gold Reserve Inc. - Judgment***"):

> This conclusion appears to me to be consistent with the object and purpose of the BIT. The preamble records that the promotion and protection of investments of investors of one Contracting Party in the territory of the other Contracting Party will be conducive to the stimulation of business initiative and to the development of economic cooperation between them. **Concluding that GRI's contribution of [USD] 300 million to the Brisas Project in Venezuela enables it to qualify as an investor will serve to promote investment in Venezuela by Canadian enterprises.** The investment of [USD] 300 million by a Canadian enterprise in a Venezuelan mining project which it owns or controls indirectly is surely the very sort of investment which the BIT was designed to encourage. (emphasis added)

than double the amount invested by Gold Reserve Inc. The issue in an FMV analysis is, as its name suggests, **present and current** FMV.

360. Many of the cases relied upon by the Russian Federation to illustrate lack of investment involve jurisdictional objections *ratione personae* to "front companies" created for the sole purpose of BIT jurisdiction, while others involve indirect claims under a BIT.[95] Such fact situations have no relevance to the valuation of the Claimants' Special "Use" Permits.

361. The attempt to introduce "investment history" into the valuation exercise is antithetical to the whole theory and practice of FMV. There are numerous investor-State awards in respect of concessions in the oil and gas fields and mining deposits which are based on the FMV of the concessions (not the underlying resources) at the Valuation Date.[96] Such concessions are the

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95 *Bolivarian Republic of Venezuela v. Serafin García Armas and Karina García Gruber*, Cour d'Appel de Paris, Registration No. 15/01040, Decision, 25 April 2017 (**RLA-30-Am**).

See Clorox Spain S.L. v. Bolivarian Republic of Venezuela, PCA Case No. 2015-30, Award, 20 May 2019 (later set aside by the Swiss Supreme Court) (**RLA-32-Am**). Clorox International is a U.S. company that invested in Venezuela in 1990, creating Clorox Venezuela. In 2011, Clorox International transferred its shares in Clorox Venezuela to a newly formed Spanish corporation, Clorox España. Clorox España then commenced an arbitration against Venezuela. The tribunal found that Clorox España was created only to take advantage of the Spain–Venezuela BIT of 1995, and that Clorox España itself did not invest in Venezuela.

See also Gold Reserve Inc. - Judgment (**RLA-108**). This was a case involving enforcement of an ICSID award. Gold Reserves (Venezuela) held rights to a Venezuelan mining concession. That company was a subsidiary of Gold Reserves (U.S.). GRI acquired Gold Reserves (U.S.) in a share swap. The concession then came under the control of GRI (Canada). The Canadian entity was used so that it would have the benefit of the Canada–Venezuela BIT. The Canadian corporation raised USD 300 million and invested it in the Venezuelan mining concession. In *obiter dicta*, Teare J. found that the passive ownership of the mining concession created by the share swap would have been insufficient to receive protection under the BIT. However, because GRI (Canada) invested [USD] 300 million, it had made an investment under the BIT.

See also Standard Chartered Bank v. United Republic of Tanzania (I), ICSID Case No. ARB/10/12, Award, 2 November 2012 (**RLA-110**); *Alapli Elektrik B.V. v. Republic of Turkey*, ICSID Case No. ARB/08/13, Excerpts of Award, 16 July 2012 (**RLA-111**); *Ruby Roz Agricol and Kaseem Omar v. Republic of Kazakhstan*, UNCITRAL, Award on Jurisdiction, 1 August 2013 (**RLA-113**) (hereinafter "***Ruby Roz***").

96 *See*, *e.g.*, *Bear Creek Mining Corporation v. Republic of Perú*, ICSID Case No. ARB/14/21, Award, 30 November 2017 (**CLA-177**); *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016 (**CLA-182**); *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, 5 October 2012 (**CLA-187**) (hereinafter "***Occidental***"); *Phillips Petroleum Co. Iran v. The Islamic Republic of Iran, The National Iranian Oil Company*, Iran-US Claims Tribunal, Award No. 425-39-2, 29 June 1989, 79 (**CLA-219**) (hereinafter "***Phillips***"); *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014 (**CLA-270 / RLA-45**); *Sapphire International Petroleum Ltd. v. National Iranian Oil Company*, Award, 15 March 1963 (**RLA-44**); *Chevron Corporation and Texaco Petroleum Corporation v. Republic of Ecuador*, PCA Case No. 2007-02/AA277, Interim Award, 1 December 2008 (**RLA-97**); *Mobil Exploration and Development*

staple of the extractive industries. The parties to the BIT cannot have intended to exclude investments in the extraction industries from protection thereunder, and the Upstream Assets are to be valued precisely as "rights to prospecting, development and exploitation of natural resources" designated for protection in Article 1.1(d) of the BIT.

362. The question before the Tribunal is the value of the Claimants' Special Permits in "an open and unrestricted market" on the Valuation Date, a question to which the investment history from Soviet times and other expenditures before the Valuation Date are both irrelevant.

PART 10 - IS THE VALUE OF THE "USE" OF UPSTREAM ASSETS TO BE ASSESSED ON THE VALUATION DATE UNDER THE UKRAINIAN SCENARIO OR RUSSIAN SCENARIO?

363. The Claimants' primary position is that on the Valuation Date, the Willing Buyer's price would assume that the Claimants' assets "would continue to operate within the Ukrainian energy market and in accordance with Ukrainian law."[97] The Respondent disputes the choice of Ukrainian law, stating that this "assumption is unrealistic and ignores the very facts on which the Claimants purport to rely."[98] The Respondent submits that the Willing Buyer would assume that it was purchasing assets in the Russian energy market and in accordance with Russian law.[99]

364. The choice of law changes the valuation of some of the Claimants' assets.[100] Importantly, Russian law would lower certain aspects of the Upstream Assets' valuation with cascading effects on the Midstream Assets. The choice of law at issue also impacts the Transition Period, which ended on 31 December 2014. More fundamentally, however, according to the Respondent the choice of law issue also affects the full reparation standard under *Chorzów Factory*,[101] a standard, it argues, that must not be applied in the abstract but rather based on the concrete facts at the time of the illegal taking.

Inc. Suc. Argentina and Mobil Argentina S.A. v. Argentine Republic, ICSID Case No. ARB/04/16, Decision on Jurisdiction and Liability, 10 April 2013 (**RLA-99**).

97 Memorial on Quantum, ¶ 51.

98 AmCM, ¶ 412.

99 AmCM, ¶ 413.

100 AmCM, ¶ 414.

101 AmCM, ¶¶ 399 *et seq*; Reply on Quantum, ¶¶ 37 *et seq*; Rejoinder on Quantum, ¶¶ 526 *et seq*.

1. *Factual Dispute: Applicable Law on the Valuation Date*

365. The Claimants assert that as "a matter of basic fact" the Valuation Date is before Crimea's annexation because technically although the annexation was rumoured it had not yet been made official.[102] As of the Valuation Date, "a number of possibilities existed for Crimea".[103] The Claimants further argue that the majority held in the Partial Award that the expropriatory acts took place "from and after 18 March 2014."[104]

366. The Respondent highlights the timeline of the incorporation into the Russian Federation of Crimea, which started in mid-February 2014,[105] following the deposition of Ukraine's former President Victor Yanukovich.[106] The Respondent further says that were the Tribunal to find that Ukrainian law applies, this would create an "inextricable contradiction" with the Claimants' position that "the investments were made in the territory of the Russian Federation for the purpose of the application of the BIT".[107]

The Ruling of the Tribunal Majority on Applicability of Russian Law on the Valuation Date

367. The majority agrees with the Respondent that although technically "a number of possibilities existed for Crimea", its incorporation into the Russian Federation was merely a formality and all but certain (*i.e.*, beyond a mere "probability") on the Valuation Date. The majority also agrees that applying Ukrainian law would contradict the BIT, since the Claimants' case presupposes the investments to have been made in the Russian Federation.

2. *Is the Russian Federation Entitled to Benefit From its Wrongdoing?*

368. The Claimants contend that the Russian Federation's invasion of Crimea inflicted loss on the value of their assets and that Russia should not benefit from its wrongdoing.[108] Adverse impacts include subjecting the assets to a less favourable legal and regulatory framework[109] and

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102 Reply on Quantum, ¶¶ 118-120.
103 Reply on Quantum, ¶ 121.
104 Claimants' Opening Presentation, Hearing on Quantum, slides 81-82, *citing* Partial Award, ¶ 231.
105 Rejoinder on Quantum, ¶ 561.
106 Mikhail Zygar, All the Kremlin's Men: Inside the Court of Vladimir Putin (2016) 274-279 (**CE-719**).
107 Rejoinder on Quantum, ¶ 565.
108 *See, e.g.*, Reply on Quantum, ¶ 149.
109 Reply on Quantum, ¶¶ 123-127, 149.

the creation of social and economic upheaval.[110] More particularly, the Claimants say the claimed losses are "*solely* the result of the Russian Federation's wrongful conduct and therefore cannot be used as a basis to reduce the valuation of Naftogaz's investments."[111] The Tribunal is obligated to remove the effects of the host State's actions where those actions have depressed an investment's value.[112] On this basis, the tribunal in *Phillips Petroleum v. Iran* held that, "it is well established that the Tribunal must exclude from its calculation of compensation any diminution of value resulting ... from any prior threats or actions by the Respondents related thereto."[113] As the *Phillips Petroleum v. Iran* tribunal stated:

> …the Tribunal would not be warranted in ignoring the effects on the value of the property of the Iranian Revolution as they would have been perceived by a reasonable buyer in September 1979. [114]

369. While the Russian Federation[115] states that "[o]nly the value depressing impact of the act of expropriation itself must be discounted"[116] and "any elevated risk of expropriation—but only that risk—must be discounted from the country risk premium",[117] the Russian Federation also

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110 Reply on Quantum, ¶ 59.

111 Reply on Quantum, ¶ 125.

112 Reply on Quantum, ¶ 125; Memorial on Quantum, ¶ 44, *quoting American International Group Inc. v. Islamic Republic of Iran*, Iran-US Claims Tribunal, Award No. 93-2-3, 19 December 1983, 96, 107 (**CLA-176**) ("[A] state should not benefit from wrongful acts taken against an investor's asset "which actions may have depressed its value.").

113 Reply on Quantum, ¶ 125; *Phillips*, ¶ 135 (**CLA-219**). *See also Occidental*, ¶ 546 (**CLA-187**).

114 *See Phillips*, ¶ 135 (**CLA-219**). Respondent's Opening Presentation, Hearing on Quantum, slide 49.

115 Respondent's Opening Presentation, Hearing on Quantum, slides 46-47.

116 *See Ebrahimi v. Islamic Republic of Iran*, Iran-US Claims Tribunal, Award No. 560-44-46-47-3, 12 October 1994, 170, ¶ 124 (**CLA-221**):

> It is well-established Tribunal precedent that while general political, social, and economic conditions that may affect a company's business prospects as of the date of taking are to be taken into account in valuing the expropriated entity, the effects of the very act of expropriation or events that occurred subsequent to expropriation shall be excluded.

117 *See Tidewater et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Award, 13 March 2015, ¶ 186 (**CLA-230**):

> This is not a matter of permitting a respondent State to profit from its own wrong. On the contrary, the damages that the Tribunal is empowered by virtue of the Treaty to award are designed to ensure that the private investor is compensated for the loss of its investment. But, in determining the amount of that compensation by reference to a discounted cash flow analysis, the Tribunal should consider the value that a willing buyer would have placed on the investment. In determining this value, one element that a buyer would consider is the risk associated with investing in a particular country. Such a factor is not specific to the particular State measure that gives rise to the claim. That measure must be left out of account in arriving at a valuation, since, according to Article 5, the market valuation must be arrived at "immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier". Rather, the country risk premium quantifies the general risks, including political risks, of doing business in

contends[118] that the "turmoil" in 2014 Crimea would be a factor in the mind of the hypothetical Willing Buyer, citing the tribunal in *Ukrnafta v. Russia*:[119]

> The Tribunal notes that 2014 was a period of turmoil in the Crimean Peninsula, and in the relations between Ukraine and Russia generally. A hypothetical willing buyer and seller would no doubt have borne these uncertainties in mind when valuing an asset located in the Crimean Peninsula on 22 April 2014.

The Ruling of the Tribunal Majority in Respect of Russia "Benefitting from Wrongdoing"

370. The view of the Tribunal majority is that while the Claimants are correct that "but for" the Russian invasion, the Claimants would have enjoyed a Russia-free Ukrainian Scenario and not suffered the loss imposed by the Russian Scenario, the arbitration is governed by the BIT. The BIT provides the remedy of compensation against any misconduct of the host State. Compensation for the misconduct is to be based on FMV measured in a hypothetical marketplace. It is understood that Ukraine and its State-owned corporations are seeking compensation elsewhere for the losses sustained by Russia's military action. The present arbitration is bound by the BIT and the role of FMV.

PART 11 - HOW ARE THE UPSTREAM ASSETS TO BE VALUED UNDER THE RUSSIAN SCENARIO?

371. In the First GCA Report, GCA proceeded on the supposition that it would apply Ukrainian law when valuing the Claimants' assets. The Claimants submit that, in its Amended Counter-Memorial, the Russian Federation advanced the Russian Scenario but did "not provide a fair market valuation of Naftogaz's investments under a Russian legal and regulatory regime for the Tribunal to evaluate."[120]

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the particular country, as they applied on that date and as they might then reasonably have been expected to affect the prospects, and thus the value to be ascribed to the likely cash flow of the business going forward.

118 Respondent's Opening Presentation, Hearing on Quantum, slide 52.

119 *PJSC Ukrnafta v. Russian Federation*, PCA Case No. 2015-34, Final Award, 12 April 2019, ¶ 383 (**RLA-77**) (hereinafter "***Ukrnafta***"). *See also*, *Stabil LLC et al. v. Russian Federation*, PCA Case No. 2015-35, Final Award, 12 April 2019, ¶ 393 (**RLA-78**) (hereinafter "***Stabil***").

120 Reply on Quantum, ¶ 128.

372. Instead, the Russian Federation provided what it described as "illustrative calculations" of the value of one of Naftogaz's producing fields (the Odeske field) and one prospective resource (the South Kerchenske prospect).[121] However, according to the Claimants, in these calculations the Russian Federation applies: (i) gas prices that are not reflective of the applicable Russian regulatory regime or economic conditions; (ii) incorrect fiscal terms (*i.e.*, the applicable royalties, taxes, and duties); and (iii) an inflated discount rate.[122]

373. GCA was instructed to provide an alternative Russian valuation and in the Second GCA Report,[123] it estimated the FMV of the Claimants' expropriated oil and gas assets under its Russian Valuation to be USD 4.447 billion—approximately USD 375 million *less* than the FMV of the same assets under Ukrainian law.[124]

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[121] First Expert Report of FTI Consulting, dated 6 December 2019 (hereinafter "**First FTI Report**"), ¶ 1.16.

[122] Reply on Quantum, ¶ 128.

[123] Second GCA Report, ¶¶ 366-448, Table 24; First FTI Report, ¶¶ 2.15-2.44.

[124] Second GCA Report, ¶ 448. The main dif erence is in GCA's valuation of the Upstream Assets, which under the Ukrainian Scenario is USD 3.606 billion. *See* Second GCA Report, ¶ 287, Table 14. Under the Russian Scenario, this is reduced to USD 3.231 billion. *See* Second GCA Report, ¶ 448, Table 24. GCA based its Russian Scenario on the expert opinion of Mr. Evgeny Zhilin, the Claimants' Russian legal expert. *See* Second GCA Report, ¶ 368. On the other hand, the First FTI Report is based its own expertise in Russian oil and gas, which forms the basis for its illustrative calculations under the Russian Scenario. The Second Expert Report of FTI Consulting, dated 3 June 2020 (hereinafter "**Second FTI Report**"), however, relies on the legal opinion of the Respondent's subsequently retained expert on Russian law, Professor Vitaly D. Melgunov. GCA observes that, in the Russian Scenario, three factors remain the same:

> First, the technical aspects of the valuation are unchanged. These have to do with whether Reserve Adjustment Factors ("**RAFs**") apply to the valuation methodology and GCA's calculation of operating costs. *See* Second GCA Report, ¶¶ 374-376. The majority deals with RAFs and operating costs separately, below.
>
> Second is the assumption that the Russian Federation would renew the Claimants' Special Permits. *See* Second GCA Report, ¶¶ 377-378. Subsequently, Professor Melgunov challenged this assumption; the majority deals also with this separately, below.
>
> Third, GCA and FTI agree that the price of oil and condensate would remain at about the same level. *See* Second GCA Report, ¶¶ 379-380. FTI does not dispute that these factors would remain the same under the Russian Scenario. *See* Second FTI Report, ¶¶ 5.1 *et seq*.

In its Russian Scenario, GCA assumes (i) the application of a Transitional Period during which Ukrainian law would apply; (ii) a Russian regulatory regime would then apply from 1 January 2015 onwards, which would yield higher prices than those in neighbouring Krasnodar (*See* Second GCA Report, ¶¶ 389-392); (iii) the designation of the Upstream Assets and Midstream Assets as an RGSS under Russian law, which would require the Willing Buyer to supply a specially defined regulated regional gas market at regulated prices set separately from those applicable in Russia more generally; (iv) a change to the applicable fiscal terms to incorporate elements of Russian tax law; and (v) a change to the discount rate to reflect Russian country risk premium.

The focus of FTI's criticisms of GCA's analysis of the Russian Scenario are summarized as follows:

374. GCA and FTI agree(d) on the following assumptions: (i) The Willing Buyer's gas would largely be sold in Crimea; (ii) the Willing Buyer's surplus gas would be sold to Ukraine; (iii) both agree on Crimea's consumption in consumer segmentation; (iv) a transition period would continue through to 31 December 2014. After receiving the First Melgunov Report, FTI considers itself bound by his opinion that Crimea was in fact in a gas deficit in 2014[125] but Dr. Moselle did not explain why the issue a gas surplus or deficit should be decided by a lawyer rather than a resource economist. Indeed, the Respondent's expert, Dr. Moselle was uncomfortable in cross-examination on this point, as follows:

> Q. So it's fair to say that on the valuation date, there was no gas deficit in Crimea?
>
> A. I mean, you'll see in our first report that we assume that there would be exports from Crimea. So on that basis, yes, that's correct.[126]

375. Accordingly, the majority proceeds on the basis that there was some surplus gas since GCA and FTI initially agreed on this and Dr. Moselle could or would not explain why FTI reversed itself in accepting Professor Melgunov's contrary opinion. Professor Melgunov is a legal academic and practicing lawyer with expertise in oil and gas *regulation* not an expert in resource economics or in oil and gas resource management.[127]

> (1) gas prices: we consider that GCA has significantly overestimated gas prices, and thus the value of the Upstream Assets, by applying what are effectively Ukrainian gas prices, rather than the much lower prices that can be clearly observed in Russia both at the Valuation Date and since;
>
> (2) discount rate: we consider that GCA has significantly underestimated the discount rate, and thus overestimated value, in particular by basing its calculation of country risk on a 13-year average instead of assessing risks as at the Valuation Date; and
>
> (3) fiscal regime: we have been instructed to rely on the opinion of Professor Melgunov for the applicable fiscal terms under Russian laws and regulations. GCA has applied fiscal terms that incorporate material tax rate reductions, leading to a higher valuation than GCA would derive based on the fiscal terms and related coefficients set out in our instructions. *See* Second FTI Report, ¶ 5.1.

[125] *See* First Melgunov Report, ¶ 163 ("in case of deficit, which, existed in the Republic of Crimea as of the Valuation Date.").

[126] Tr., Hearing on Quantum, Day 7, 41:25-42:4.

[127] Tr., Hearing on Quantum, Day 4, 82:25-85:11.

1. *Areas of Disagreement*

376. The Second GCA Report outlines the following four areas of disagreement:

(a) Whether the Willing Buyer would be required to sell gas at Ukraine's regulated prices and tariffs during the Transition Period;

(b) whether Krasnodar gas prices are relevant to Crimean gas pricing after the Transition Period ends;

(c) whether the Willing Buyer would expect Russian gas prices would move towards export parity; and

(d) whether surplus gas sold to Ukraine's industrial market would be above Russia's export price to Ukraine.[128]

2. *Transition Period: Supply Obligations and Price Regulations*

377. Immediately prior to annexation, the Ukrainian Parliament adopted a resolution to continue the application of existing Ukrainian law in Crimea until overridden by subsequent "regulatory acts of the Republic of Crimea",[129] but its independent legislative authority was terminated prior to annexation. The Russian Federation's *Annexation Law* contained a similar provision.[130]

378. The Annexation Treaty provided for the following "transition period" (the "**Transition Period**"), to run from 18 March 2014 to 31 December 2014:

> Article 6
>
> **A transition period**, during which matters pertaining to the integration of the new constituent entities of the Russian Federation into the economic, financial, credit,

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128 Second GCA Report, ¶ 390.

129 Autonomous Republic of Crimea, Resolution No. 1745-6/14, 17 March 2014 (**CE-199**) (hereinafter "**Independence Resolution**"):

> 2. Upon the entry into force of this Resolution, the legislation of Ukraine shall not apply in the territory of the Republic of Crimea, and decisions adopted by the Verkhovna Rada of Ukraine and other state bodies of Ukraine, adopted after 21 February 2014, shall no longer be carried out.
>
> The legislation of Ukraine, other than that specified in the first paragraph of this clause, shall apply in the territory of the Republic of Crimea until there are corresponding regulatory acts of the Republic of Crimea.

130 Russian Federation, Federal Constitution Law No. 6-FKZ, Arts. 6, 23, 21 March 2014 (**CE-230**).

> and legal systems of the Russian Federation and the system of state bodies of the Russian Federation, as well as matters pertaining to the execution of military obligations and the performance of military service in the territory of the Republic of Crimea and the federal city of Sevastopol have to be resolved, **shall be in effect from the date of admission of the Republic of Crimea** to the Russian Federation and the formation of new constituent entities within the Russian Federation and **until 1 January 2015**.[131] (emphasis added)

379. Russian law was *de facto* paramount from and after the annexation. The relevant inquiry is, therefore, what would a Willing Buyer reasonably expect on the Valuation Date as to whether Russian law would permit Ukrainian law and gas regulations to apply during and after the end of the Transition Period on 31 December 2014?

380. Under Ukrainian law, Naftogaz was a State-owned enterprise tasked with domestic supply and thus subject to price regulation. The key difference is that the Willing Buyer would be a "hypothetical" independent producer. Under Ukrainian law, independent producers have no domestic supply obligations and few (if any) price regulations.[132]

381. Equally, the Claimants argue that Crimean regulations would cease to apply because the superseding Russian law did not purport to regulate Crimean gas prices, meaning the Willing Buyer, freed of any regulations of either Ukraine or Russia, could have exported gas to Ukraine at "unregulated" prices.[133] The Claimants say this *could* produce nine months of near-windfall

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[131] 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, Art. 6, 18 March 2014 (**CE-224-Am**) (hereinafter "**Annexation Treaty**").

[132] Expert Report of Evgeny Zhilin, 14 February 2020 ("**First Zhilin Report**"), ¶¶ 27-29; First GCA Report, ¶¶ 274-275; Second GCA Report, ¶ 393.

[133] *See* Tr., Quantum Hearing, Day 7, 41:25-42:4. Here, on whether Crimea had a gas surplus or deficit after meeting market demand, Dr. Moselle testified in cross-examination as follows:

> Q. So it's fair to say that on the valuation date, there was no gas deficit in Crimea?
>
> A. I mean, you'll see in our first report that we assume that there would be exports from Crimea. So on that basis, yes, that's correct.

In the First Melgunov Report, ¶ 163 (served with the Rejoinder on Quantum), Professor Melgunov says the opposite: "in case of deficit, which, existed in the Republic of Crimea as of the Valuation Date.". The contradiction between FTI and Professor Melgunov and was put to Dr. Moselle in cross-examination several times for an explanation; he repeatedly stated that it was a question for Professor Melgunov, declining to explain why FTI had come to an opposite conclusion previously. *See* Tr., Hearing on Quantum, Day 7, 51:15-57:7.

profits during the Transition Period, since the new owner would also not have to sell at Russian tariff prices.

382. The Russian Federation argues that a Willing Buyer would have assumed, as of the Valuation Date, that Naftogaz's investments would be subject to Russia's regulatory regime and to the market conditions specific to Crimea as a constituent unit of the Russian Federation, including the obligation to sell gas into the domestic Crimean market at Russian tariff prices. Here, it notes that under Russian law, only Gazprom is authorized to export gas.[134]

383. The principal part of the Russian Federation's gas supply system is the **Unified Gas Supply System** ("**UGSS**") located in the western, or European, part of the country. Gazprom owns the UGSS and is its main user. Between 2008 and 2013, gas from independent producers only accounted for between 10 percent and 17 percent of usage of the UGSS.[135] The Naftogaz assets were part of the Crimean **Regional Gas Supply System** ("**RGSS**"). Mr. Zhilin and Professor Melgunov agree that once under Russian jurisdiction, the Crimea gas supply system would be classified as being part of the Russia's RGSS rather than the UGSS.

384. The Claimants' expert, Mr. Evgeny Zhilin, described the Transition Period as follows:

> 28. As Russian laws and regulations would not yet apply during this transitional period, the owner of the Upstream and Midstream Assets would not have an obligation to satisfy demand for gas in Crimea (i.e., the owner would not have the obligations that it would otherwise have had if the assets were categorized as an RGSS [Regional Gas Supply System]…as of November 2014, the Russian authorities did not yet consider the Upstream and Midstream Assets to be an RGSS.
>
> 29. On this basis, given that Russian laws and regulations would not apply during the transitional period, the willing buyer could sell gas at unregulated prices within Crimea, save that unlike Independent Producers operating under Russian laws and regulations (who cannot export gas, as explained below at Section VI), the owner of the Upstream and Midstream Assets would not be restricted from exporting gas. **As a result, the Russian Government would need to take steps**

Since the Respondent's experts had confusing opinions on whether there was a surplus or deficit on the Valuation Date, the majority proceeds from the assumption that there was a surplus since GCA and FTI initially agreed on this and Dr. Moselle could or would not explain the contradiction.

[134] AmCM, ¶¶ 410-414.
[135] First FTI Report, ¶¶ 3.50-3.52 (which paragraphs contain the extent of FTI's UGSS vs. RGSS "analysis" in its First Report).

> **to ensure that the owner of the Upstream and Midstream Assets would satisfy local Crimean gas demand.**[136] (emphasis added)

385. To this, Professor Melgunov responded as follows:

> 46. …The normative legal acts that were previously adopted by the state bodies of the Autonomous Republic of Crimea in the City of Sevastopol, as well as **newly adopted legal acts of the Republic of Crimea and Sevastopol would remain effective in the territories of the Republic of Crimea and the Federal City of Sevastopol until the expiry of the transitional period or the adoption of the relevant normative legal acts of the Russian Federation** and or normative legal acts of the Republic of Crimea or the Federal City of Sevastopol
>
> *****
>
> 61. That being said, the Law No. 6-FKZ did **not** provide that Russian laws would only apply as of January 2015 in relation to the use and protection of the subsurface, foreign investments and ensuring national defence and security.
>
> 62. Thus, from a legal standpoint, as of the Valuation Date, the Willing Buyer, being aware of the planned admission of the Republic of Crimea to the Russian Federation as a constituent entity of the Federation, would have no reasonable grounds to expect that the laws of Ukraine would continue to apply in the territory of the Republic of Crimea after its admission into Russia. (emphasis added)

386. Additionally, Professor Melgunov is of the opinion that if the Willing Buyer decided not to supply gas to domestic consumers in Crimea during the Transitional Period, it would constitute a breach of the Law on Competition,[137] which breach would be remedied thereunder by Russia's Federal Antimonopoly Service ("**FAS**").

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[136] First Zhilin Report, ¶¶ 28-29. *See also* Tr., Hearing on Quantum, Day 4, 49:17-50:9.

> So the Constitution sets the framework for admitting new constituent members of Russia which have been part of foreign states or independent states. So that is what the Constitution says. Then there is the federal constitutional law, which sets out the principles under which independent foreign states or parts of foreign states are integrated into Russia. And then we have the treaty of 18th March, we have the Law on Admission of 21st March, and we have also the Law on Admission being checked by the Constitutional Court of the Russian Federation on 19th March. So all of them, the treaty and the Law on Admission, contain similar provisions giving effect to Ukrainian legal regime effectively Ukrainian legal regime, which was incorporated into the Crimean legal regime on 17th March 2014 by way of the Independence Resolution, by virtue of the Independence Resolution. So this is how it needs to be read and treated.

[137] Second Expert Report of Professor Vitaly D. Melgunov, dated 16 November 2020 (hereinafter "**Second Melgunov Report**"), ¶ 94; First Melgunov Report, ¶ 96:

> Furthermore, I believe that, after the acquisition of the Upstream and Midstream Assets, a hypothetical willing buyer would acquire a dominant position in the gas market of the Republic of Crimea. Pursuant to Article 5 of Federal Law No. 135 dated 26 July 2006 "On the Protection of Competition" (the "**Law on Competition**"), a dominant position means the position of an economic entity (or a group of entities) or several economic entities (groups of entities) in the market for a specific commodity, that enables such an

387. In his Second Report, Mr. Zhilin makes the following response:

> While Prof. Melgunov has baldly asserted that the willing buyer would have occupied a dominant position, and that a refusal to supply gas to consumers in Crimea would have constituted an abuse of such position, the FAS would have needed to undertake a detailed legal and economic analysis and investigation into these two issues under the Law on Competition, before making such a determination and it would take several months for at an FAS investigation to commence and that even if a Crimean RGSS were found to have abused its market position, it would still have a rights of appeal.[138]

The Tribunal Majority's Ruling on the Transition Period

388. The Tribunal majority notes the whole purpose of a Transition Period was to avoid a legal vacuum by continuing the old laws and regulations in place until, as Mr. Zhilin notes, the Government of the Russian Federation took steps to introduce a different regulatory regime into Crimea. In the majority view, however, a Willing Buyer would reasonably assume the transition would be completed as of the end of the Transition Period, *i.e.*, 31 December 2014. Up to that point, the reasonable expectation would be one of a Ukrainian market at Ukrainian prices.[139]

389. The Tribunal notes Crimea's physical separation from the Russian Federation during this period. A pipeline connection between the Kerch Peninsula and Krasnodar was not complete until December 2016.[140]

390. Professor Zhilin says that the Russian Federation "would have to take steps to ensure upstream and midstream assets would satisfy local Crimean gas demand."[141] In the majority view, the Willing Buyer would expect Russia to do so.

391. In the view of the Tribunal majority, the Willing Buyer would expect to be obliged to supply the Crimean domestic market during the Transition Period at existing prices. It would be

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economic entity (a group of entities) or such economic entities (groups of entities) to have a decisive influence on the general conditions of commodity circulation in the respective commodities market. The Law on Competition therefore would have prevented any hypothetical willing buyer from abusing from its dominant position (in particular, this law would have prevented it from setting a high monopolistic price, or from refusing (avoiding) to supply gas to consumers without economic or technological reasons for such refusal).

138 Second Expert Report of Evgeny Zhilin, dated 7 September 2020, ¶¶ 68-69 ("**Second Zhilin Report**").

139 The Transition Period was clearly established by law. *See* Independence Resolution (**CE-199**); Annexation Treaty (**CE-224-Am**); Russian Federation, Federal Constitutional Law No. 6-FKZ, 21 March 2014 (**CE-230**).

140 First FTI Report, ¶ 6.11.

141 First Zhilin Report, ¶ 29.

unrealistic for the Willing Buyer to expect that, during the Transition Period, the Russian Federation would have allowed the major gas supplier in Crimea:

(a) to deny supply to the domestic market (where else would local residents get their gas as there were no pipelines in 2014-2015 connecting Crimea to Russia?);

(b) or sell at unregulated prices despite Russian policy to keep prices low;

(c) or to export gas to Ukraine despite the Gazprom monopoly.[142]

392. Accordingly, in the majority view, gas produced by the Upstream Assets in the Transition Period would have been sold into all market segments in Crimea.

393. Mr. Zhilin suggests a Willing Buyer might reasonably believe that the Russian Federation would subsidize the Willing Buyer in the same way it subsidized Gazprom's purchase of gas from Sakhalin Energy, under a Production Sharing Agreement ("**PSA**"). Sakhalin Island is north of Japan, 8,000 kilometres ("**km**") away from the Crimean Peninsula. Professor Melgunov testified that the Russian Federation has only had three PSA's and they were all concluded before 2003. The majority finds that Mr. Zhilin's suggestion is an unlikely "best case scenario" for the Willing Buyer rather than the most probable scenario. The possibility of a PSA should not, therefore, be factored into the valuation.

394. In the view of the Tribunal majority, the Willing Buyer would not expect to be permitted to behave as aggressively as Mr. Zhilin proposes, and, if it were permitted to, the Willing Buyer would almost certainly be corrected by the Russian Federation using the Law on Competition or perhaps a more direct intervention. The Russian Federation would not be expected to wait for lengthy FAS inquiries to take their course before stepping in to keep the gas flowing to Crimean factories and homes at regulated prices.

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[142] First FTI Report, ¶ 6.11.

3. *Krasnodar Gas Pricing vs. RGSS Gas Pricing*

395. The Parties do not agree on the expected gas pricing. FTI posits that Krasnodar's prices should apply because "the adjacent Krasnodar region would have been a reasonably [*sic*] proxy for expected Crimean prices".[143] Krasnodar is separated from Crimea by the Kerch Strait. Mr. Zhilin contradicted this assumption in the First Zhilin Report, observing that Krasnodar is connected to Gazprom's UGSS, but whether and when Russia would connect Crimea to the UGSS was unknown. He premised this on the fact that there was no connection over the Kerch Strait on the Valuation Date. In fact, as mentioned, a bridge with a pipeline connection was only completed in December 2016.[144]

396. Professor Melgunov agrees with Mr. Zhilin that as of the Valuation Date "there were no official announcements that a gas pipeline would be built" to connect Crimea to Krasnodar across the Kerch Strait.[145] However, Professor Melgunov says that a pipeline connection to Krasnodar would nevertheless be expected by a Willing Buyer,[146] describing the various steps taken after the annexation to connect Krasnodar with Crimea.[147] However, this was not information available to a Willing Buyer on the Valuation Date.

The Tribunal Majority's Ruling on Krasnodar Prices

397. In the view of the Tribunal majority, the Willing Buyer in March 2014 would reasonably have assumed that gas prices would be governed starting in January 2015 by Russia. Mr. Zhilin and Professor Melgunov agree that Russia's Federal Tariff Service ("**FTS**") sets all regulated tariff prices for gas.[148] In the view of the Tribunal majority, such prices would **not** be expected to be linked to Krasnodar but would instead be expected to build on the prices applicable in Crimea in the Transition Period then gradually increase to export parity. The Tribunal majority rejects the Krasnodar "scenario" because:

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143 First FTI Report, ¶ 6.9.
144 First Zhilin Report, ¶¶ 53-55.
145 First Melgunov Report, ¶ 162.
146 First Melgunov Report, ¶ 163.
147 First Melgunov Report, ¶ 165.
148 First Melgunov Report, ¶ 158; First Zhilin Report, ¶¶ 57-60.

(a) Krasnodar did not have a gas-pipeline connection with Crimea on the Valuation Date. Krasnodar and Crimea were different gas markets;[149]

(b) Crimea was connected to the Ukrainian market, which had higher gas prices than Krasnodar on the Valuation Date;

(c) as of the Valuation Date, Crimea was liberalizing its gas markets (which would promote higher gas prices in the future);[150]

(d) the cost of *offshore* exploration and development in Crimea is significantly higher than the cost of *onshore* exploration and development in Krasnodar—meaning that Krasnodar prices would not provide the Willing Buyer with a profit, as Russian law requires;[151]

(e) on the Valuation Date, gas prices in Crimea were already much higher than Krasnodar prices;

(f) the Russian Federation had declared its intent that domestic prices should *increase* over time to a level on par with exports.[152]

4. *RGSS Pricing and Export Parity*

398. At issue is the most likely tariff pricing that the FTS would use for the domestic supply of gas in Crimea. Mr. Zhilin testified that as of the Valuation Date, the Willing Buyer could not have known the regulated gas prices applicable from 1 January 2015, *i.e.*, after the Transition Period ended.[153] However, Mr. Zhilin says that the regulated prices could nevertheless be estimated on the basis that the FTS is required to determine tariffs in accordance with stated guidelines.[154] RGSS tariff pricing requires that an operator: (i) recover its cost of supply and production (extraction, transportation, processing, storage, and sales), and (ii) make sufficient profit to finance

149 Second GCA Report, ¶ 397. *See also* First FTI Report, ¶ 6.11.
150 Second GCA Report, ¶¶ 129, 398-399.
151 Second GCA Report, ¶¶ 369, 387, 396.
152 Second GCA Report, ¶¶ 401-404.
153 First Zhilin Report, ¶ 50; Tr., Hearing on Quantum, Day 5, 23:15-20.
154 First Zhilin Report, ¶ 48.

its expansion and development plans with respect to exploration, extraction, transmission, and storage activities.[155]

399. Moreover, and in line with Russian law and market expectations as of the Valuation Date, Mr. Zhilin and GCA consider that FTS tariffs would gradually increase to "export parity"—*i.e.*, the price a producer would receive on the export of gas after taking into account the export duty.[156] This goal was declared in 2007 in the Russian Federation's Resolution No. 333 "On Improvement of State Regulation of Gas Prices" wherein the Russian Government announced its intention to achieve the export parity by 2011.[157] According to Mr. Zhilin,[158] the Russian Federation reiterated that goal on several occasions, although its implementation was ultimately delayed.[159] In September 2013, the Russian Government decided to freeze gas prices for 2014 for industrial gas purchasers, as later reflected in the federal budget for 2014-2016, but thereafter it was predicted by observers that prices would increase to reach parity.[160]

400. The Tribunal majority rejects the Respondent's arguments that Krasnodar prices would apply.[161]

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[155] First Zhilin Report, ¶ 49; Russian Federation, Federal Law No. 69-FAZ "On Gas supply in the Russian Federation", Art. 21, 31 March 1999 (**CE-1024**); Russian Federation, Resolution No. 1021 "On State Regulation of Prices and Tariffs For Gas", Arts. 11, 13, 14, 29 December 2000 (**CE-1065**).

[156] First Zhilin Report, ¶¶ 51-52; Government of the Russian Federation, Resolution No. 1021 "On State Regulation of Prices and Tariffs For Gas", Arts. 11, 13, 14, 29 December 2000 (**CE-1065**).

[157] Russian Federation, Resolution No. 333 "On Improving State Regulation of Gas Prices", Art. 4, 28 May 2007 (**CE-1071**).

[158] First Zhilin Report, ¶ 52.

[159] In 2009, the Russian Federation adopted its road map "Energy Strategy of the Russian Federation Until 2030", which states at Section VI.5 the goal of further liberalizing the domestic gas market through the application of the principle of equal profitability of domestic and export gas supplies. *See* Russian Federation, Order No. 1715–r, "Energy Strategy of the Russian Federation Until 2030", Sec. VI.5, 13 November 2009 (**CE-1073**). In December 2010, the transition period for parity was prolonged from 2011 to 2014. *See* Russian Federation, Resolution No. 1205 "On Improvement of State Regulation of Gas Prices", 30 December 2010 (**CE-1072**). In April 2013, the Ministry of Economic Development of the Russian Federation published a document called "Forecast of Long-term Socio-economic Development of the Russian Federation for the Period up to 2030" further supporting the idea of netback parity. *See* Ministry of Economic Development of the Russian Federation, "Forecast of Long-term Socio-economic Development of the Russian Federation for the Period up to 2030", March 2013 (**CE-1074**).

[160] Maxim Tovkailo, "People Will Pay For Businesses", Vedomosti, 8 November 2013 (**CE-1030**).

[161] *See also* First Zhilin Report, ¶ 53; First Melgunov Report, ¶¶ 153 *et seq*.

The Tribunal Majority's Ruling on Export Parity

401. The majority concludes that under its guidelines, the FTS is required to set tariffs in line with the Russian Government's repeated statements that it is committed to achieve export parity. In particular, the Tribunal majority concludes that the Willing Buyer would be guided by **the Russian Federation's 2007 declaration in Resolution No. 333 that gas prices would achieve netback/export parity, which is to say that Russia's industrial gas prices would move toward the higher prices paid on the global market for industrial use**. While implementation has been delayed,[162] the FTS continued its policy on parity as of the Valuation Date.

402. The Tribunal majority agrees with GCA that a Willing Buyer would expect the FTS to impose tariffs as of 1 January 2015 equivalent to the weighted average Crimea price in 2014 and to gradually increase the regulated residential tariff by 3.5 percent a year until export parity had been achieved.[163] As GCA notes, this approach would be consistent with both the Russian Federation's gas liberalization plan that was publicly announced in late 2013 and also with market expectations at the time.[164]

5. *Ability of a Willing Buyer to Export Surplus Gas to Ukraine*

403. The Parties disagree as to the likelihood of the Willing Buyer being permitted to export Crimean gas to Ukraine's industrial sector. The need to export would be driven by the fact that GCA expected Crimean production to exceed demand.[165] Export would earn it higher prices for gas. As mentioned above, the majority accepts the evidence of GCA (and, initially, of FTI) that Crimea had a gas surplus in 2014.

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162 First Zhilin Report, ¶¶ 51-52.

163 Second GCA Report, ¶¶ 401-404.

164 First Zhilin Report, ¶ 67 (discussing government plan from September 2013). FTI cites to the same plan in their analysis, but only applies that plan to very low prices. As a result, FTI's regulated prices never achieve export parity and therefore do not reflect the Russian Federation's stated goals at the valuation date. *See* Second GCA Report, at Figure 7 (showing that the "FTI Domestic Price" series never meets the "Producer Export Parity" series).

165 Second GCA Report, ¶ 398.

404. The facts underlying the debate seem elusive and FTI and Professor Melgunov contradict each other.[166] FTI originally agreed with GCA that "production in excess of Crimean consumption would have been exported and sold into the Ukrainian industrial segment."[167]

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166 The diagram below explains such contradictions:

Second GCA Report, ¶ 398	**Zhilin, ¶ 45 (c)**	**First FTI Report, ¶ 6.11**	**First Melgunov Report, ¶ 117**
Third, Crimea's nearest export market and only pipeline connection at the Valuation Date was to **Ukraine**, **a market that of ered the willing buyer the opportunity to sell gas at higher prices based on Russian exports and Western European hub prices** (e.g. NCG). Also as at the Valuation Date, a willing buyer would have expected to need to export gas to Ukraine during 2014, as **anticipated production from the Upstream Assets alone was to exceed anticipated demand in Crimea**, and the UGS Facility would exceed capacity before the 2014-15 winter season begins. Citing **CE-1104**; First FTI Report, Appendix 16, *Crimean Consumption tab*.	*Third*, as a practical matter, **I understand from the Second GCA Report** that if the willing buyer were not permitted to export gas under Russian laws and regulations, as from the end of 2015 the willing buyer would have insufficient storage capacity to hold the volumes of gas that GCA estimates would be produced from the Upstream Assets.	In our illustrative calculations, we assume that gas produced by the **Upstream Assets would have been sold into all market segments in Crimea (at Krasnodar prices), and that production in excess of Crimean consumption would have been exported and sold into the Ukrainian industrial segment**. **We consider that this assumption is reasonable given that, as at March 2014, Crimea was not connected by pipeline to Russia**, nor are we aware of any clear expectation that a connection would be completed in future, as at March 2014. A pipeline connection was established in December 2016. If we were to assume that more of the gas would have been sold within Russia, this would lead to a lower value for the Upstream Assets. *See also* First FTI Report, Appendix 16.	This unverified suggestion by Mr. Zhilin may lead one to a mistaken impression that gas export can be deemed an "industrial (technical) necessity" to prevent any shortage in storage capacities. **This stands in contradiction to the facts.** I know from my scholarly and practical experience in the oil and gas industry that, **where oil and gas consumption, as well as the capacity of the oil and gas storage facilities, do not allow for production at full scope, the subsurface user would schedule and gradually reduce the production rate** at the fields and (or) would postpone putting into operation the new fields. This does not however prevent the increase of such rate and the production of that volume of oil and gas in the future, once consumption expands and the storage facilities are freed without any losses of production and transportation.

167 First FTI Report, ¶ 6.11.

405. However, in the Second FTI Report, FTI changed direction and accepted Professor Melgunov's opinion that exports to Ukraine would be prohibited by Russia.[168]

406. The Respondent says the "export scenario" is unrealistic in light of evidence that in fact gas would be in short supply to meet domestic market demand in Crimea.[169] FTI seems to doubt the existence of such a shortfall. In its second report, FTI suggests a surplus smaller than predicted by GCA but nevertheless a surplus in excess of Crimean demand:

> Our own production forecasts are significantly lower than GCA's as a whole, and therefore exceed Crimean consumption levels to a far lesser degree.[170]

407. The Respondent further contends that the Willing Buyer would not have been permitted by Russia to export to Ukraine. Export operations require gas surpluses that would be available after the domestic demand has been satisfied by gas deliveries to the consumers in Crimea. As of the Valuation Date, according to the Respondent, "no such surpluses existed and there were no grounds to anticipate that such surplus would exist in the nearest future"[171] but if there was surplus supply, the Willing Buyer:

(a) would have sought to sell the gas to Gazprom (which could then have exported it) at a price significantly less than the price that would have been achieved by

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[168] Second FTI Report, ¶¶ 5.15-5.17.

[169] Second Melgunov Report, ¶ 110, which states:

> BP's Statistical Review of World Energy 2013, which was available as of the Valuation Date, provided evidence of significant shortage of inland gas in Crimea. Information received from the State Unitary Enterprise "Chernomorneftegaz" also shows that in 2013 the consumption of gas in Crimea exceeded the level of its production. Furthermore, the gas shortage in the coming years was discussed in mass media shortly before the Valuation Date, in early 2014. Consequently, the Willing Buyer should have been aware of the situation as of the Valuation Date and should not have relied on the predictions of Ukrainian authorities. In the circumstances of gas shortage, which affected the Republic of Crimea in 2014 (and was expected to continue in the future years), it was unrealistic for the Willing Buyer to assume it would have been able to export gas (neither independently, in case of amending the Law of Gas Export, nor by entering into an agency or swap agreement with PJSC Gazprom, as Mr. Zhilin suggests), because export operations require gas surpluses that should be available after the domestic demand has been satisfied by gas deliveries to the consumers in the Republic of Crimea. As of the Valuation Date, no such surpluses existed.

[170] Second FTI Report, ¶ 5.19.

[171] Second Melgunov Report, ¶ 111.

exporting to Ukraine directly, given that a Willing Buyer would have had no other potential buyers of the gas; and/or

(b) otherwise it would have needed to curtail production, by restricting development of certain fields to keep production in line with expected demand.[172]

The Tribunal Majority's Ruling on the Willing Buyer's Ability to Export

408. In the view of the Tribunal majority, the Claimants have not established a reasonable basis to conclude that either the Russian Federation or Gazprom would allow the Willing Buyer to export gas at export prices which would have the effect of reducing Gazprom's profits and diminishing the earnings of its Government shareholders.

409. Russian legislation protects the export monopoly of Gazprom. The Russian Federation would be unlikely to enact an exception for the Willing Buyer given Gazprom's track record[173] of

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[172] Second FTI Report, ¶ 5.18.

[173] Russian Federation, Federal Law No. 177-FZ "On Gas Export", 18 July 2006 (**CE-1069**); First Melgunov Report, ¶ 103:

> At the federal level, the issues related to the export of gas are regulated by the Federal Law No. 117-FZ dated 18 July 2006 "On Gas Export" (the "**Law on Gas Export**"). The Law on Gas Export, in its Article 3, grants the exclusive right to export gas *via* a pipeline to the owner of the UGSS (*de facto*, PJSC Gazprom) or to its wholly owned subsidiary.

First Zhilin Report, ¶ 43:

> Prior to Crimea's accession to Russia, there was no RGSS that was connected to a foreign country by pipeline (nor was this likely, as all RGSSs were located remotely from other countries in the northern and eastern territories of Russia). Therefore, prior to the Crimean RGSS, no RGSS had the ability to export pipeline gas from Russia. Only the UGSS operator (Gazprom) had connections to foreign pipelines, and its monopoly on pipeline gas exports was the practical result of both the UGSS infrastructure and its historical role as a state-owned, monopolistic gas supplier until the emergence of the first independent gas producers in the 1990s. As a result, the question of whether an RGSS would be permitted to export gas would have been a novel question under Russian law.

First Melgunov Report, ¶¶ 106-107:

> What is more, based on the above rules of the Law on Gas Export, which provide for the exclusive right of PJSC Gazprom to export gas *via* a pipeline, it is impossible that a willing buyer would have been granted the right to export gas via a pipeline contrary to the terms of the applicable legislation. It would have required amending the Law on Gas Export, which, for objective reasons related to the peculiarities of the Russian federal legislative process (which in particular requires that the relevant draft law be first considered by the State Duma, then approved by the Federation Council and finally signed by the Russian President, before it is officially published and enters into force) and the significance of the issue at hand, would probably take no less than a year. This is of course assuming that the Law on Gas Export would be amended for the sole benefit of the hypothetical willing buyer.

resisting such exceptions. Thus the majority's assessment of the value of the Claimants' Upstream Assets is based on price movement towards export parity (which was official Russian policy) not on any expectation about the Willing Buyer's ability to actually export as during the relevant period.

PART 12 - ADDITIONAL DISCOUNTS PROPOSED BY THE RUSSIAN FEDERATION

410. The Respondent contends that future earnings reasonably to be expected by the Willing Buyer should be further discounted as follows:

(a) the value of the Upstream Assets should be discounted to allow for the risk the Special Permits would not be renewed;

(b) the value of the Upstream Assets should be discounted because of anti-competition laws;

(c) the value of the Upstream Assets should be discounted because of a risk the gas fields would be designated as SPFIs.

1. *Should the Value of Upstream Assets be Discounted to Allow for the Risk the Permits Would Not be Renewed?*

411. Mr. Zhilin expressed the view that the Willing Buyer would have expected the Russian Federation to recognize the continuing validity of Naftogaz's Special "Use" Permits during the Transition Period.[174] In fact, he points out that Special Permits did continue to be valid after March 2014.

412. Professor Melgunov disagreed. He states in his Second Report that:

> 68 …There was no certainty that the Willing Buyer could reasonably rely on the Ukrainian permits or have Russian licenses automatically reissued. In light of

In this regard, in my opinion, even a mere suggestion that the Law on Gas Export would be amended to grant the right to export specifically to the willing buyer is baseless and totally unrealistic, given that even major Russian oil and gas companies (such as PJSC Rosneft Oil Company and PJSC NOVATEK) failed to obtain it without offering the State new investments for the construction of LNG plants.

[174] The acts of the Republic of Crimea provided for the continued validity of Ukrainian permits. *See* Independence Resolution (**CE-199**); Nationalisation Resolution (**CE-202**).

> such uncertainty, the most prudent course of action for the Willing Buyer would have been to assume that Ukrainian permits would not be effective and it would have to apply for the issuance of new Russian licenses.[175]

413. In contrast, the First FTI Report, relied on by the Respondent, suggests it would be reasonable for the Willing Buyer to "assume that the licences issued by Russia would be issued to match the acreage rights under the licenses issued by the Ukrainian state."[176]

414. **In the view of the Tribunal majority**, the Russian Federation would be concerned about instability in the production and distribution of gas if permit renewals were refused to a Willing Buyer. No one but the Willing Buyer would possess the infrastructure to mobilize in a reasonable time production for Crimea users and continued exploration. In the view of the Tribunal majority, the Willing Buyer would have had no difficulty in securing renewal of the licenses through the Transition Period and beyond. No discount is justified in respect of permit renewal risk.

2. *Should Upstream Asset Value be Discounted Because of a Risk the Gas Fields Would be Designated Subsurface Plots of Federal Importance?*

415. Professor Melgunov opines that a Willing Buyer would be aware that the Russian Federation would/could designate the Upstream Assets as SPFIs, thereby eliminating their value.[177]

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175 Second Melgunov Report, ¶ 68.

176 First FTI Report, ¶ 6.4:

> In our illustrative valuations, we assume that the licenses issued by Russia would be issued to match the acreage rights under the licenses issued by the Ukrainian state. We assume that technical reserves and resources remain unchanged from those that would've been exploited under Ukrainian jurisdiction.

The footnote within this paragraph, footnote 102, states the following: "Licenses issued by Russia our subsoil use licenses, while licenses issued by Ukraine are exploration and exploitation rights offered under a Special Permit, as explained in paragraph A9.3."

See First FTI Report, ¶ A9.3: "Licenses are typically of limited duration and can be subject to numerous rights, obligations, terms and conditions. In Ukraine, exploration and exploitation rights are offered under a Special Permit. In Russia, such rights are offered under a subsoil use license.", *referring to* Federal Agency for Mineral Resources, The Russian Government, accessed 22 November 2019 (**FTI-111**).

177 *See, e.g.*, First Melgunov Report, ¶¶ 21-22:

> **B. The Claimants' Upstream Assets in the Black Sea and the Sea of Azov Constitute Subsurface Plots of Federal Importance Pursuant to the Legislation of the Russian Federation.**

416. FTI did not mention the SPFI issue in the First FTI Report, dated 6 December 2019,[178] despite the expertise in valuing Russian oil and gas assets of Dr. Stuart Amor, one of the First FTI Report's authors. The SPFI issue was raised for the first time in the First Melgunov Report,[179] which is dated 29 May 2020. This seems to the Tribunal majority to be a curious oversight on the part of Dr. Amor if SPFIs are as significant as Professor Melgunov suggests.

417. The Russian Federation maintains a federal list of SPFIs. The Upstream Assets have never been included on the federal list although, as Professor Melgunov points out, inclusion on the list is not a condition precedent to a designation.

418. Mr. Zhilin disputes Professor Melgunov's SPFI analysis. He explains that the Russian Federation introduced the current legal regime applicable to SPFIs in 2008 which (i) deemed geological exploration and production of hydrocarbons in SPFIs to be of strategic importance for ensuring national defence and security, and (ii) restricted foreign investors from becoming shareholders in new business entities of strategic importance to national defence and security.[180]

> 56. Article 15 of the Law on Subsurface lists protection of interests of national security of the Russian Federation is one of the objectives of the State subsurface use licensing system. Moreover, the Russian mining law doctrine highlights, as one of its basic principles, the necessity to ensure national security in the area of subsurface use.
>
> 57. On that basis, Article 2.1 of the Law on Subsurface defines the term and the test for allotment of subsurface plots of federal importance (that is, the plots allotted to ensure national defence and security).
>
> 1. Such subsurface plots automatically include, based on the criterion of territory: any and all subsurface plots located in the internal waters, territorial sea, and continental shelf of the Russian Federation;
>
> 2. the plots whose use requires using defence and security lands;
>
> 3. any (mainland) plots with extractable oil reserves of at least 70 million tons, and gas reserves of at least 50 billion cubic meters.
>
> * * * * *
>
> 60. In view of the geographical location of the majority of the Claimants' Upstream Assets, i.e. most gas fields and structures are located in either the Black Sea or the Sea of Azov [list], most of the Claimants' upstream Assets qualify as subsurface plots of federal importance as per the criteria mentioned in para. 1 of Article 2.1. of the Law on Subsurface.
>
> 61. The other remaining subsurface plots related to the relevant Upstream Assets that are located on the mainland [list] would also be qualified as plots federal importance if there are [*sic*] located on the defence and security lands or contain material hydrocarbon reserves.

178 *See* First FTI Report, ¶¶ 6.1 *et seq*.
179 First Melgunov Report, ¶ 60.
180 Second Zhilin Report, ¶¶ 21 *et seq*.

Mr. Zhilin claims that CNG does not satisfy two of the three SPFI criteria.[181] He notes that the subsurface plots pertaining to the Upstream Assets have not been treated as SPFIs to date and in his view, as the Russian Federation had signalled a willingness to apply the regime pragmatically,[182] a Willing Buyer would have been entitled to assume that the Russian Federation would not designate the offshore Upstream Assets.

419. In the view of the Tribunal majority, there is no reason on the evidence for the Willing Buyer to expect SPFI designation would happen, and no need to factor in a discount. Professor Melgunov's suggestion is unsupported speculation and is thus irrelevant to the valuation.

PART 13 - FISCAL TERMS AND LICENSING OF THE SPECIAL PERMITS IN THE RUSSIAN SCENARIO

1. *Mineral Extraction Tax*

420. The First FTI Report states that the valuation of the Upstream Assets under the Russian Scenario must reflect the impact of Russia's Mineral Extraction Tax ("**MET**"), a royalty paid per unit of produced hydrocarbon.[183] The First Zhilin Report called out FTI for its failure to mention that Federal Law No. 263-FZ dated 30 September 2013 ("**Law No. 263-FZ**") amended the MET.[184] This Law amended the Tax Code of the Russian Federation (the "**Tax Code**"), lowering

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181 Tr., Hearing on Quantum, Day 4, 14:24-15:4:

> This included Resolution No. 1758, referred to the Claimants as the Nationalisation Resolution, which is CE-202 on the record, which provided for the validity of Naftogaz's Ukrainian permits after their transfer to another entity, the Russian Chornomornaftogaz, which didn't satisfy the requirements for an SPFI user.

Second Zhilin Report, ¶ 20:

> 20. The Russian Chernomorneftegaz, however, could not have qualified for Russian Licenses in SPFI areas because it did not meet the Law on Subsurface's requirement that the license holder have at least five years of experience developing subsurface plots located on Russia's continental shelf, or the requirement that Russia hold a share in the license holder's charter capital or control of voting shares exceeding fifty percent. The fact that the Russian Federation nevertheless intended for the Russian Chernomorneftegaz to hold the Russian Licenses served as a further signal to the willing buyer that Russia would not designate the subsurface plots pertaining to the Upstream Assets as SPFIs upon Crimea's admission.

182 Nationalization Resolution (**CE-202**); Law No. 58-FZ, 29 April 2008 (**CE-1148**).

183 First FTI Report, ¶¶ A9.11 *et seq*.

184 First Zhilin Report, ¶ 67, *citing* Law 263-FZ, Art. 1(1)(3), 30 September 2013 (**CE-1121**). Specifically, Law 263-FZ amended Art. 342.4(14) of the Tax Code of the Russian Federation, 5 August 2000 (**CE-1079**) (hereinafter "**Tax Code**").

the royalty payments for gas and gas condensate by 90 percent for RGSS producers.[185] It was scheduled to come into force on 1 July 2014, three months after the Valuation Date.[186] Mr. Zhilin expresses the opinion that the Willing Buyer would take tax reduction into consideration in its assessment of value.[187]

421. In response to Mr. Zhilin, the Respondent called a new expert to provide opinion evidence about Russian law, Professor Melgunov. From Professor Melgunov's perspective, a Willing Buyer would not factor in the 90 percent tax reduction in Law No. 263-FZ because, although it was scheduled to come into force on 1 July 2014, "there are cases where the effective date of published federal laws was postponed."[188] He also observes that to qualify, the subsurface plots must belong exclusively to an RGSS.[189] Finally, he highlights that the procedure for claiming this exemption had not been established and points to the likely amount of document collection required to obtain this exemption.[190] Based on these three uncertainties, he concludes that a Willing Buyer would not presume that this tax benefit would be available to it.[191]

The Tribunal Majority's Ruling on the MET

422. The majority prefers Mr. Zhilin's opinion about the availability of the MET benefit. It is reasonable to assume that if a law is scheduled to come into force shortly, then it will likely do so. Professor Melgunov's concern about whether the expropriated system would qualify as an RGSS for the purposes of Law 263-FZ contradicts his opinion elsewhere that the system would be an RGSS. Finally, a Willing Buyer is entitled to assume that it will be treated fairly and equitably under whatever procedure is established. The procedural difficulties prophesised by Professor Melgunov are speculative and bereft of any probative documentary support.

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185 First Zhilin Report, ¶ 67.
186 First Zhilin Report, ¶ 67.
187 First Zhilin Report, ¶ 67.
188 First Melgunov Report, ¶ 180.
189 First Melgunov Report, ¶ 183.
190 First Melgunov Report, ¶¶ 183-184.
191 First Melgunov Report, ¶ 186.

2. *New Offshore Hydrocarbon Deposits*

423. Effective 1 January 2014, Federal Law No. 268-FZ ("**Law No. 268-FZ**") came into force in the Russian Federation.[192] This Law partially exempts new offshore hydrocarbon deposits ("**NOHDs**") from the MET. To qualify, commercial extraction must have started after 1 January 2016. NOHDs receive favourable tax breaks at varying levels.[193] FTI did not mention this in the First FTI Report. Like the MET issue, this amendment to the Tax Code potentially favours the Claimants.

424. Appendix C to the Second GCA Report contains a Microsoft Excel spreadsheet which, relying on Mr. Zhilin's NOHD opinion, describes which of the Upstream Assets would qualify as NOHDs, setting out their varying tax exemptions based on each field's individual characteristics.

425. Professor Melgunov provides the following opinion:

> As I was informed by Ivanyan and Partners, and as confirmed by the conclusions made in a separate expert report by the Russian industry expert Vygon Consulting that the Russian Federation will also submit in these arbitral proceedings, the development of a number of the offshore gas fields that comprise the Claimants' Upstream Assets, began in the Soviet period or, if not, in the 1990-2000s.
>
> For instance, as I learnt from the Vygon Consulting expert report, industrial production started on offshore gas fields in the following years: in 1994 - at Shtormove gas field, in 2012 - at Odeske gas field, in 1992 - at Arkhanhelske gas field, in 2002 - at East Kazantypske gas field, in 1983 - at Holitsynske gas field; in 2004 - at North Bulhanatske gas field.
>
> **Based on these facts, it can be concluded that a number of the offshore fields included in the Claimants' Upstream Assets were put into industrial production development well before 1 January 2016.** In view of this, as of the Valuation Date, a willing buyer would have no grounds to view itself "automatically" as a future NOHDs operator and, consequently, to expect that it would be able to benefit from a preferential tax regime.[194] (emphasis added)

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[192] First Zhilin Report, ¶ 68, *citing* Tax Code, Arts. 338(6), 342(2.1) (**CE-1079**).

[193] First Zhilin Report, ¶ 68: "The law partially exempts an NOHD field—*i.e.*, a field for which commercial extraction has not commenced before 1 January 2016, and which satisfies additional conditions as explained in Annex B to this report—from the MET such that the MET will equal a rate of 30, 15, or 10 percent of the sales price of gas condensate or crude oil only, or 30, 15, or 1.3 percent of the sales price of natural gas, depending on the characteristics of the field.".

[194] First Melgunov Report, ¶¶ 175-177.

426. Professor Melgunov repeated this in his PowerPoint presentation during the Hearing on Quantum:

> The special (preferential) tax regime for **new** offshore hydrocarbon deposits (NOHD) is **inapplicable** to the majority of the Claimants' Upstream assets, because they **did not meet** the established criteria (both in terms of the degree of reserve depletion and the date of the beginning of commercial production of hydrocarbons).
>
> **Most of the deposits** from the Claimants' Upstream assets **were not new** (were put into development long before the date specified in the Law), and the degree of depletion of the reserves has also been above 1% (*see* First Expert Report – paras. 175-177).[195] (emphasis in the original).

The Tribunal Majority's Ruling on NOHDs

427. It appears that Professor Melgunov overlooked Appendix C to the Second GCA Report because the fields he mentions are *excluded* from GCA's NOHD exemption calculations. GCA refers to Shtormove, Odeske, Arkhanhelske, East Kazantypske, and Holitsynske **Offshore Hydrocarbon Deposits** ("**OHDs**") and as such GCA considers them to be **ineligible** for NOHD deductions. Mr. Zhilin points out that OHDs—minimally depleted fields—are dealt with separately under the Tax Code.[196] The majority finds that Professor Melgunov's opinion pertaining to NOHDs is not supported by the facts.

3. *One-Time License Payments*

428. Professor Melgunov testified that the Willing Buyer could face substantial one-off payments to acquire the Special Permits[197] because "a one-time payment for a SPFI can reach several billion rubles".[198] This opinion, however, is premised on the Upstream Assets being designated as SPFIs.[199]

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195 Presentation of Professor Melgunov, Hearing on Quantum, slide 32.
196 First Zhilin Report, ¶ 68, footnote 84.
197 First Melgunov Report, ¶¶ 189-190.
198 Presentation of Professor Melgunov, Hearing on Quantum, slide 33.
199 First Melgunov Report, ¶ 191:

> It should be noted that, in practice, in similar circumstances, the **one-off payment for federal subsurface plots** may amount to several billion roubles. For example, in a 2014 auction for the use of the subsurface of the Minkhovsky **subsurface plot of federal importance** located in Yamal-Nenets Autonomous District of the Russian Federation, the initial amount of the one-off payment was RUB 2.722 billion, while the eventual

The Tribunal Majority's Ruling on One-Time License Payments

429. The majority has already given its reasons for concluding that the Upstream Assets would not be designated SPFIs. It should further be noted that FTI does not mention one-off licensing fees of several billion rubles in its First Report, nor does it mention SPFIs. To the contrary, FTI assumed "zero bonus fees were payable."[200] The Tribunal majority thus rejects this aspect of Professor Melgunov's opinion in favour of Mr. Zhilin's evidence about subsurface license fees, which formed the basis of GCA's opinion of value and closely resembles FTI's initial opinion.[201]

4. *Value Added Tax, Corporate Tax, Environmental Impact Fees, Property Tax*

430. There appears to be substantial agreement among the experts about the application of these various taxes to the Upstream Assets.[202]

5. *Export Duties*

431. Mr. Zhilin provides an opinion about the Russian Federation's levies of export duties on oil and gas under Federal Law No. 5003-1 "On Customs Tariff", dated 12 May 1993 ("**Law on**

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one-off payment (as per the auction winner's bid PJSC "Oil Company "Rosneft") amounted to RUB 5.9 billion.

200 Second FTI Report, ¶ 5.53: "In Our First Report we had assumed that signature/production bonuses would have varied significantly from field to field whilst conservatively **assuming that zero bonus fees were payable** to the government for the purpose of our illustrative calculations." (emphasis added); First FTI Report, Table A9-1. Under the line titled "Signature/production bonuses", this Table states the following: "We conservatively assume **zero bonus fees payable** to the government." (emphasis added).

201 First Zhilin Report, ¶¶ 73-75.

202 Second GCA Report, ¶¶ 422-424:

> We agree with FTI that a 20% corporate tax profits rate applies in Russia, and that within any one legal entity, losses from one project can offset profits from others. We also agree with FTI that VAT at 18% is paid on domestic purchases and is levied on domestic sales.
>
> However, we have noted an additional levy that is payable, namely Property Tax. FTI does not address this, although it is stated as being levied at 2.2% of the net book value of fixed assets.
>
> We do not have these net book values upon which to make such a calculation and, as FTI has assumed in its illustrative valuations of Odeske and South Kerchenske, we have likewise assumed that any Property Tax has a de minimis effect.

Second FTI Report, ¶ 5.50 ("In the Second GCA Report, GCA agrees with our assessment of: (i) a 20% corporate tax profit rate in Russia; and (ii) an 18% rate of VAT.").

Customs Tariff").[203] Specifically, he states that "exemptions from export duties apply for exports of gas, gas condensate, and crude oil, extracted from NOHD fields" under certain conditions.[204]

432. In its Second Report, FTI says "[w]e have been instructed to rely on the opinion of Professor Melgunov for the appropriate fiscal terms and applicable rates for export duty …".[205] Although Professor Melgunov provides an opinion that exports are not possible, neither his First nor Second Reports includes an opinion about the Law on Customs Tariff. Professor Melgunov only mentions it in a footnote in his analysis of NOHDs.[206] This appears to be yet another discrepancy between FTI and Professor Melgunov.

433. Since the majority has found elsewhere that it is unlikely that the Willing Buyer would be permitted to export gas, the rate of export duties is moot.

PART 14 - THE RUSSIAN FEDERATION'S CRITICISMS OF THE CLAIMANTS' VALUATION OF UPSTREAM ASSETS

434. Broadly speaking, the Russian Federation raises three issues regarding GCA's valuation of the Upstream Assets and whether there is sufficient evidence for GCA to provide an opinion of value:

(a) GCA's methodology and the application of Petroleum Resources Management System ("**PRMS**");

(b) the quality of the evidence that GCA relied upon in rendering its opinion of value; and

(c) the accuracy of GCA's valuation of the Upstream Assets' operating costs.

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203 First Zhilin Report, ¶ 69.
204 First Zhilin Report, ¶ 70.
205 Second FTI Report, ¶ 5.52.
206 First Melgunov Report, ¶ 179, footnote 102; Article 3(2) of the Federal Law No. 263-FZ dated 30 September 2013 "On Amendments to Chapter 26 of Part Two of the Tax Code of the Russian Federation and Article 3.1 of the Law of the Russian Federation 'On Customs Tariffs'" (**VM-55**).

435. A theme that runs throughout FTI's criticisms of GCA is that the Claimants, for example CNG, were unprofitable, money-losing ventures and that the valuation of their assets should be adjusted accordingly.[207] The Russian Federation points to NJSC Naftogaz's consolidated financial statement that:

> …the Group's negative working capital as at 31 December 2013 and 2012 amounted to UAH 53,893 million and UAH 33,208 million, respectively, and for the years then ended the Group incurred net losses in the amounts of UAH 17,957 million and UAH 31,466 million, respectively, and there is uncertainty as to the outcome of significant ongoing litigations for the Group.[208]

436. It appears to the Tribunal majority that in making these criticisms, FTI has somewhat lost sight of the Tribunal's mandate, which is to determine the FMV (if any) of the hypothetical sale of the expropriated **assets** rather than a hypothetical sale of **shares** in the Claimant companies. Many property-rich, cash-poor companies may lurch into bankruptcy but nevertheless possess assets of great value. That CNG and Naftogaz were unprofitable in the lead up to the Valuation Date is of no relevance when determining the FMV of their **assets** in a hypothetical sale of those **assets** to a Willing Buyer.

1. *Challenge to the Quality of the Operating Costs Evidence*

437. Broadly speaking, the Russian Federation criticizes the Claimants for the poor quality of the information they have produced.[209] GCA explained that as a result of the invasion and subsequent takeover of Crimea, the Claimants no longer have the documents and information in their power, possession, or control.[210] According to the Claimants, the Russian Federation cannot

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207 *See*, *e.g.*, Tr., Hearing on Quantum, Day 5, 71:12-74:8; Presentation of FTI, Hearing on Quantum, slides 8-12; Second FTI Report, ¶¶ 2.9-2.10.

208 NJSC Naftogaz, Consolidated Financial Statements as at 31 December 2013 and 2012 and for Years Ended, 27 February 2015, 5 (**CE-832**).

209 Second FTI Report, ¶ 2.13:

> In this regard, as we explain in paragraphs 4.83 to 4.111, **we maintain our view that the financial and operating information upon which GCA relies is poorer than the information we would generally rely on in such a valuation** (and poorer than the information upon which a potential buyer would likely seek to evaluate a transaction worth more than USD 4 billion according to GCA's valuation). This decreases the reliability of GCA's valuation. (emphasis added)

210 Second GCA Report, ¶¶ 94, 101.

seize documents and information from the Claimants *en masse* and then object to the Claimants' limited evidence.

438. The issues regarding the quality of evidence that is available to determine the FMV of the Upstream Assets are as follows:

> (1) no historic field level financial accounts have been provided. These would have enabled us (and GCA) to match field level economic models to actual reported figures. Instead, GCA has made numerous unsupported assumptions regarding *inter alia* sales volumes and operational costs;
>
> (2) no field-level reservoir models or annual reserve accounts have been provided. These would have enabled us to: (i) analyse detailed forecasts, developed prior to the Valuation Date, of how the fields were expected to be developed; and (ii) perform a detailed analysis of gas-in-place Recovery Factors, etc. that were accepted prior to the Valuation Date;
>
> (3) GCA does not provide its work product wherein it calculated gas-in-place, recovery factor, pressure analyses, flow analyses, or reservoir parameters such as porosity. Having access to these work documents would have enabled us to test GCA's assumptions and conclusions;
>
> (4) no evidence has been provided that work commitments were met under the evidenced Special Permits;
>
> (5) no maintenance records for operating fields have been provided. GCA has not provided evidence of the state of repair of the Upstream Assets, or maintenance activity carried out in order to certify asset integrity. These would have allowed us to determine the level of downtime and maintenance that should be considered in the forecast analyses; and
>
> (6) GCA has referenced CNG quarterly and annual financial performance if reports but provides no evidence of these reports.[211]

A. *Lack of Historic Field Level Financial Accounts*

439. GCA's DCF analysis estimates future capital expenditures based on financial data field development plans and investment reports.[212] Information was unavailable about operating costs related to individual fields.[213] GCA considered the information about the combined fields was sufficiently accurate because "most fields are gas and are located in relatively shallow water, so

211 First FTI Report, ¶ 2.63.
212 First GCA Report, ¶ 141.
213 First GCA Report, ¶ 142.

the similarities between the fields are greater than the differences".[214] Palasa was the one exception, because it is a deep water development.[215]

440. GCA's estimate of operating costs are based on CNG's actual 2012 and 2013 operating costs.[216] Thus:

> i. Fixed costs are assessed based on the number of producing wells at any time. We used the fixed cost parameter of [Ukrainian hryvnia] UAH 280,000 per well per month.
>
> ii. The variable cost for gas production is UAH 8.0/Mcm (e.g., the variable cost for 1 MMcm of gas production is equal to UAH 8,000).
>
> iii. The variable cost for liquids production (applied to both condensate and oil) is UAH 25.0/mt (e.g., the variable cost for 1,000 mt of liquids production is equal to UAH 250,000).[217]

GCA says its use of these parameters matches CNG's total 2013 operating cost of UAH 332.7 million.[218]

441. The First GCA Report applies this methodology to the Claimants' Upstream Assets over 151 pages.[219]

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214 First GCA Report, ¶ 142.
215 First GCA Report, ¶ 143.
216 First GCA Report, ¶ 144, Table 9; Chornomornaftogaz, Quarterly and Annual Financial Performance Reports from 2011-2013 (**CE-914**):

Cost Element	Units	2012		2013		Average	
		Gas	Liquids	Gas	Liquids	Gas	Liquids
Fixed	th. UAH	258,196	38,931	253,061	63,165	255,629	51,048
Variable	th. UAH	9,455	1,313	13,928	2,574	11,692	1,944
Gas production	Mcm	1,174,463		1,650,743		1,412,603	
Liquids production	mt		71,686		73,403		72,545
Average producing wells	Number	82		94.5		88	

217 First GCA Report, ¶ 145.
218 First GCA Report, ¶¶ 145-146.
219 First GCA Report, ¶¶ 153-248, Appendix VII, 209-329.

442. Even though GCA states that "[n]o information was available about operating costs related to individual fields",[220] FTI criticizes GCA's methodology for not using historic field level financial accounts. FTI says that such documents "would have enabled us (and GCA) to match field level economic models to actual reported figures".[221] FTI does not explain why this is a preferred methodology when nearly all the fields are similar. It says that GCA "made numerous unsupported assumptions regarding *inter alia* sales volumes and operational costs".[222] FTI does not identify any specific assumptions in GCA's 151 pages of analysis.

B. *Lack of Field Level Reservoir Models and Annual Reserve Accounts*

443. The First FTI Report criticizes GCA in the following terms:

> no field-level reservoir models or annual reserve accounts have been provided. These would have enabled us to: (i) analyse detailed forecasts, developed prior to the Valuation Date, of how the fields were expected to be developed; and (ii) perform a detailed analysis of gas-in-place Recovery Factors, etc. that were accepted prior to the Valuation Date …[223]

444. GCA also pointed to its reliance on "extensive field-level subsurface and performance data" to derive its estimates and predictions of future production.[224] It says that the Ryder Scott reserves report data was as of 31 December 2013, meaning that earlier data would not assist the analysis.[225]

445. FTI subsequently takes issue with the fact that GCA did not act prudently because it did not "consider **contemporaneous** field and reservoir models"[226] (emphasis added), which

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220 First GCA Report, ¶ 142.
221 Second FTI Report, ¶ 4.92.
222 Second FTI Report, ¶ 4.92.
223 First FTI Report, ¶ 2.63(2). For context, pages 98 to 466 of Ryder Scott's first report provide their data about how Ryder Scott estimated future reserves, resources, and income attributable to the Upstream Assets (*See* Ryder Scott Company, Estimated Future Reserves, Resources and Income Attributable to Certain Interests (**CE-895**)). GCA addresses Shtormove and Odeske in the body of its report, along with the 17 smaller fields it analyzes in Appendix VII of its first report.
224 Second GCA Report, ¶ 97.
225 Second GCA Report, ¶¶ 97-98.
226 Second FTI Report, ¶ 4.96:

> The purpose of GCA's analysis should have been to determine the forecasts of production, costs, expenses, etc that would have been estimated by a petroleum evaluator as of the Valuation Date. A prudent petroleum

disregards the fact that the Upstream Assets are in the Respondent's possession and are inaccessible. FTI states that GCA did not perform their analysis to the standards of a prudent petroleum evaluator,[227] but does not reveal where that standard comes from or what it is based on. The majority concludes that FTI has not provided the Tribunal with any valid critiques of GCA on this issue.

C. *GCA Work Product*

446. FTI says that it was unable to test GCA's assumptions and conclusions because GCA did not append its work product to its First Report. This meant that FTI was unable to check GCA's calculations for gas in place, recovery factor, pressure analyses, flow analyses, and reservoir parameters.[228] In its Second Report, GCA denies this assertion, detailing how this information was provided to FTI.[229] Specifically, much of the work was provided in PHDWin data files that came from both Ryder Scott[230] and GCA,[231] along with other data.[232] PHDWin data files allow software owners to analyze oil and gas well performance and carry out economic analysis; the software package is published by TRC Consultants.[233] FTI says this data was not sufficient to allow it to review GCA's work.[234]

447. Due to the lack of detail about what steps FTI took (if any) to understand the information presented to it, the majority does not accept this criticism of GCA's work.

evaluator at the Valuation Date would have considered contemporaneous field level reservoir models and annual reserve accounts in performing its analyses.

227 Second FTI Report, ¶ 4.96.

228 First FTI Report, ¶¶ 2.63(3), 5.39; Second FTI Report, ¶ 4.97.

229 Second GCA Report, ¶ 99.

230 Ryder Scott PHDWin Data File (**CE-915**).

231 GCA, PHDWin Data File (**CE-917**).

232 Adjustments to the Project of Development for Holitsynske Gas Field, 2011, Table 3.26, 150-153 (**CE-962**); Plan for the Commercial Development of the Shtormove Gas Condensate field, 2012, Tables 3.8-3.10 (**CE-957**); First GCA Report, footnote 205, *referring to* Screenshot of MBAL and Prosper Calculations for Odeske (**CE-920**); Screenshot of MBAL Inputs for Odeske for the Second GCA Report, 14 February 2014 (**CE-1090**).

233 *See*, *e.g.*, Second GCA Report, i (Glossary) ("PHDWin[:] A commercial software package (by TRC Consultants) used to conduct analysis of well performance and to carry out economic analysis.").

234 Second FTI Report, ¶¶ 4.97-4.98.

D. *Whether the Claimants Satisfied Working Conditions*

448. FTI's fourth criticism is that "no evidence has been provided that work commitments were met under the evidenced Special Permits".[235] GCA's reply is that it was unaware of any concerns that the Claimants had failed to meet their commitments under the Special Permits. Furthermore, the fact that the Special Permits had been retained and reissued by the Russian Federation suggests that the Claimants were, in fact, in compliance with their work commitments.[236]

449. FTI expands on its critique in its Second Report. It says that as part of the due diligence process a hypothetical Willing Buyer would examine the appendices to each Special Permit to determine whether the owner of the Special Permit had complied with the several work commitments listed at the end of each permit.[237] It directs the Tribunal's attention to one example of how CNG appears not to have complied with a work commitment in one field.[238] FTI does not provide an opinion about whether this example of non-compliance would be material such that it could result in suspension, termination, or non-renewal.

450. The majority agrees with GCA that FTI's issue in effect requires the Claimants to prove a negative: that they have not failed in complying.[239] FTI shows that there was likely an issue with one field. It does not appear that this issue was material to CNG's regulator, since FTI does not show any associated regulatory history. The Tribunal majority would expect that if CNG had a history of suspensions or terminations of Special Permits, then there would be evidence of this. FTI has none. Similarly, FTI does not respond to GCA's observation that the Russian Federation reissued the Special Permits. The majority, therefore, finds that this criticism has not been established.

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235 First FTI Report, ¶ 2.63(4).
236 Second GCA Report, ¶ 100.
237 Second FTI Report, ¶ 4.104.
238 Second FTI Report, ¶ 4.105.
239 Second GCA Report, ¶ 100 ("GCA is not aware of any concerns that work commitments had *not* been met, and FTI does not suggest they were not met."). (emphasis in the original)

E. ***Maintenance Records***

451. FTI complains that GCA has not accounted for the possibility of extraordinary shutdowns.[240] GCA's Second Report states, "we did not provide maintenance records because we understand from Naftogaz's counsel that Naftogaz does not have access to this information".[241] Further, it points out that repairs and maintenance are accounted for in their operating data and that there was no reason to assume given ongoing production that the facilities were not in good working order. FTI does not point to any factors or evidence that show either a reasonable or probable risk. The majority of the Tribunal considers that a theoretical possibility alone is not sufficient to displace GCA's likely operations costs.

F. ***Quarterly and Annual Financial Reports***

452. In its First Report, FTI stated "GCA has referenced CNG quarterly and annual financial performance reports but provides no evidence of these reports".[242] GCA highlighted the evidence in its Second Report.[243] In reply, FTI observes that the financial information GCA uses does not contain basic financial statements FTI would expect in audited financial accounts, nor does it provide the details of the relevant accounting standards used. However, FTI does not state what basic financial statements it would expect, nor does it describe what details should be present. In these circumstances, the Tribunal majority is not persuaded of the validity of this criticism.

2. *Accuracy of GCA's Operating Costs Analysis*

453. The Russian Federation argues that GCA likely underestimated the operating costs and thus likely overestimated the value of the Upstream Assets.[244]

454. The GCA's Mr. Seager testified at the hearing that:

> Our analysis, set out in spreadsheets provided to Russia, matches the actual operating cost data available for 2013. The approach that we used is industry standard and was also used by Ryder Scott. FTI does not dispute the methodology

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240 Second FTI Report, ¶¶ 4.108 *et seq*.
241 Second GCA Report, ¶ 101.
242 First FTI Report, ¶ 2.63(6).
243 Second GCA Report, ¶¶ 103-104.
244 First FTI Report, ¶ 5.43.

> and has also used it for their own illustrative calculations; they only apply some different numbers.[245]

He was not cross-examined or otherwise challenged on this testimony.

A. *Assessment of Fixed and Operating Costs*

455. The Second GCA Report provided a response to FTI's issue about GCA's calculation of fixed and operating costs.[246]

456. FTI appears to have declined the opportunity to further join issue after receiving GCA's clarification. The Tribunal majority therefore finds this criticism to be unsubstantiated.

457. In its Second Report, FTI also raises issues about operating costs for the first time. Its criticism is that GCA valued the service assets based on their market value, and therefore the operating costs should also have been calculated using market rates rather than the actual operating costs that GCA used.[247] In the view of the Tribunal majority, the actual operating costs are the most reliable source of information since the actual costs necessarily reflect a sample of the Crimean market. Accordingly, this is not a valid criticism.

B. *Use of Average Fixed and Operating Costs*

458. GCA detailed how its cost parameters differed from those of both Ryder Scott and FTI.[248] According to GCA, both Ryder Scott and FTI overestimated the operating costs of the Upstream Assets because they mistakenly included Midstream costs in their analyses.[249] The Second FTI

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245 Tr., Hearing on Quantum, Day 5, 14:10-14:16.

246 Second GCA Report, ¶ 107:

> The operating costs provided to and cited by GCA were not available to us on a field-by-field basis, but in the aggregate across all developed fields at the Valuation Date by line item category (*i.e.*, by category of expense). These line items were classified as either relating to fixed costs, costs that vary with gas production, or costs that vary with liquids production. This is standard industry practice and was followed by Ryder Scott, FTI (in its report), and GCA. For all offshore fields, to estimate operating costs going forward, we applied these unit costs to the number of producing wells and the production volumes of gas and liquids (respectively), to derive the total operating cost per field, by year. It is not the case that GCA's analysis used the "*same ... costs*" going forward—we used the same cost parameters, adjusted in future years for inflation. This is standard practice in the oil and gas industry. (emphasis in the original)

247 Second FTI Report, ¶¶ 4.65-4.67.

248 Second GCA Report, ¶ 110, Table 5.

249 Second GCA Report, ¶ 111.

Report suggests that GCA did not account for the operating costs of the Midstream Assets at all.[250] At the Hearing on Quantum, Mr. Seager explained that their costs were accounted for in "transportation tariffs reimbursed by those customers."[251]

459. Mr. Seager was not cross-examined or otherwise challenged on this testimony. The majority therefore accepts GCA's position that the operating costs of the Midstream Assets are separate, and that they are covered by the transportation tariffs reimbursed by customers.

C. *Number of Wells in Odeske Field*

460. GCA found that FTI's operating costs analysis was incorrect because FTI included 22 wells in the Odeske field when there are, in fact, 20 wells. The addition of two further wells would result in increased operating costs that would lower the valuation of this field.[252] FTI did not respond to this issue.

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[250] Second FTI Report, ¶¶ 4.68-4.82.

[251] Tr., Hearing on Quantum, Day 5, 14:17-14:23.

[252] Second GCA Report, ¶ 112.

D. *Onshore Costs*

461. In response to the issue raised by FTI, GCA expanded upon how it calculated onshore costs in its Second Report.[253] FTI did not respond to the above clarification in their Second Report.[254] The majority therefore accepts GCA's valuation of onshore costs for the Upstream Assets.

3. *Conclusion*

462. The majority of the Tribunal is satisfied that the Claimants have met the onus of proving their operating costs on a balance of probabilities. FTI's criticisms of GCA's methodology, the quality of the evidence GCA relied upon and suggested errors in the accuracy of GCA's calculation of the operating costs are not persuasive.

PART 15 - THE QUANTUM VALUATION OF UPSTREAM ASSETS

463. The Russian Federation argues[255] that a DCF analysis is industry standard practice and the most appropriate method to value Upstream Assets. It outlines what it regards as the appropriate steps of a DCF valuation in this case:

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[253] Second GCA Report, ¶¶ 114-117:

> As discussed above, the available data on operating costs provided to GCA do not distinguish between onshore and offshore assets. It was necessary to make a reasonable assumption to account for this fact. We therefore applied <u>all</u> of the fixed costs to the offshore wells.
>
> We took this approach because the cost of operating an onshore field is significantly less than that to operate an offshore field, so it would not be appropriate to assume the calculated offshore per-well fixed costs applied onshore.
>
> Our approach is a simplification, but the overall economic impact is negligible in our view—if it exists at all. Total onshore production in 2013 was about 0.7% of the total production on a gas equivalent basis, and declining. Moreover, by applying <u>all</u> of the fixed costs to the offshore fields, we may have marginally underestimated the field life and value of the offshore fields. In any event, because the onshore assets contribute less than 1% to total value, any variation in the end of life caused by assuming no fixed cost is *de minimis* and immaterial.
>
> For all the reasons set out above, in GCA's opinion the operating cost basis established in 2013 forms a reasonable basis for estimating such costs going forward. Had costs been available for individual fields, we would have considered them, but such detail was neither available nor necessary for the valuation of the Upstream Assets. (emphasis in the original)

[254] FTI did take issue with the final sentence of Second GCA Report, ¶ 117, but did so in the context of critiquing the information available to GCA: Second FTI Report, ¶ 4.90.

[255] Respondent's Opening Presentation, Hearing on Quantum, slide 60.

(a) determine a production forecast for the volumes that could be commercially produced;

(b) establish a price forecast for gas, condensate and oil prices;

(c) determine gross revenues on that basis;

(d) apply the relevant fiscal terms; and, finally

(e) apply the appropriate discount rate to the cash flows, accounting notably for country risk.

464. This model was followed by GCA who approached valuation of the Upstream Assets as follows:[256]

1 **Future Production and Costs**
GCA identified the volumes of gas, condensate, and oil that a willing buyer stepping into the shoes of NJSC Naftogaz, CNG and UGV could produce from the Upstream Assets and sell.

GCA then identified the costs associated with that production.

2 **Gas Pricing**
GCA assessed what the market would consider to be a reasonable expectation of the future price that gas could be sold in Ukraine (and, as a result, would factor in a willing buyer's purchase price calculations).

3 **Oil and Condensate Pricing**
GCA assessed what the market would consider to be a reasonable expectation of the future price that oil and condensate could be sold (and, as a result, would factor into a willing buyer's purchase price calculations).

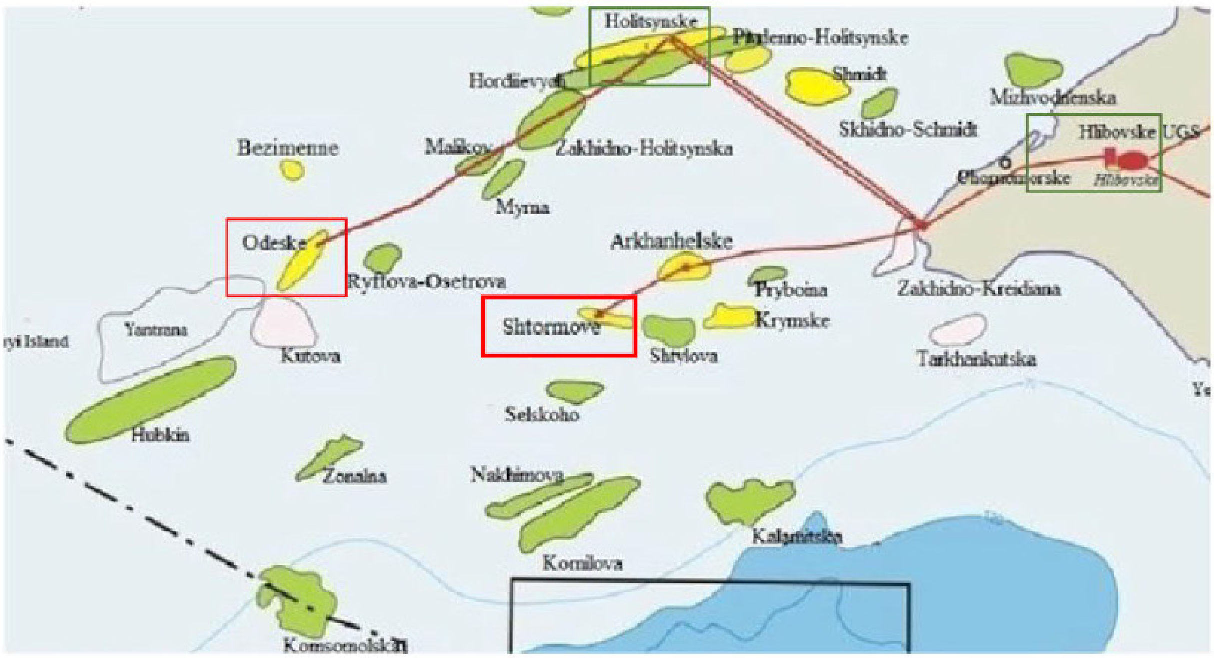
4 **Contractual and Fiscal Terms**
GCA determined the contractual and fiscal terms applicable to the Upstream Assets. After accounting for these terms, GCA calculated the net revenues that would be expected from the Upstream Assets going forward.

5 **Discount Rate**
GCA assessed the appropriate discount rate, adjusted to reflect country risk, used to convert the expectations of future net cash flows into a FMV on the Valuation Date.

256 First GCA Report, ¶ 46.

6 **Results of the DCF Analysis**
GCA calculated the FMV of future net cash flows of individual assets into a FMV on the Valuation Date for NJSC Naftogaz, CNG and UGV's interests in those Upstream Assets.

4.1 Upstream Assets



Source: First GaffneyCline Report, Figure 29 (with the Shtormove field circled)

465. Unfortunately, FTI was instructed by counsel for the Russian Federation to refrain from providing their own valuation. Counsel instructed FTI as follows:

> 3. In respect of the inappropriate assumptions you identify in respect of (1) and (2), provide illustrative calculations showing the impact of changing those assumptions on the value of one producing field and one prospective resource. **For the avoidance of doubt, please refrain for the time being from providing an overall valuation of the Claimants' purportedly dispossessed assets.** It must be made clear that your illustrative calculations in this regard shall be made without prejudice to the Respondent's position that any investments made before

> 1 January 1992 are not subject to any compensation, and thus cannot have any value in these proceedings.[257] (emphasis added)

1. *Quantifying the Upstream Resources by Petroleum Resources Management System*

466. The quantum experts for the Claimants, GCA, and the Respondent, FTI, agree that, in the words of FTI:

> the Petroleum Resources Management System … defines industry accepted standards for classifying and categorizing petroleum resources based on:
>
> (1) uncertainty associated with the quantity of petroleum present in the fields; and
>
> (2) the chance of commerciality, which reflects the project maturity.[258]

However, FTI disagrees with GCA's application of PRMS which it states are "higher than a reasonable estimate." Unfortunately, FTI does not offer a competing estimate.

467. The experts also agree about the basic methodology, as can be seen from FTI's Second Report:

> We agree with GCA that proved plus probable ("2P") reserves are recognized as the best estimate of the reserves, and that best estimate production forecasts are typically used for economic valuations. Accordingly, our valuation is based on 2P reserves.[259]

468. According to the Russian Federation however, GCA's technical assessment is "flawed"[260]:

(a) the PRMS provides a useful starting point but does not account for the risks and uncertainties that must be factored in the determination of FMV;

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257 Letter from Schellenberg Wittmer to FTI Consulting, 2 December 2019 (**FTI-154**).

258 First FTI Report, ¶ 5.6.

259 Second FTI Report, ¶ A4.6; Petroleum Resources Management System, June 2018, Figures 1.1, 2.1 (**FTI 2-2**); GCA Presentation, Hearing on Quantum, slide 5; Tr., Hearing on Quantum, Day 5, 8:7-12, 9:4-6; First GCA Report, ¶¶ 69-71. PMRS Version 1.01 was approved for use in June 2018 by the Society of Petroleum Engineers, the World Petroleum Council, the American Association of Petroleum Geologists, the Society of Petroleum Evaluation Engineers, the Society of Exploration Geophysicists, the Society of Petrophysicists and Well Log Analysts, and the European Association of Geoscientists and Engineers. Mr. Seager of GCA helped write the standard. When asked about PRMS's definitions during his cross-examination, Mr. Seager pointed out that he "was actually on the committee that wrote these definitions, so I'm aware of the discussions that went behind it."

260 Respondent's Opening Presentation, Hearing on Quantum, slide 62.

(b) the level of project maturity impacts the risk and uncertainty associated with reserves, but is not quantitatively accounted for under the PRMS framework;

(c) in line with industry practice, GCA should apply Reserves Adjustment Factors ("**RAFs**") to derive risked cash flows;[261]

(d) RAFs are commonly used to account for risk and uncertainty.[262]

2. *The Use of Reserve Adjustment Factors*

469. The Russian Federation says that RAFs should have been used in GCA's PRMS analysis based on calculations found in a 2013 survey by the Society of Petroleum Evaluation Engineers ("**SPEE**").[263] GCA takes the position that RAFs are used almost exclusively in North America.[264]

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261 *Occidental*, ¶ 709 (**CLA-187**).

262 AmCM, ¶ 436(i)-(ii); Rejoinder on Quantum, ¶¶ 601-631.

263 *See* First FTI Report, ¶ 5.29; Second FTI Report, ¶¶ 4.29 *et seq*.; Thirty-Second Annual Survey of Parameters Used in Property Evaluation, June 2013, Society of Petroleum Evaluation Engineers, 44, Table 25 (**FTI-42**):

OFFSHORE RAFs Used for Acquisitions - Respondents Who Use Only RAFs (%)						
(21 Respondents)	Average	Median	Standard Deviation	Minimum	Maximum	Mode
Proved Producing	95.2	95.0	4.0	90.0	100.0	95.0
Proved Shut-In	77.1	85.0	21.1	25.0	100.0	85.0
Proved Behind-Pipe	74.0	75.0	14.5	50.0	100.0	75.0
Proved Undeveloped	57.6	50.0	19.9	20.0	100.0	50.0
Probable Producing	40.7	50.0	17.1	0.0	65.0	50.0
Probable Shut-In	31.0	40.0	20.8	0.0	55.0	50.0
Probable Behind-Pipe	30.2	30.0	19.1	30.0	50.0	50.0
Probable Undeveloped	25.5	25.0	19.0	0.0	50.0	10.0
Possible Producing	11.3	10.0	9.5	0.0	25.0	10.0
Possible Shut-In	8.2	10.0	6.8	0.0	20.0	10.0
Possible Behind-Pipe	7.5	5.0	6.5	0.0	20.0	10.0
Possible Undeveloped	6.6	5.0	6.8	0.0	20.0	0.0

264 Second GCA Report, ¶ 78. GCA's Mr. Seager stated in his examination-in-chief (*see* Tr., Hearing on Quantum, Day 5, 8:7-8:12):

> FTI claims that the application of RAFs is common in international valuation practice. This is not the case. In my entire career, which now spans nearly 50 years, I have never used reserve adjustment factors in a valuation opinion. The proper approach is to use the 2P, or best estimate.

470. In response, FTI cited six cases that have used RAFs to value petroleum reserves. Of these, five are from the United States. One is an investor-State dispute, named *Occidental Petroleum v. Ecuador*.[265] This was admitted by FTI's expert, Mr. Davis, to be the only practical example outside of North America that FTI cited for in-practice use of RAFs.[266] FTI was not able to produce any other practical examples of the international application of RAFs.[267] Given how often oil and gas are the subjects of investor-State disputes, the Tribunal majority would have expected if RAFs were common outside the North America, then there to be more than one case to illustrate that point.

471. FTI also cites six publications to demonstrate the use of RAFs internationally but Mr. Davis did not point to the articles as evidence of international acceptance when asked about the issue in cross-examination.[268]

472. The Tribunal majority notes that Mr. Seager's London-based valuation experience and current practice appears to be more focused on the international oil and gas market than Mr. Davis's Texas-based practice and experience, which appears to be largely focused on the U.S. domestic market. The Tribunal majority thus accepts the evidence of Mr. Seager that RAFs are not appropriate in the valuation of the Upstream Assets in this arbitration.

473. Further, the majority prefers the evidence of Mr. Seager that a 2P or best estimate approach based on PRMS is the international industry standard for valuing oil and gas fields. The majority also finds that since Mr. Seager helped write PRMS standards, he is qualified to employ them and

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In his cross-examination, Mr. Seager was challenged on his opinion that RAFs are largely a North American phenomenon to which he gave the following explanation (*see* Tr., Hearing on Quantum, Day 6, 25:1-16):

> Q. Mr Seager, geology is the same everywhere in the world: it's not different in the US than –
> A. That's not relevant. Yes, geology is similar around the world. What matters is this has historically been developed in the United States over many decades, where, particularly **the onshore US, there's dealing with individual landowners who have mineral rights, which doesn't happen anywhere else in the world. There are, typically, small parcels of acreage that are dealt with, and people are looking at individual wells with different ownerships. And when banks are looking to lend money on one well, they have no other means of recourse to recover that money apart from that well.** So, yes, that's riskier than developments involving hundreds of wells, which is what we're dealing with offshore Crimea -- offshore and onshore Crimea. (emphasis added)

265 *Occidental* (**CLA-187**, **FTI2-88**). *See*, *e.g.*, Second FTI Report, ¶¶ 4.30 *et seq*.
266 Tr., Hearing on Quantum, Day 6, 50:2-50:5.
267 Tr., Hearing on Quantum, Day 6, 53:11-53:14.
268 Tr., Hearing on Quantum, Day 6, 53:11-53:14.

that he did in fact apply them correctly to the Upstream Assets. The majority further accepts that RAFs are largely a North American phenomenon and rarely used in international practice and they do not need to be considered as part of PRMS. Finally, the majority is satisfied that PRMS can be used as a basis for determining the FMV of oil and gas reserves and that GCA analyzed site-specific risk and uncertainty factors when applying its PRMS evaluation to the Upstream Assets to yield an industry-standard, internationally-acceptable FMV.

3. *Whether Risk has Properly Been Taken Into Account by GCA*

474. FTI agrees that PRMS defines industry-accepted standards for classifying and categorizing petroleum resources, but disagree with GCA that fair market value could be assessed without a suitable adjustment for geological, mechanical, and development risks and uncertainties.[269] FTI refers to GCA's "unrisked PRMS".[270]

475. FTI gives generic examples of possible geological uncertainties.[271] FTI does not point to evidence that geological, mechanical, and development risks or uncertainties *actually* exist or existed in the Upstream Assets.

476. In their Second Report, FTI states that the lack of "location specific data" about geological and development risks should increase GCA's risk from 10 percent and 20 percent, respectively, to 50 percent. Mr. Davis of FTI further emphasized his 50 percent risk analysis at the Hearing on Quantum, stating that "[p]robable reserves have a lower likelihood of being produced than Proved reserves, **perhaps** as low as 50% probability of being produced."[272] (emphasis added)

477. Mr. Seager of GCA testified that his approach reflected the fact that "there was no evidence of any of these issues arising in the assets that we were evaluating".[273]

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[269] First FTI Report, ¶ 5.3 (1).
[270] *See*, *e.g.*, Second FTI Report, ¶ 4.6.
[271] First FTI Report, ¶¶ 5.13-5.23.
[272] Tr., Hearing on Quantum, Day 5, 79:9-79:11; FTI Presentation, Hearing on Quantum, slide 17.
[273] Tr., Hearing on Quantum, Day 6, 17:25-19:11:

Q. And "construction" echoes the sorts of problems I was referring to earlier, such as drilling and casing the well, and any delay that could arise with mechanical issues or equipment issues; would you agree?

478. The Tribunal majority accepts Mr. Seager's evidence that the geologic,[274] mechanical, and development[275] risks and uncertainties are, in fact, slight and therefore are minor aspects in the current PRMS analysis. Mr. Davis's (of FTI) testimony about mechanical risks during his re-examination accords with Mr. Seager's testimony that mechanical risks are low.[276]

> A. That would be covered by article (d). But what the [VALMIN] code says is that you have to consider those, and **we considered them and there was no evidence of any of these issues arising in the assets that we were evaluating.**
>
> …
>
> Q. I'm saying: what this provision says is that your valuation report should include an evaluation of the risks and include an analysis including the effects that these risks may have on the valuation?
>
> A. As I've said, we looked at the operations. **They are very standard oil field operations. We didn't see any evidence of mechanical problems or delays occurring in the history that was available to us.** We did run some sensitivities, is my understanding, and to the extent that you wish to discuss those, I think perhaps my colleague Mr George may be able to shed some light on some of the sensitivities we ran. But overall, that was encompassed in the totality of our evaluation. **On the technical aspects, there was nothing that we saw that needed us to include any uplift on capital. In terms of timing, we did consider that. We looked at the proposed time of development in the field development plans, and we were actually fairly conservative.** We pushed the timing out, in some cases several years, in order to accommodate the fact that developments may not occur as originally projected in the development plans. So I think we've taken all that into account. (emphasis added)

Tr., Hearing on Quantum, Day 6, 15:16-16:2:

> **Q. And sometimes, if you have a serious issue, this can lead to significant cost overrun, right?**
> A. As I said before, it can do, but it's not a common occurrence. **Here we're dealing with a well-established petroleum province. There's more than 100 producing wells that have been drilled. It's a very simple hydrocarbon area in which to drill. There's no high pressures, there's no high temperatures. It's basic oil and gas field technology. Yes, of course problems could occur, but I wouldn't factor that in as a significant factor into an evaluation**. (emphasis added)

274 Second GCA Report, ¶¶ 83-86.

275 Second GCA Report, ¶¶ 87-88.

276 Tr., Hearing on Quantum, Day 6, 55:3-25:

> Q. Maybe just one point. We heard earlier Mr. Seager say that mechanical issues when drilling a casing well are very rare. What's your view on this statement?
>
> A. My opinion on that is I think it's -- you very, very, **very commonly experience some small problems or some things that don't go according to your plan.** That's very common. As a matter of fact, I've -- you know, I don't think I've ever seen a well that was drilled that went exactly according to plan. **But those very common changes generally had very little or no or negligible effect on the -- on your ability to drill and complete the well, or the cost of the well.** And then you have -- you know, sometimes you run into problems. The more frequently -- or less frequently you run into problems that might have, you know, some very small material effect on your ability to drill and complete the well and the cost (inaudible) the well. And then even less frequently than that, you have material problems drilling and completing the well that have a material cost. And then occasionally, and I agree it is very rare, you have tremendous – you know, tremendous mechanical problems that make it impossible to drill or complete the well. (emphasis added)

479. It appears that FTI interpreted the absence of evidence about risk and uncertainty to be evidence of their absence from GCA's analysis. However, according to Mr. Seager the low risk and high certainty reflects the historic information about the Upstream Assets. FTI's analysis also seems to overlook GCA's analysis of risk in the First GCA Report, which covers probabilistic evaluation, the risking of contingent and prospective resources, along with a review of historical development and production.[277]

480. The Tribunal majority accepts that risks and uncertainties are accounted for in GCA's PRMS calculations and that they in fact reflect the history of the Upstream Assets. The majority prefers to rely on the site-specific risks and uncertainties Mr. Seager described in his cross-examination based on the history of the Upstream Assets rather than the possible risks and uncertainties described by FTI.

4. *The GCA Calculation of Past and Future Gas Production from the Upstream Resources*

481. After applying PRMS 2018 to develop the resource base,[278] GCA then charted the historical and projected the future rate of production.[279]

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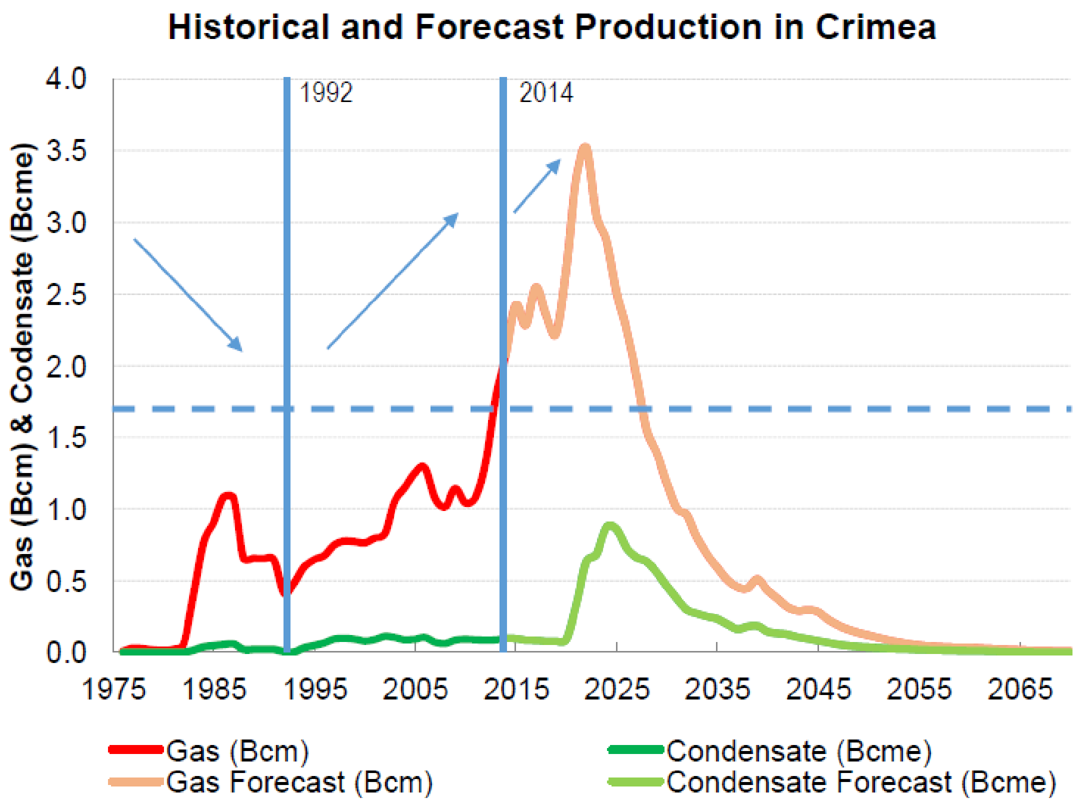
277 First GCA Report, ¶¶ 103-140.

278 *See* Second GCA Report, ¶ 60.

> **(2) The PRMS Methodology Accounts for Risk and Uncertainty**
>
> 60. The vertical axis of the PRMS framework (Figure 1 above) accounts for the risk that a certain project (e.g., a field development) will not take place.
>
> 1) Projects in the Reserves class are subject to a firm plan and are effectively committed, so the chance of development is taken to be 100%. This applies to all categories of Reserves.
>
> 2) Projects in the Contingent Resources class relate to discoveries that may not be developed, or developed in a timely manner, due to one or more contingencies. For this reason, a Chance of Development (Pd) of less than 100% is applied to the success-case forecasts.
>
> 3) Projects in the Prospective Resources class relate to exploration opportunities; in other words, to prospects that have not yet been drilled to confirm a discovery. Such projects are therefore subject to a Chance of Geologic Discovery (Pg) (otherwise called geological chance of success) as well as a Chance of Development (Pd).
>
> 4) Both Pg and Pd must be estimated using informed professional judgment based on the facts in each case — there is no "formula" to derive the values, but they should be based on sound technical considerations.

279 Claimants' Opening Presentation, Hearing on Quantum, slide 106, *referring to* PHDWin Data File (**CE-917**).

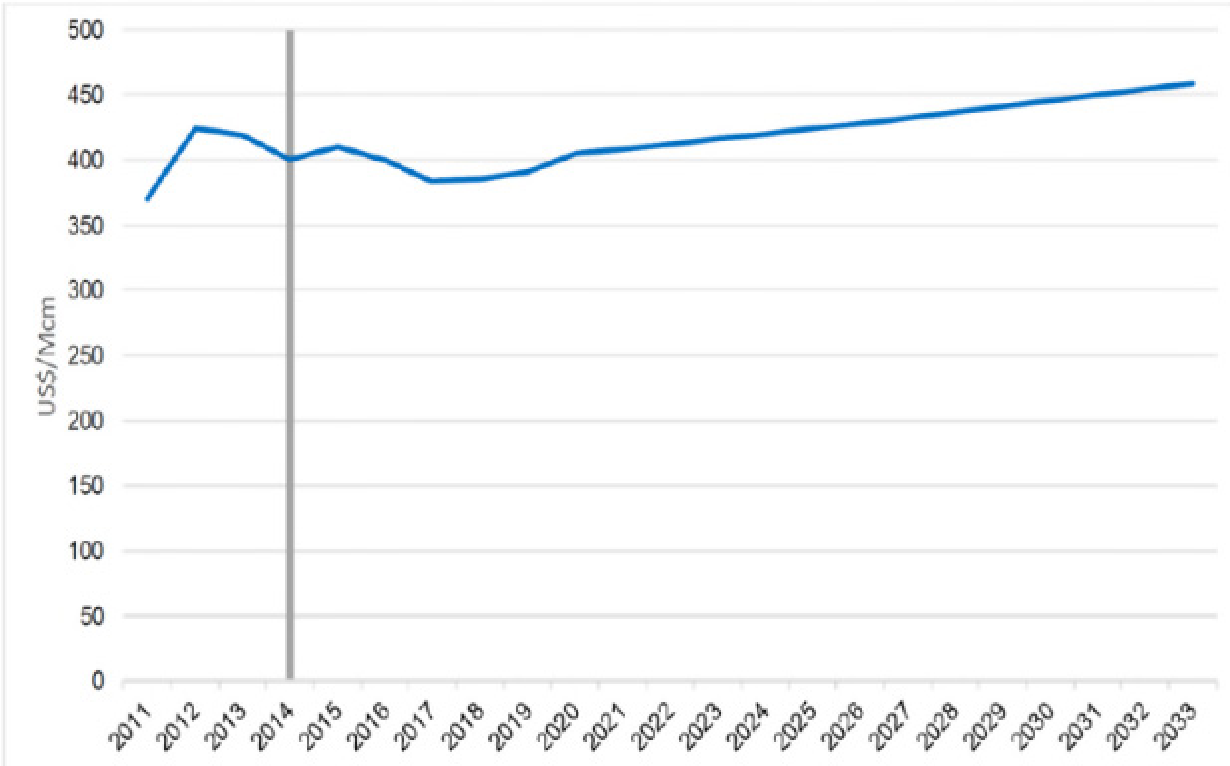


482. GCA then projected likely gas prices over the expected life of the Upstream Assets:[280]

[280] First GCA Report, ¶ 321, figure 44. *See also* First FTI Report, ¶ 7.14, Second FTI Report, ¶¶ 6.4-6.33. FTI raised no concerns about calculation of:

1) the price that Naftogaz paid Gazprom under the long-term SPA;
2) the NCG hub price;
3) the Henry Hub futures prices, plus costs to the Ukrainian border;
4) the weighted average import price; and
5) price that could be obtained by selling gas to industrial consumers.

Figure 44: Outlook for Independent Producer Gas Prices (US$/Mcm) [287]



483. Mr. Zhilin and Professor Melgunov agreed that the Russian FTS would consider Crimea to be an RGSS until such time that it was connected to the UGSS.[281] As stated earlier in this Final Award, the Tribunal majority rejects the Respondent's arguments that Krasnodar prices would apply.[282] Instead, the Tribunal majority agrees with Mr. Zhilin that the Willing Buyer would rely **on the Russian Federation's 2007 declaration in Resolution No. 333 that gas prices would increase to netback/export parity, which is to say that Russia's industrial gas prices would move higher to match the prices paid on the global market for industrial use**. While implementation has been delayed,[283] the FTS, the Russian regulator, never changed its policy.

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281 First Zhilin Report, ¶¶ 36, 38; First Melgunov Report, ¶ 90.
282 *See also* First Zhilin Report, ¶¶ 53; First Melgunov Report, ¶ 153.
283 First Zhilin Report, ¶¶ 50-51.

484. GCA's analysis of the Upstream Assets under the Russian Scenario starts with the assumption that Ukrainian regulations and pricing would continue to 31 December 2014.[284] From 1 January 2015 onwards, GCA assumes that RGSS prices in Crimea would be higher than the UGSS prices in Krasnodar.[285] Finally, it bases its prices on the Willing Buyer's expectation that gas prices would increase to export parity.[286] The Tribunal majority accepts GCA's outlook for prices.

485. In order to estimate future capital expenditures for the purposes of the DCF analysis, GCA obtained the costs for development activities from financial data, field development programs ("**FDPs**"), and investment reports. Most costs were in UAH, which were converted to USD at the exchange rate in force in early March 2014.[287]

486. This led GCA to an analysis of the applicable fiscal terms.[288]

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[284] Second GCA Report, ¶ 393.

[285] Second GCA Report, ¶ 395.

[286] Second GCA Report, ¶¶ 401-402.

[287] First GCA Report, ¶ 141.

[288] According to GCA:

- FTI is in broad agreement with [Gaffney Cline's] understanding of the applicable fiscal terms;
- Reviewed and applied terms of Special Permits;
- Accounted for applicable royalty rates;
- Accounted for corporate tax and value added tax;
- Did *not* account for undepreciated tax balances;
- Accounted for terms of production sharing agreement (Permit No. 4478);
- Accounted for terms of joint-venture/joint-operating agreements (Permit Nos. 1632, 2113, 2377, 2378, 2379, 2692, 4594, 4991).

See First FTI Report, ¶ A9.27; First GCA Report, ¶¶ 344-350, Table 39 (**CE-1105**); Second GCA Report, ¶¶ 20, 287, Table 14; Joint Investment Agreement No. 2847 Between Chornomornaftogaz and Shelton Canada Corporation, 24 July 2003 (**CE-56-Am**); Joint Operation Agreement No. 1201 Between Chornomornaftogaz and CBM Oil plc, 28 September 2007 (**CE-69-Am**).

487. The experts GCA and FTI both proposed a discount rate, which largely differed in the Country Risk Premium ("**CRP**").[289] GCA arrived at a discount rate range of 12.9 percent to 17.3 percent.[290]

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289 *See* Second FTI Report, ¶ 3.3:

> Nearly all of the difference between our and GCA's discount rate estimates is attributable to our respective estimates of the premium in the discount rate applicable to reflect risks associated with where the production assets are located and where their potential customers are located (also referred to as the country risk premium or CRP).

290 First GCA Report, Appendix V, Table 88:

Table 88: Country-Risk Adjusted Weighted Average Cost of Capital on the Valuation Date (after the incorporation of Country Risk)

		Low	High
Corporate Assumptions			
Asset Beta	$B_A = B_E / (1 + (D/E)*(1-T))$	0.8	1.2
Leverage	D/E	40%	10%
Pre Tax Cost of Debt	R_D	4.0%	8.0%
Statutory Tax Rate	T	35.0%	25.0%
Market Assumptions			
Risk Free Rate	R_F	4.0%	4.0%
Market Equity Premium	R_{MP}	5.0%	5.0%
Country Risk Premium	R_C	8.0%	8.0%
WACC Calculation			
Re-Levered Equity Beta	$B_E = B_A * (1 + (D/E)*(1-T))$	1.01	1.29
Cost of Equity	$R_E = R_F + B_{EA} * R_{MP}$	9.0%	10.5%
Country Risk Adjusted Cost of Equity	$R_{E(CR)} = R_E + R_C$	17.0%	18.5%
Pre Tax Cost of Debt	R_D	4.0%	8.0%
Tax rate	T	35.0%	25.0%
Post Tax Cost of Debt	R_{DT}	2.6%	6.0%
	$R_{E(CR)} * E/V$	12.2%	16.8%
	$R_{DT} * D/V$	0.7%	0.5%
WACC	$WACC = R_{E(CR)} * E/V + R_{DT} * D/V$	**12.9%**	**17.3%**

488. In its "illustrative calculations", FTI applies a *Crimean* discount rate—reflecting what it argues is increased risk in Crimea relative to the Russian Federation.[291] The Crimean CRP that FTI puts forth is based on Crimea's former status as a part of Ukraine.[292] **This is at odds with FTI's general view that the Ukrainian connection should essentially be ignored in the forward-looking economic analysis**. As mentioned earlier, the Respondent's general position is that the Russian energy market and Russian law should apply.[293] This is consistent with GCA's conclusion that Crimea's discount rate should be tied to the discount rate of the State (the Russian Federation) that governs the territory.[294] **In the majority view, the approach taken by GCA is more consistent with the Russian Scenario than is FTI's resort to a Ukrainian based CRP for Crimea.**

489. The Claimants then identified the differences in terms of the quantum analysis between the Ukrainian Scenario and the Russian Scenario.[295]

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291 First FTI Report, ¶¶ A7.36-A7.52.

292 Ukrainian Autonomous Republic of Crimea 'B-' And 'uaBBB-' ratings affirmed, S&P Global Ratings, 20 December 2013 (**FTI-96**); Autonomous Republic of Crimea Downgraded to 'CCC uaB-', S&P Global, 25 February 2014 (**FTI-97**).

293 AmCM, ¶ 424.

294 Second GCA Report, ¶ 428.

295 Claimants' Opening Presentation, Hearing on Quantum, slide 119:

Input	Dif erence	Source:
Technical Evaluation	None.	Second GCA Report, ¶¶ 374-376
Permit Renewal	None.	Second GCA Report, ¶¶ 377-378
Oil and Condensate Prices	None.	Second GCA Report, ¶¶ 379-380
Gas Prices	2014: Ukrainian regulatory regime applies for transitional period. 2015+: Regulated prices would be set for RGSS and exports allowed. 2017: Export parity achieved.	Second GCA Report, ¶¶ 382-412
Fiscal Terms	2014: Ukrainian fiscal terms apply for transitional period. 2015+: Russian fiscal terms apply.	Second GCA Report, ¶¶ 413-424
Discount Rate	Russian country risk premium (2.3%) applies; resulting discount rate is 9-12%.	Second GCA Report, ¶¶ 425-434

490. In the end result, GCA valued the Upstream Assets (Russian Scenario) at USD 3.231 million as follows:[296]

	Producing Fields										Fields Planned for Development						
Field/ Prospect Name	Odeske	Odeske	Shtormove	Arkhanhelske	Holitsynske	East Kazantypske	East Kazantypske	Dzhankoi	Semenivske	Zadorozhne	Bezimenne	Bezimenne	North Kerchenske	Shmidta	Subotina	South Holitsynske	North Bulhanatske
Interest Owner	CNG	UGV	CNG	CNG	CNG	CNG	UGV	CNG	CNG	CNG	CNG	UGV	CNG	CNG	CNG	CNG	CNG
Working Interest	50%	50%	100%	50%	50%	50%	50%	100%	100%	100%	50%	50%	50%	49%	10%	49%	100%
9% Disc. Rate	893	893	878	0	16	9	9	15	6	3	31	31	36	16	31	47	11
12% Disc. Rate	780	780	791	0	15	8	8	12	6	3	24	24	26	8	19	36	11

	Contingent Resources		Prospective Resources								
Field/ Prospect Name	Arkhanhelske CR	Shmidta CR	Hubkina West	Hubkina Central	Hubkina East	Palasa	Shtormove Deep	Kerchenske	Albatros	Pryvybiina	South Kerchenske
Interest Owner	CNG	CNG	CNG	CNG	CNG	NG	CNG	NG	NG	NG	NG
Working Interest	50%	49%	49%	49%	49%	100%	49%	100%	100%	100%	100%
9% Disc. Rate	19	72	11	2	2	0	44	10	44	80	267
12% Disc. Rate	10	53	7	1	1	0	30	0	28	53	176

Discount Rate:	9%	12%
	Totals (in millions US$)	
Producing Fields (NPVs):	2,724	2,403
Fields Planned for Development (NPVs):	203	147
Contingent Resources (EMVs):	92	63
Prospective Resources (EMVs):	460	295
	Tax Consolidation	
Tax and VAT Consolidation excl. Palasa	40	36
	3,519	2,944
	3,231	

Apportionment by Claimant:

Company	US$MM
CNG	2,140
UGV	940
Naftogaz	151
Total	**3,231**

See Second GCA Report, Table 24; CE-1104

491. In the absence of a competing valuation from FTI, but having given consideration to FTI's challenges to the GCA analysis, the Tribunal majority fixes the quantum of compensation of the expropriated Upstream Assets at USD 3,231,000,000.

PART 16 - THE MIDSTREAM ASSETS

492. The Claimants owned and/or operated a comprehensive network of onshore pipelines in Crimea to carry the gas to market as shown in Figure 47 of the First GCA Report. The bulk of these pipelines was operated by various Claimant companies, but owned by the State.

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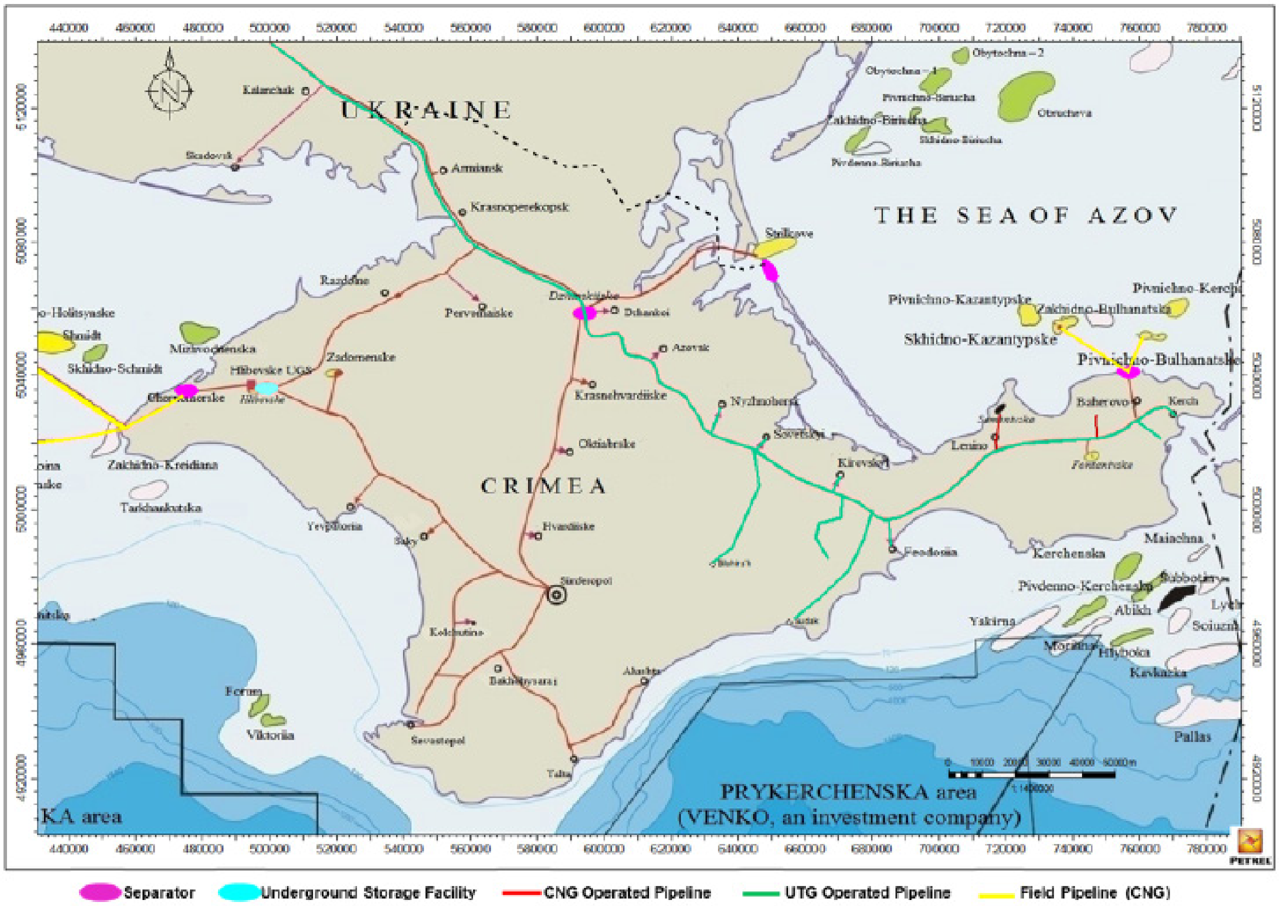
296 Claimants' Opening Presentation, Hearing on Quantum, slide 120.

Figure 47: Crimea's Natural Gas Transportation System[429]



493. As of the Valuation Date, the Midstream Assets consisted of:

(a) the gas pipeline system operated by CNG, located primarily in the Central and Western parts of Crimea (including the inventory in the pipelines);

(b) the gas pipeline system operated by UTG, located primarily in the Northern and Eastern parts of Crimea (including the inventory in the pipelines);

(c) the underground gas storage facility at Hlibovske (the "**UGS Facility**"), located in Western Crimea, which was operated by CNG (including the cushion gas inventory); and

(d) the local distribution pipelines, ancillary equipment, and buildings, owned by UTG and NJSC Naftogaz, which were located throughout Crimea, referenced to as "Book Value Assets".[297]

494. CNG's 854 km pipeline system connected to the UTG network so that CNG could physically transport its gas production to the UTG network.[298] UTG operated a 429 km pipeline system, with fill gas inventory, which transported gas to the major cities and towns in Northern and Eastern Crimea.[299] This was a relatively new pipeline system and it was connected to UTG's pipeline system in mainland Ukraine.

495. UTG also owned and operated smaller diameter, shorter pipelines that connected the main gas pipelines to the gas distribution stations ("**GDS**"). These stations serviced a number of towns in the Northern and Northeastern parts of Crimea. UTG owned the equipment and building at each GDS, the access road to the GDS, and a communications and radio control system that allowed UTG to operate the pipelines and deliver gas to each town distributor.[300]

496. Naftogaz owned several smaller diameter, shorter pipelines that served as connections from the main pipelines of CNG and UTG to a GDS, supply pipelines from the GDS to several village networks, and a supply pipeline to a thermal power station.[301]

497. In his opening, counsel for Naftogaz made clear that the bulk of the pipelines were **operated not owned** by the Claimants in his discussion of Slide 122:

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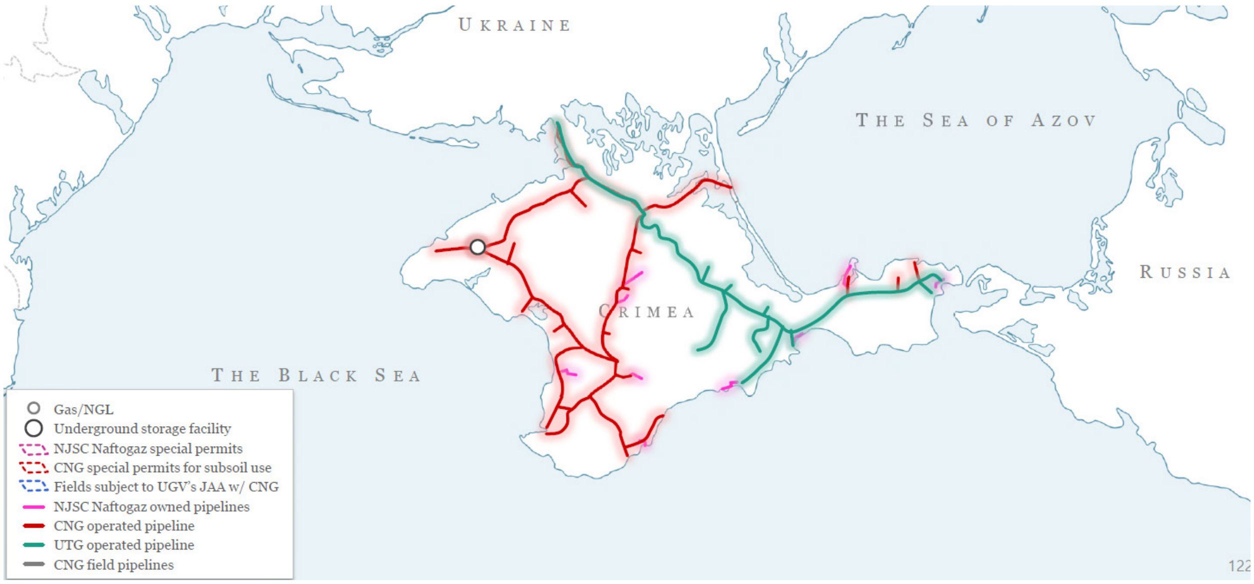
[297] First GCA Report, ¶ 418.

[298] First GCA Report, ¶ 421.

[299] Excerpts from EY Accounting Data as of 31 December 2014, 23 July 2015 (**CE-353**) (listing assets owned and operated by UTG); Excerpts of Kharkivtransgaz 2b(k) Form, 11 March 2014 (**CE-447-Am**) (listing assets in Crimea operated by Kharkivtransgaz, a division of UTG); Excerpts of Ukrgaztekhzviazok 2b(k) Form, 20 March 2014 (**CE-448-Am**) (listing assets in Crimea operated by Ukrgaztekhzviazok, a division of UTG).

[300] Excerpts from EY Accounting Data as of 31 December 2014, 23 July 2015 (**CE-353**) (listing assets owned and operated by UTG); Excerpts of Kharkivtransgaz 2b(k) Form, 11 March 2014 (**CE-447-Am**) (listing assets in Crimea operated by Kharkivtransgaz, a division of UTG); Excerpts of Ukrgaztekhzviazok 2b(k) Form, 20 March 2014 (**CE-448-Am**) (listing assets in Crimea operated by Ukrgaztekhzviazok, a division of UTG).

[301] Excerpts from EY Accounting Data as of 31 December 2014, 23 July 2015 (**CE-353**) (listing assets owned and operated by UTG); Excerpts of Kharkivtransgaz 2b(k) Form, 11 March 2014 (**CE-447-Am**) (listing assets in Crimea operated by Kharkivtransgaz, a division of UTG); Excerpts of Ukrgaztekhzviazok 2b(k) Form, 20 March 2014 (**CE-448-Am**) (listing assets in Crimea operated by Ukrgaztekhzviazok, a division of UTG).



> (Counsel for Naftogaz) I will first provide an overview of the investments that the Russian Federation expropriated. These consist of CNG and UTG's rights **to operate** transportation pipelines in Crimea, which connected Crimea to the wider Ukrainian gas market and delivered gas to local distribution networks, as well as certain distribution pipelines owned by Naftogaz. These pipelines are highlighted here on the slide. The main pipelines **operated** by CNG are indicated in red; the main pipelines **operated** by UTG are indicated in green; and the distribution pipelines owned by NJSC Naftogaz are highlighted in pink. In addition to these pipelines, CNG had a special permit, issued in 1998 under Ukrainian law, to operate a 1 bcm gas storage facility at the Hlibovske field.[302] (emphasis added)

498. In addition, there were a number of miscellaneous assets held by UTG and CNG in Crimea, for example, CNG maintained trucks and onshore drilling rigs, and UTG maintained a number of buildings and pipeline vehicles. These investments also form part of the Midstream Assets (the "**Miscellaneous Midstream Assets**").

499. According to the Russian Federation, GCA's Midstream valuation suffers from a fundamental flaw because GCA considers that all the Midstream Assets must necessarily carry value because they are "used". Russia says that it is a fundamental principle of valuation that an investor's perception of value is based only on an asset's ability to generate future returns. An asset does not have value to an investor simply because they are in "use". Thus, Russia says,

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302 Tr., Hearing on Quantum, Day 1, 114:11-25.

GCA's misconception motivates their valuation of the Midstream Assets, causing them to apply incorrect methodologies and assumptions that a Willing Buyer would not apply.[303]

1. *The Approach of the Tribunal Majority*

500. A different approach is required for each of the categories of the Midstream Assets:

(a) the Claimants' Special Permits to use the Midstream pipelines and the UGS Facility owned by the State call for an income approach (as with the Special Permits for the Upstream Assets);

(b) the small pipelines owned by the Claimants will be valued at depreciated replacement value;

(c) the Claimants' Miscellaneous Midstream Assets will be valued at their depreciated book value, as recorded by Ernst & Young ("**EY**").

501. The difference between FTI and GCA's valuation of the Midstream Assets is set out below:

Midstream Asset Type	GCA Valuation USD Million	FTI Comments
Pipeline Systems	456	FTI says Russian transmission tariffs were far lower than Ukrainian tariffs, with no apparent prospect of an increase. **The pipeline networks generated no profits under Russian tariffs.**
UGS Storage Facility	63	FTI says based on its loss-making operation under Ukrainian tariffs, under the even lower Russian tariffs this **facility would have been of no value**.
Natural Gas Inventories	146	FTI says GCA has double-counted the "cushion gas" (which it values at USD 142 million), which is **required to operate the gas storage facility**, **and is not a source of incremental value**. The same could apply to the USD 4 million of pipeline fill.
Other Midstream Assets	50	FTI says GCA has not identified any incremental revenues or value linked to those assets. With a **lack of evidence of any such revenues or value**, we consider it inappropriate to assign value to these assets at this time.
Total	**751**	**Zero**

303 AmCM, ¶¶ 448-469; Rejoinder on Quantum, ¶¶ 701-754.

502. CNG's and UTG's right to operate the pipelines and CNG's right to operate the UGS at Hlibovske fall under Article 1.1(d) of the BIT:

> rights to engage in commercial activity, including rights to the exploration, development and exploitation of natural resources.

503. The Claimants' ownership of pipelines and equipment falls under Article 1.1(a) of the BIT:

> movable and immovable property, as well as any other related property rights.

504. GCA valued the following Midstream Assets and in the majority Tribunal view, none of them date from Soviet times and thus do not trespass on Article 12 of the BIT.

	Circumstances of Acquisition	**Date of Acquisition**
	NJSC Naftogaz	
Building of gas networks, village Yantarne	On 29 December 2002, NJSC Naftogaz entered into an agreement with Subsidiary Company Ukrtransgaz to fund the construction of this asset, and, under the terms of this agreement, acquired the ownership of the pipeline on 30 December 2004, when the pipeline was commissioned.	30 December 2004
Supply pipeline to Novyi Svit village	On 29 June 2004, NJSC Naftogaz entered into an agreement with Subsidiary Company Ukrtransgaz to fund the construction of this asset, and under the terms of this agreement, acquired the acquired the ownership of the pipeline on 12 January 2006, when the pipeline was commissioned.	12 January 2006
Inter-settlement gas pipeline to village Berehove	On 15 December 2005, NJSC Naftogaz entered into an agreement with OJSC Krymgaz for gas supply and gas infrastructure development to fund the construction of this asset, and under the terms of this agreement, acquired the ownership of the pipeline on 25 January 2006, when the pipeline was commissioned.	25 January 2006
Extension pipeline to GDS (gas distribution station) and	On 27 September 2004, NJSC Naftogaz entered into an agreement with Subsidiary Company Ukrtransgaz to fund the construction of this asset, and under the terms of this agreement, acquired the ownership of the	29 November 2006

	Circumstances of Acquisition	Date of Acquisition
gasification of MBC in Krasnokamianka village	pipeline on 29 November 2006, when the pipeline was commissioned.	
Inter-settlement gas pipelines from GDS -3 (gas distribution station) in city Simferopol to the settlements of Dobre Village Council	On 9 October 2009, NJSC Naftogaz entered into an agreement with OJSC Krymgazbud and Affiliated Enterprise Naftogazmerezhi to fund the construction of this asset, and under the terms of this agreement, acquired the ownership of the pipeline on 1 January 2009, when the pipeline was commissioned.	1 January 2009
Gasification of urban village Oktiabrske, Krasnohvardiiskyi region	On 9 October 2009, NJSC Naftogaz entered into an agreement with OJSC Krymgazbud and Affiliated Enterprise Naftogazmerezhi to fund the construction of this asset, and under the terms of this agreement, acquired the ownership of the pipeline on 26 January 2010, when the pipeline was commissioned.	26 January 2010
Gasification of villages Rozdolne and Vinnytske Simferopol region	On 9 February 2010, NJSC Naftogaz entered into an agreement with OJSC Krymgazbud, and Affiliated Enterprise Naftogazmerezhi to fund the construction of this asset, and under the terms of that agreement, acquired the ownership of the pipeline on 30 August 2010, when the pipeline was commissioned.	30 August 2010
Supply gas pipeline to village Shcholkino	NJSC Naftogaz acquired the ownership of the pipeline on 31 October 2003, when the pipeline was commissioned.	31 October 2003
Supply gas pipeline to village Yantarne	NJSC Naftogaz acquired the ownership of the pipeline on 15 December 2003, when the pipeline was commissioned.	15 December 2003
Supply gas pipeline to Kamysh-Burunska TPS [thermal power station]	NJSC Naftogaz acquired the ownership of the pipeline on 1 September 2004, when the pipeline was commissioned.	1 September 2004

	Circumstances of Acquisition	Date of Acquisition
	Chornomornaftogaz	
MGP Hlibovka – Simferopol	CNG acquired the right to operate the pipeline and related branch pipelines to various gas distribution stations from NJSC Naftogaz.	Sometime after 4 February 1999
MGP Peredove – Sevastopol	CNG acquired the right to operate the pipeline and related branch pipelines to various gas distribution stations from NJSC Naftogaz.	Sometime after 4 February 1999
MGP Simferopol – Sevastopol	CNG acquired the right to operate the pipeline and related branch pipelines to various gas distribution stations from NJSC Naftogaz.	Sometime after 4 February 1999
MGP Bahchysarai – Yalta	CNG acquired the right to operate the pipeline and related branch pipeline to one gas distribution stations from NJSC Naftogaz.	Sometime after 4 February 1999
MGP Yalta – Alushta	CNG acquired the right to operate the pipeline from NJSC Naftogaz.	Sometime after 4 February 1999
MGP Krasnoperekopsk – Hlibovka	CNG acquired the right to operate the pipeline and related branch pipelines to various gas distribution stations from NJSC Naftogaz.	Sometime after 4 February 1999
MGP Kherson (Chaban) – Crimea, MGP Krasnoperekopsk – Dzhankoy	CNG acquired the right to operate the pipeline and related branch pipelines to various gas distribution stations from NJSC Naftogaz.	Sometime after 4 February 1999
MGP Dzhankoy – Simferopol	CNG acquired the right to operate the pipeline and related branch pipelines to various gas distribution stations from NJSC Naftogaz.	Sometime after 4 February 1999
Gas Pipeline Strilka -Dzhankoy	CNG acquired the right to operate the pipeline and related branch pipeline to one gas distribution stations from NJSC Naftogaz.	Sometime after 4 February 1999
Hlibovske underground-gas-storage facility and associated cushion gas inventory	CNG applied for the special permit for subsoil used and acquired it on 24 March 2000.	24 March 2000
Offshore and onshore exploration and	Assets that existed before CNG was formed were transferred to its ownership upon its formation.	18 August 1998 or later

	Circumstances of Acquisition	Date of Acquisition
production equipment	Assets that were commissioned after CNG was formed were acquired on the date indicated in the accounting data.	
	Ukrtransgaz	
Gas pipeline Armyansk-Dzhankoy	Ukrtransgaz acquired the right to operate the pipeline from NJSC Naftogaz under Agreement 19/2.	17 June 1999
Extension gas pipeline to the GDS in Bilohirsk town	Ukrtransgaz acquired the right to operate the pipeline from NJSC Naftogaz under Agreement 19/2.	17 June 1999
Extension gas pipeline to GDS in Sudak town	Ukrtransgaz acquired the right to operate the pipeline from NJSC Naftogaz under Agreement 19/2.	17 June 1999
Gas pipeline Dzhankoy-Feodosia-Kerch	Ukrtransgaz acquired the right to operate the pipeline from NJSC Naftogaz under Agreement 19/2.	17 June 1999

505. The Russian Federation contends,[304] and the Tribunal majority agrees, that GCA's use of the DRC methodology to value the "Use" Permits and licenses is inappropriate. However, GCA also provides a valuation using the "income approach". In the view of the Tribunal majority, the "income approach" is correct in the circumstances.

2. *Differences Between the Majority and the Dissenting Opinion*

506. In her Dissenting Opinion, Professor Stanivuković accepts the theory of the Russian Federation that:

> … NJSC Naftogaz and CNG are legal successors to companies founded in the Soviet Union prior to 1 January 1992 that engaged in the same type of commercial activities. All rights and obligations of their predecessors were transferred to them, including the right to operate gas transportation and storage facilities.[305]

304 AmCM, ¶ 450; Rejoinder on Quantum, ¶¶ 716-721.
305 Dissenting Opinion, ¶ 110.

507. According to our colleague, this means that they had rights to operate the gas transportation system before 1 January 1992 notwithstanding that they were not incorporated until 1998 and did not invest in the Upstream Assets until 1999 at the earliest.

508. In the majority view, the conclusion that "they" (the Claimants) had "rights to operate the gas transportation system before 1 January 1992" simply ignores the basic premise of Ukrainian corporate law—separate legal personality—as discussed earlier. Equally, the Tribunal majority rejects the Respondent's theory of "legal succession" that is, in reality, no succession at all.

509. Our colleague also points to restrictions on the sale of property by Agreement No. 76[306] but:

(a) insofar as the Claimants' case is based on rights of use, any restriction on sale of the underlying assets is irrelevant;

(b) the "restricted market" argument simply denies the basis of FMV which presupposes a sale of the assets in an "open and unrestricted market".

510. Equally, our colleague's argument based on restriction on the transfer to the Willing Buyer of rights of use presupposes (in our colleague's scenario) a lack of consent to a transfer which, in the view of the majority, is wholly unrealistic. Only the Willing Buyer would be in a position to generate gas to make use of the Midstream pipelines which would otherwise sit idle, an unacceptable situation in a Ukrainian or Russian winter.

3. *Pipelines and UGS Facility*

A. ***The Claimants' Rights "To Use" State-Owned Midstream Pipelines***

511. GCA valued the Claimants' cost in the Midstream State-owned pipelines by valuing their depreciated replacement cost. As FTI points out,[307] and the Tribunal agrees, there is no compelling argument to pay the Claimants the depreciated replacement cost of pipelines that the Claimants did not own.

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306 Dissenting Opinion, ¶ 113.
307 Second FTI Report, ¶ 9.29.

512. On the other hand, FTI also challenges the appropriateness of GCA's alternative income approach in light of GCA's acknowledgement that:

> On 1 March 2014, the tariff revenue was simply too low to generate the returns necessary to replace the pipeline system as it aged, or to provide a return to the investor. [308]

513. On this basis, FTI says that, in light of Russian tariffs or the prevailing Ukrainian tariff levels of March 2014, the Claimants' investment in the use of the pipeline networks had no value.[309] In context, however, what GCA actually wrote was:

> On 1 March 2014, the tariff revenue was simply too low to generate the returns necessary to replace the pipeline system as it aged, or to provide a return to the investor. Likewise, the income approach undervalues the assets because of the low transportation tariffs in place on 1 March 2014. **But both the financial metrics and income approaches reflect historic prices for transport and storage, and not future tariff increases that were anticipated on 1 March 2014.**[310] (emphasis added)

514. GCA (unlike FTI) actually did an "income approach" valuation of the Claimants' rights to "use" the Midstream pipelines. In the view of the Tribunal majority, the "income approach" is likely the basis on which a Willing Buyer would assess its worth and should therefore be used to value the gas transmission and storage systems operated by CNG and UTG.

515. It is necessary to determine the net present value of net future income streams from the delivery of gas to customers and distribution companies in Crimea beginning in March 2014. GCA based the number of years of projected future income streams on the remaining estimated working life of each pipeline system, being 24 years for CNG and 52 years for UTG.[311] This was appropriate. There is no basis to conclude that the Claimants would have been denied the "use" in that period of time but for the Russian invasion and expropriation.

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308 First GCA Report, ¶ 496.
309 First FTI Report, ¶¶ 9.10, 10.19.
310 First GCA Report, ¶ 496.
311 *See* First GCA Report, ¶ 482.

516. Using the corporate financial statements, GCA estimated the future cash flows from the operation of CNG's pipeline and storage system and UTG's pipeline system based on historic operating profits before interest, tax, depreciation, and amortization ("**EBITDA**") during 2012-2013.[312]

517. FTI notes that "Russian transmission tariffs were significantly lower as at the Valuation Date than Ukrainian tariffs".[313] However, the Respondent's expert witness on Russian oil and gas law, Professor Melgunov, acknowledged that Russia's FTS sets tariffs on a case-by-case basis. Under Russia's regulations, the FTS must examine many factors. Professor Melgunov thus concludes that "a hypothetical willing buyer could generally expect to be compensated for its economically justified and documented costs."[314]

518. In light of Professor Melgunov's conclusion that the regulator, FTS, would set a tariff based on the Willing Buyer's economically justified and documented costs which had already been demonstrated to the Ukrainian regulator prior to March 2014, the Tribunal majority believes GCA's use of prevailing Ukrainian tariffs is a reasonable and conservative basis for calculating the value of the use of pipelines and storage facility in the Russia Scenario. It is not plausible for FTI to argue that the FTS would set tariffs so low as to turn the right to use these assets into liabilities.

B. *CNG Cash Flow Estimation*

519. CNG's EBITDA for gas transmission and storage at the UGS at Hlibovske averaged USD 5.76 million per year during 2012-2013, based on its income statement.[315] This amount was projected annually for the 24-year period representing the weighted average of the remaining useful life of the pipelines operated by CNG. The volume of gas transported and stored in 2012-2013 was assumed (conservatively) to be constant despite the opportunity to increase the number of customers in Crimea.

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[312] First GCA Report, ¶¶ 482-483.
[313] First FTI Report, ¶ 9.10.
[314] First Melgunov Report, ¶ 141.
[315] Chornomornaftogaz, Quarterly and Annual Financial Performance Reports from 2011-2013 (**CE-914**).

520. The cost of maintenance and asset replacements are both operating costs included in the projection of EBITDA. GCA then estimated the resulting annual after-tax cash flow to be USD 5.34 million.[316]

C. *UTG Cash Flow Estimation*

521. As UTG did not prepare financial data for the pipeline system it operated in Crimea, GCA estimated the EBITDA for UTG's activities in Crimea using financial aid and operating data of Naftogaz's gas transportation business in 2012 and 2013.[317]

522. This produced an estimated average EBITDA for UTG of USD 2.84 million. This amount was projected annually for the 52-year period. The volume of gas transported was kept constant.

523. The cost of maintenance and asset replacements are both operating costs included in the projection of EBITDA. GCA applied a corporate tax rate of 18 percent prevailing in 2014 to the projected EBIT (earnings before interest and taxes) for gas transmission to obtain the tax paid. The resulting cashflow was USD 2.71 million for 49 years and USD 2.60 million for the following three years.[318]

524. Discounting the projected cash flows for CNG and UTG by applying an assumed rate of 15 percent provides a value of USD 40 million and USD 18 million respectively. Discounting the projected cash flows for CNG and UTG by applying an assumed rate of 10 percent provides a value of USD 53 million and USD 27 million respectively.

The Tribunal Majority's Ruling on the Compensation for Pipeline and UGS Facility Usage

525. Thus, using the income approach, GCA estimated the value of the use of the CNG pipeline system plus the UGS Facility at between USD 40 million and USD 53 million. In the Tribunal majority view, the appropriate compensation would be to take the mid-point of USD 46.5 million.

526. In addition, using the same "income approach", GCA estimated the value of the Claimants' **use** of the UTG pipeline systems at between USD 18 million and USD 27 million. The Tribunal

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316 First GCA Report, ¶ 488.
317 First GCA Report, ¶¶ 476-478.
318 First GCA Report, ¶¶ 493.

majority concludes that the appropriate award would be USD 22.5 million: USD 14.5 million to CNG and USD 8 million to UTG accordingly.

4. *Natural Gas Inventories*

527. The records show the existence of 1,183 million cubic meters of the Claimants gas expropriated by the Russian Federation. The volume of gas at the UGS Facility on the Valuation Date is not disputed. In its second report, FTI says "[w]e entirely agree with GCA's description of the gas inventories"[319] which were found to be as follows:

Value of Gas Inventory (USD MM)

Natural Gas Inventories	Quantity (MMcm)	GCA Value (USD/Mcm)	GCA Value (USD MM)
CNG UGS Cushion Gas	491	289	142
CNG Pipeline Fill	16	272	4
UTG Pipeline Fill	1	272	-
Working Gas	675	-	*[320]
Total:	**1,183**		**146** (plus value of working gas)

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[319] Second FTI Report, ¶ 9.47 ("We entirely agree with GCA's description of the gas inventories…".); Information on the Gas Stored in Crimea, Naftogaz, 18 November 2014 (**CE-325**):

> As at March 1, 2014:
> - balance of **working natural gas** in the storage is 687.7 mcm, including
> 675.3 mcm of gas owned by National Joint-Stock Company "Naftogaz of Ukraine" priced at **USD 255.25 million**;
> - balance of **base gas** is 881.0 mcm, including 390 mcm of remaining reserves and 491.0 mcm of injected gas.
> So, the total volumes of gas stored in the storage as at March 1, 2014, are 1,568.7 mcm. (emphasis in the original)

Letter No. 04/1-630 of SOE Ukrtransgaz to Chornomornaftogaz, 17 February 2014, 273 (**CE-878**); Analysis of Underground Gas Storage Network of Ukraine, (**CE-529-Am**) (stating that residual gas reserves amounted to 388.6 MMcm); Report on gas flow in the Hlibovske UGS for the period 26.03.2014-31.03.2014, 17 April 2014, 2 of PDF (**RE-135**):

4. Gas balance in the Hlibovske UGS as of 26 March 2014	**1 549 231.764**
- of which buffer	881 100.000
- of which active	668 131.764

[320] Not assessed by GCA.

528. It should be noted that GCA (and the Claimants) exclude from the claim an additional 390 million cubic metres of reserve gas from a depleted gas field that GCA concluded could not be substantiated and thus it would have no value to a Willing Buyer.[321] This leaves the balance of 1,183 million cubic meters for the Tribunal to deal with.[322]

529. GCA valued the 491 million cubic meters of cushion gas at the UGS Facility as of the Valuation Date. As will be seen, the 675 million cubic meters of "working gas" supply stored at the UGS Facility is valued outside the scope of the GCA reports,[323] but adopting the same financial parameters.

530. It is necessary to distinguish between "cushion gas" which it was necessary to retain in the storage facility to maintain enough pressure to function and "working gas" which is available to distribute to customers. As explained on the website of Uniper (a major German energy company):[324]

> The gas held in a gas storage facility is always divided into cushion and working gas. The cushion gas is the volume of gas that is necessary to ensure the minimum storage pressure necessary for optimal gas injection and withdrawal. In caverns, the cushion gas is also necessary to ensure stability.

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[321] First GCA Report, ¶ 501:

> We consider that the remaining reserves in the previously depleted gas field (*i.e.*, gas that remained in the field when production ceased, prior to use of the depleted field as a storage facility) cannot be substantiated and would not have been valued by a willing buyer. We have therefore not included the 390 MMcm of remaining reserves in the previously depleted gas field as inventory to be valued.

[322] First GCA Report, ¶ 503:

Natural Gas Inventories	Quantity (MMcm)	Price (US$/Mcm)	Value (US$MM)
CNG UGS Cushion Gas	491	289	142
CNG Pipeline Fill	16	272	4
UTG Pipeline Fill	1	272	-
Total	**1,183**		**146**

[323] First GCA Report, ¶ 498, footnote 485 ("we also understand that an NJSC Naftogaz stored 675 MMcm of natural gas of the facility, but this volume of gas is being valued outside the scope of this report.").

[324] Energy storage-Underground gas storage, Uniper (**FTI-57**).

A. *The Cushion and Fill Gas Issue*

531. FTI says GCA wrongly valued the UGS Facility separately because the "cushion gas" is not an asset that the Willing Buyer could sell, but rather a necessary input would require to operate the storage facility.[325] According to FIT, GCA's approach is analogous to charging a buyer the full market price of a car, and then charging them an additional amount for the cost of the wheels.[326] FTI explains:

> A willing buyer would not pay an additional amount for the wheels, which are a necessary input for operating the car. If the seller wants to sell the wheels separately, he must deduct its value from the market price of the car, to avoid "double counting." [327]

532. However, in the majority view, the "car" analogy is not apt because in this case the Willing Buyer is not "buying" the car but only "renting" the use of the UTG Facility. In a rental car situation, the renter hires the vehicle but is responsible for supplying the gas. In the event, the Russian Federation expropriated the gas and must pay for it.

B. *The Working Gas Issue*

533. The Claimants argue entitlement to compensation for the cost of working gas both as direct and consequential damages. The "direct" damages argument is a straightforward application of Article 31 of the ILC.[328] The Russian Federation took the gas and the Russian Federation must pay for it.

534. If the replacement of working gas is treated as a consequential loss, Naftogaz must prove (i) the amount of damages, (ii) that the damages (Naftogaz's purchase of replacement gas) were reasonably caused by the Russian Federation's expropriation of NJSC Naftogaz's 675-million

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325 First FTI Report, ¶ 9.16.
326 First FTI Report, ¶ 9.16.
327 First FTI Report, ¶ 9.19.
328 ILC Articles, Article 31 (**CLA-72-Am**). The parties agree that Art. 31 of the ILC Articles sets out the relevant legal test:

1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.

2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.

cubic meters of gas[329] and (iii) that the loss was reasonably foreseeable. In the view of the majority, the Claimants have satisfied all three preconditions.

535. According to the Claimants:

> NJSC Naftogaz in 2014 was a net importer of gas. It needed to purchase gas months in advance of knowing actual demand in order to ensure that demand could be met, especially in anticipation of the next winter "withdrawal" season. NJSC Naftogaz imported large volumes of gas throughout the year, including during off-peak months to fill storage facilities. NJSC Naftogaz would then use the stored gas to meet demand during the winter months.[330]

Expropriation of the 675 million cubic meters of gas caused the need for replacement. Moreover, it was entirely foreseeable by the Russian Federation that if it took the Claimants' gas, the Claimants would have to replace it. In any case, international law requires the taker to pay for what is taken.

536. In terms of pricing, Naftogaz relies on a preliminary invoice from Gazprom of 8 April 2014 and a subsequent invoice dated 13 May 2014.[331]

537. The Claimants allege that as a result of the Respondent's seizure of Naftogaz's 675,260.598 thousand cubic meters of working gas stored at the UGS Facility, Naftogaz's quantum of

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[329] Memorial on Quantum, ¶ 97; AmCM, ¶ 491.

[330] Reply on Quantum, ¶ 168. *See also* 2014 Annual Report, 76 (**CE-145**) ("Naftogaz received only 13.9 bcm from Ukrainian state-owned producers at a regulated price set below the market level" and in order "[t]o cover the remaining needs of households, Naftogaz imported about 8.2 bcm of gas at market prices in 2014.").

[331] Preliminary Invoice No. 10 from JSC Gazprom to NJSC Naftogaz, 8 April 2014 (**CE-830**); Invoice No. 15 from JSC Gazprom to NJSC Naftogaz, 13 May 2014 (**CE-1057**); Contract No. KP Between OJSC Gazprom and NJSC Naftogaz For the Purchase and Sale of Natural Gas in 2009-2019, as amended, 19 January 2009 (**CE-843**). According to Naftogaz, it purchased replacement gas from Gazprom under its contract with Gazprom. The translated portion of the May 2014 Gazprom invoice states in its relevant part:

in US dollars

Item No.	Description	Unit of measu-rement	Quantity	Price	Amount	VAT amount (0%)	Total
1.	For the natural gas of Russian origin actually delivered in April 2014 under Contract No. KP dated 19 January 2009 under Commercial Statement No. 4-K-14-KP dated 13 May 2014	tcm	2,585,525.955	491.52	1,270,837,717.40	-	1,270,837,717.40

replacement gas was USD 491.52 per thousand cubic meters.[332] It therefore seeks damages of USD 331,904,089.[333]

538. In 2014, NJSC Naftogaz began putting gas into storage in April—as it usually does.[334] Russia's expropriation of gas *already in storage* in April 2014 meant that NJSC Naftogaz needed to import more gas for injection into storage than it would have otherwise.[335]

539. The Russian Federation denies any causal link between its seizure of NJSC Naftogaz's working gas on 11 April 2014 and NJSC Naftogaz's purchase of gas from Gazprom later that month. Russia asserts that:

(a) NJSC Naftogaz has not shown that it purchased gas from Gazprom *to replace* the stored gas that Russia expropriated;

(b) NJSC Naftogaz intended to deliver the stored gas to Crimean consumers, could no longer do so, and therefore had no need to replace it;

(c) Russia's expropriation of NJSC Naftogaz's gas occurred after the end of the winter withdrawal season, meaning that NJSC Naftogaz did not need to purchase replacement gas to supply consumers in April 2014;

(d) NJSC Naftogaz did not need to purchase additional volumes under a high-priced contract with Gazprom, Contract No. KP, and could have chosen a lower-priced alternative;

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332 Chornomornaftogaz-NJSC Naftogaz Natural Gas Storage Agreement No. 14/2932/13, 15 April 2013 (**CE-129-Am**); Preliminary Invoice No. 10 from JSC Gazprom to NJSC Naftogaz, 8 April 2014 (**CE-830**); Invoice No. 15 from JSC Gazprom to NJSC Naftogaz, 13 May 2014 (**CE-1057**).

333 Reply on Quantum, ¶ 179.

334 National Energy and Utilities Regulatory Commission of Ukraine, Resolution No. 1398, "On the Approval of a Standard Form Contract for the Storage (Injection, Storage, Off-take) of Natural Gas", Secs. 2.5, 2.7, 1 November 2012 (**CE-1111**): (specifying that the "gas injection period" normally commences on 15 April of any given year).

335 That Naftogaz did not need to satisfy Crimean demand because of the Russian Federation's annexation of the territory is irrelevant; the Russian Federation seized both the territory (reducing demand to an extent) and also the gas producing investments in that territory (reducing supply more than the reduction in demand).

(e) Gazprom would have delivered the same volumes to NJSC Naftogaz in April 2014 regardless of the Russian Federation's expropriation of the gas; and

(f) NJSC Naftogaz had other sources of gas it could have used to supply its customers, *e.g.*, other gas in storage.[336]

540. In its Rejoinder, the Russian Federation focuses on causation. First, it denies that there is a causal connection between Naftogaz's purchases from Gazprom in April 2014 and the seizure of the gas at the UGS Facility. It emphasizes a passage from *Clayton v. Canada*, "[a]uthorities in public international law require a high standard of factual certainty to prove a causal link between breach and injury".[337] The Respondent also asserts that it could not have foreseen that Naftogaz would purchase more gas in April 2014 under its contract from Gazprom as a result of the Respondent's seizure of the UGS Facility.[338] Finally, it states that the Claimants have used the wrong volume quantification because the is not seized until 11 April 2014, several weeks after the Valuation Date of 17/18 March 2014, and so the amount of the UGS Facility was by that point reduced from 675,260.598 to 668,131.764 thousand cubic meters.

The Tribunal Majority Ruling on the Compensation for the Expropriation of 1,183 (1,176) Million Cubic Meters of Gas

541. The Claimants claim compensation for 1,183 million cubic meters expropriated by the Russian Federation. The Respondent concedes that there were 1,176 cubic meters of gas in the UGS Facility and pipelines.

542. Broadly speaking, the Russian Federation took the gas and it should pay for it.

543. The Claimants have established that Naftogaz needed to replace the gas taken by Russia to meet its requirements in areas of Ukraine other than Crimea. Gazprom was the regular supplier.

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336 AmCM ¶¶ 501-511.

337 Rejoinder on Quantum, ¶ 788, *citing William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware v. Government of Canada*, PCA Case No. 2009-04, Award on Damages, 10 January 2019, ¶ 110 (**RLA-145**).

338 Rejoinder on Quantum, ¶¶ 801-803.

544. Under Naftogaz's contract with Gazprom, the price of gas from time to time was determined by a price formula, which was indexed to the price of gas to oil product prices. This formula includes, *inter alia*, variables for oil price changes.[339] Pursuant to Addendum 29 of the contract, the parties agreed to a temporary discount in the first quarter of 2014 that applied from 1 January 2014 two 31 March 2014. The price, subject to the formula, was USD 268.50 per thousand cubic meter at the Valuation Date.[340] **In applying the formula to the gas price, GCA calculated that on the Valuation Date, 17 March 2014, the purchase price for gas under Addendum 29 of Naftogaz's contract with Gazprom was USD 272.00 per thousand cubic meters**.[341] The Tribunal majority accepts the calculation as appropriate.

545. By contrast, GCA's weighted average cost of gas imported from one of Naftogaz's German supplies, NCG, in 2013 was USD 401.30 per thousand cubic meter for delivery at the Ukrainian border.[342]

546. Further, according to GCA, transport and storage tariffs of USD 17.00 per thousand cubic meter would need to be added to the cost of replacing the **cushion gas, for a total cost of USD 289.00 per thousand cubic meter**.[343] GCA did not add the transport and storage tariff of USD 17.00 to the pipeline fill gas.

547. FTI did not disagree with GCA's gas pricing on the Valuation Date. Rather, FTI's analysis focused only on whether GCA's calculation led to "double counting" cushion and fill gas.[344] The

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339 First GCA Report, ¶ 258, *citing* Contract No. KP Between OJSC Gazprom and NJSC Naftogaz For the Purchase and Sale of Natural Gas in 2009-2019, as amended, 19 January 2009 (hereinafter "**Gazprom GSA**") (**CE-843**):

> Under the terms of the Gazprom GSA, the price paid for gas delivered at the Ukrainian- Russian border was determined by a price formula. The price formula indexed the price of gas to oil product prices, specifically gas oil (a distilled oil product used primarily by industry) and heavy fuel oil (a heavy oil product burned in a boiler or furnace). The formula included variables that could be used to moderate the impact of oil price changes (the "k" factor) and account for variations in the energy content of the gas supplied by Gazprom and any negotiated discounts (the "Factual Price").

340 First GCA Report, ¶ 259, *citing* Gazprom GSA, Addendum No. 29, 17 December 2013, T-0072-T-0073 (**CE-843**).

341 First GCA Report, ¶¶ 259, 503, footnote 489 (Px = [USD] 268.5 * 8155 (LHV for March 2014)/8050 = [USD] 272/Mcm based on the Gazprom GSA (**CE-843**); Naftogaz supplied the LHV.).

342 First GCA Report, ¶ 264.

343 First GCA Report, ¶ 503.

344 *See* First FTI Report, ¶¶ 9.14 *et seq*.; Second FTI Report, ¶¶ 9.44 *et seq*.

Tribunal majority rejects FTI's position on this point. In the result, however, the only opinion of value as to gas pricing from Russian-supplied gas on the Valuation Date comes from the First GCA Report.

548. To value the amount of gas in the UGS Facility, the imported gas must be transported to a storage facility, injected and stored underground. Based on transportation and storage tariffs in effect for March 2014, this would add USD 17.00 per thousand cubic meter to the imported price of gas[345] for a total cost of USD 289 per thousand cubic meter. This yields a value for the natural gas inventory in the UGS Facility of USD 142 million, and for the pipeline fill of USD 4 million. Therefore, the total value of the cushion gas and pipeline fill is USD 146 million.

549. In the opinion of the Tribunal majority, the Claimants have not established a claim to the higher price of USD 491.52 per thousand cubic meter charged by Gazprom in April for the Working Gas inventory at the UGS.

550. However, the Russian Federation admits it seized 668.13 million cubic meters of gas.[346] The majority accepts the reduced figure of 668.13 million cubic meters. The Claimants have therefore established their burden of proof under Art. 31 of the ILC Articles. The majority finds that GCA's rate of USD 272 per thousand cubic meter is the most appropriate figure. (As GCA's lowest figure, this rate does not include the USD 17 for import charges, since it is unclear to the majority whether the replacement gas came from Gazprom, Europe, or domestic source.) Therefore the majority finds that the Working Gas should be valued at USD 181,731,839.81.

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[345] Changes in Tariffs for Natural Gas Transportation, Distribution, and Supply (**CE-935**). GCA converted the UAH denominated tariffs to US dollars at the average exchange rate during 2Q 2014; the general transportation tariff of UAH 93.9/Mcm plus the injection and storage tariffs of UAH 35.1/Mcm and UAH 37.6/Mcm respectively. 166.6/9.605 = [USD]17/Mcm (rounded). Historical Exchange Rates, Fxtop.com, 17 March 2014.

[346] Rejoinder on Quantum, ¶ 804:

> Finally, the Respondent notes that the Claimants still rely on the wrong volumes of gas for the purpose of their calculations, namely 675,260,598 cubic meters. **As the Respondent has previously pointed out, however, there were only 668,131,764 cubic meters of gas stored in the UGS facility as of 1 April 2014.** Considering that the seizure occurred on 11 April 2014 according to the Claimants themselves, the relevant volumes are those that were in place at the UGS facility at that date, and not as of 1 March 2014, as wrongly alleged by the Claimants.

551. The correct prices to apply are those prevailing as of the Valuation Date of 17 March 2014 as follows:

Value of Gas Inventory (USD MM)

Natural Gas Inventories	Quantity (MMcm)	GCA Value (USD/Mcm)	GCA Value (USD MM)
CNG UGS Cushion Gas	491	289	142
CNG Pipeline Fill	16	272	4
UTG Pipeline Fill	1	272	0
Working Gas	668	272	181.7
Total:	**1,176**		**327.7**

552. FTI did not make an equivalent analysis. **The Tribunal majority accepts as appropriate the valuation of gas inventory of USD 327,731,839.81**.

5. Miscellaneous Midstream Assets

553. In 2014, EY performed an audit of assets owned by NJSC Naftogaz and UTG and identified their date of commissioning and historical cost.[347]

554. GCA has included in its valuation USD 50 million for what it calls the "Miscellaneous Midstream Assets".[348] It describes these as "a number of miscellaneous Midstream Assets, reflecting investments in gas distribution."[349] As the name implies, GCA has valued these assets at their depreciated value in accounting documents.[350]

555. FTI says there are two issues with the valuation:

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[347] First GCA Report, ¶ 505; Excerpts from EY Accounting Data as of 31 December 2014 (**CE-353**). To assist with these calculations, GCA reformatted and organized the data into an electronic spreadsheet. GCA Review of EY Accounting Data as of 31 December 2014, Tab "OC" (**CE-1000**).

[348] First GCA Report, Table 75.

[349] First GCA Report, ¶ 504.

[350] First GCA Report, ¶¶ 504-509.

(a) first, it is not clear that these assets generate any revenue beyond those which are captured elsewhere in GCA's valuation. FTI sees no evidence that additional revenues could have been earned from the "Miscellaneous Midstream Assets." Without evidence of such revenues (and the corresponding value), FTI considers it inappropriate to assign value to the Miscellaneous Midstream Assets;

in the view of the Tribunal majority, FTI's objection to the lack of recorded income in respect of the expropriated assets is simply a function of FTI's inappropriate use of DCF methodology. In the majority view, the Russian Federation chose to take physical possession of these assets and must pay for them whether they generate an income stream or not.

(b) second, according to the Respondent,[351] accounting values do not generally provide a good measure of economic value. There is no reason to believe that the accounting data upon which EY relied provide a reasonable basis with which to assess the market value of the underlying assets to the Willing Buyer;

in the Tribunal's majority view, the depreciated book value of these assets is an appropriate measure in circumstances where the Russian Federation took possession of the assets in mid-February 2014, well in advance of the Valuation Date, to the exclusion of the Claimants. If the Russian Federation considered the GCA valuation excessive, the Russian Federation is in possession of the assets and the related documentation and could have supplied different information.

556. As noted below, the Claimants' efforts to examine the marine assets were rebuffed by Russian armed men. UTG called the former Director of the Kharkivtransgaz Main Gas Pipeline Directorate, Mr. Petr F. Slesar, to testify about the seizure of UTG's assets and the efforts made to preserve them:

> **Attempt to Safeguard Certain Ukrtransgaz Assets in Crimea**
>
> At the time that the Russian Federation annexed Crimea and after, I held the position of Director of the Kharkivtransgaz MGPD of Ukrtansgaz [*sic*] and was

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[351] AmCM, ¶¶ 482-483.

> in regular communication regarding production issues with my direct report Andrei Sarabeyev, the manager of the Feodosia production facilities.
>
> On 20 or 21 March 2014, I ordered Mr. Sarabeyev and a mechanic from the Feodosia production facilities to remove all of Ukrtransgaz's equipment in Crimea to Kherson, in continental Ukraine. This equipment included, for example, emergency response and restoration equipment, lifting machines, and excavation equipment that I listed above.
>
> **In response to my order, drivers and mechanics began transporting the machines, equipment and materials north, to continental Ukraine, in a convoy of more than 20 vehicles.**
>
> Mr. Sarabeyev reported to me that the convoy moved approximately 100 kilometers from Feodosia when armed men in the Crimean town of Dzhankoy stopped the convoy. Mr. Sarabeyev further reported to me that the armed men wore military uniforms without insignia. They refused to allow the convoy to proceed farther towards continental Ukraine and then impounded the convoy in a police lot. I understood from Mr. Sarabeyev that the convoy was released 10 days later but was permitted only to return to Feodosia.[352] (emphasis added)

557. The Claimants contend that they should not be faulted for their inability to ascertain the condition of these assets on the Valuation Date. In the absence of any competing analysis from FTI, the Tribunal majority ought to accept the GCA calculations.

558. USD 35 million out of USD 50 million of GCA's valuation relates to UTG.[353] This value is largely connected to gas supply pipelines, gas distribution stations (which connect supply pipelines to local distribution networks), and communications and radio equipment that allowed UTG to operate the pipelines and deliver gas to LDCs.[354]

The Tribunal Majority's Ruling With Respect to Miscellaneous Midstream Assets

559. The Tribunal majority accepts the Claimants' explanation[355] that their assets in Crimea and their supporting documentation were taken by the Russian Federation. As a result, Naftogaz now cannot access the assets or produce additional appraisals to support its valuation as of the Valuation Date. As the Russian Federation is the source of this problem, Russia is not in a position to credibly complain about it.

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352 WS Slesar, ¶¶ 6-9.
353 First GCA Report, Table 75.
354 First GCA Report, ¶ 507.
355 Reply on Quantum, ¶ 160.

560. On the basis of the Claimants' financial statements, GCA valued the Miscellaneous Midstream Assets at USD 50 million comprised as follows:[356]

Table 75: Value of Miscellaneous Midstream Assets (USD MM)

	Number of Assets	BV (UAH MM)	BV (USD MM)
NJSC Naftogaz	10	61	11
UTG	44	231	35
CNG	980	34	4
Total	**1,034**	**326**	**50**

561. The Tribunal accepts these calculations as correct and awards compensation accordingly.

562. In the result, the Tribunal majority accepts as correct the following valuations of the Claimants' Midstream Assets:

Midstream Assets	Value (USD MM)	Method
Pipeline System and Facility	69	Income approach
Storage and Fill Gas	146	Replacement Value
Working Gas	181.7	Replacement Value
Miscellaneous Midstream Assets	50	Depreciated Book Value
Total:	**446.7**	

PART 17 - SERVICE ASSETS

563. To assist with its exploration, production, and development activities, CNG maintained a fleet of four "jack-up" drilling rigs, 22 marine vessels, and 3 helicopters.

564. The Claimants relied on the expert opinion evidence from Mr. Bill Cline of GCA to establish the FMV of the Service Assets. The Respondent did not cross examine Mr. Cline.

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356 First GCA Report, Table 75.

1. *Inspection of Service Assets*

565. The Second FTI Report puts forward the following issues with the Second GCA Report:

> ***Working condition***
>
> In the First GCA Report, **GCA assumed "*that each drilling rig, marine vessel and helicopter was in good working order and in sound seagoing/airworthy condition*** *– in terms of both its hull and machinery – as could be expected for a vessel/aircraft of its age, size and type.*" GCA also assumed that "*each of the Service Assets was undamaged, fully equipped, fully maintained, and has valid certificates to operate*". **However, GCA provided no evidence that these assumptions were correct nor any explanation as to why these assumptions are appropriate**.[357] (emphasis added)

566. Paragraph 295 of the Second GCA Report points out that "the [Service] [A]ssets were being used and guarded by the Russian Navy.[358] The Claimants say they are entitled to have this equipment treated as in good working order because they were not allowed to make a personal inspection. This point is also made in the Reply on Quantum.[359]

567. The Second GCA Report cites at footnote 331 a letter from Chornomornaftogaz to Naftogaz that attached a report from the State Border Guard Service of Ukraine (*i.e.*, the Ukrainian Coast Guard).[360] The letter itself is dated 20 December 2016 and its subject is "… [the] collection of evidence to prove the seizure of sites and property by the Russian Federation and its illegal industrial activity".[361] The report comes from the acting Head of the State Guard Service of

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[357] Second FTI Report, ¶ 8.23. *See also* ¶ 8.11(3) ("GCA assumed without basis that the vessels are in '*good working condition*' …").

[358] Second GCA Report, ¶ 295:

> In GCA's view this criticism is misplaced for a number of reasons: (i) there is no reason to assume that the assets in Crimea would somehow have suffered higher deterioration and depreciation than the (very large) population of rigs and marine vessels around the world that comprise the body of comparable market values; (ii) the assets are being used and guarded by the Russian Navy, suggesting they are both in good condition and of value, respectively; (iii) the rigs were all planned into future operations at the time of expropriation (so their loss or absence would require acquisition of replacement equipment); and, finally (iv) inspection records suggest that, up until the point of their expropriation, the vessels were regularly inspected and certified.

[359] Reply on Quantum, ¶ 104 ("Upon inspection, however, Naftogaz discovered that they were being used in oil field operations by State Unitary Enterprise of the Republic of Crimea "Chernomorneftegaz" (the "***Russian Chernomorneftegaz***"), under guard by the Russian Navy, suggesting they were then in good working condition.").

[360] Second GCA Report, ¶ 295 (note, the foot mistakenly cites document (**CE-1030**); the correct citation is found in the Reply on Quantum and is document (**CE-377**).

[361] Letter of S. Nezhnova to A. Kobolyev No. 997/16, 20 December 2016, T-0001 (**CE-377**).

Ukraine, Mr. Servatiuk, and reflects the 32-hour mission of the Ukrainian Coast Guard ship "*Hryhorii Kuropiatnykov*", which took place between 30 November and 1 December 2016. The ship's manifest shows that there were many observers aboard, including prosecutors, government officials, representatives from the Claimants, and media.[362] The report details Russian preparations for "armed response."[363]

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[362] Letter of S. Nezhnova to A. Kobolyev No. 997/16, 20 December 2016, T-0004 (**CE-377**).

[363] The Ukrainian Coast Guard's report states in its relevant parts (*see* Letter of S. Nezhnova to A. Kobolyev No. 997/16, 20 December 2016, T-0004-T-0006 (**CE-377**)):

> 1.2.1. On December 01, 2016 at 04:20, at the point defined by coordinates 45°21′4″N and 30°52′N″2E, a target was identified and recognized as SEDR "Tavrida" (IMO: 8763373, according to Certificate of Ownership ПВ 003547, this vessel belonged to PJSC "NJSC Chornomornaftogaz," and as such, it should have been under the national flag of Ukraine but actually flied the flag of the Russian Federation (the RF)). **The rig was occupied by armed and other unidentified people**. This fact was photo-documented.
> As the coast guard ship "H. Kuropiatnykov" detected and approached the SEDR at a distance of approximately 40 cbl picked up radio talks, **ordering the armed people to cover their actions and evidencing their subordination to a single authority in command**. These data were confirmed by radio interception as registered in the ship's logbook. **Further visual observation of the site identified signs of preparation of the said persons for an armed repulse.**
> The numerous attempts to contact SEDR "Tavrida" made at 07:52 using radio station ICOM-602, Channel 16, elicited no response from SEDR "Tavrida."
> 1.2.2. On December 01, 2016 at 05:15, at 45°18′4″N, 30°50′8″E, another target was detected and recognized as the tugboat "Fedor Uriupin" (IMO: 9443499, going without any flag). The tugboat was contacted by radio at 08:12, using radio station ICOM-602, Channel 16, and it responded that the boat was involved in an accident rescue operation in the area of the Odessa Gas Field and had no radio contact with the nearby SEDRs. **Further, from 08:14, in violation of international maritime law, the tugboat crew refused to continue radio communication and acted in a way creating preconditions for navigational accidents and preventing the legitimate activities of our ship.**
> [The rig "Ukraine" was sited at 06:20 and did not respond to radio contact]
> 1.2.4. On December 01, 2016 at 07:55, at point of coordinates 45°16′5″N, 30°51′7″E, a target was identified and recognized as the coast guard ship (CGS) "Pytlivyi" of the Black Sea Fleet of the Russian Federation (pennant No. 868, call sign "Bugel-868," based in Sevastopol). During a radio contact with CGS "Pytlivyi" established at 08:00 using radio station ICOM-602, channel 16, **the Russian warship warned against approaching the SEDR closer than 10 cbl, citing a security zone it had established there**. The argument that it was impossible for the Russian Black Sea Fleet warships to establish any security zones around SEDRs in the E(M)EZ of Ukraine, the commander of that ship gave no answer. **Further, CGS "Pytlivyi" started dangerous manoeuvring, crossing the course of our ship and cutting it off from the drilling rigs and satellite platforms, which made CGS "Hryhorii Kuropiatnykov" changed its course to avoid collision and pass clear of each other at a distance of 1 cbl.** The dangerous manoeuvring by CGS "Pytlivyi" made it impossible for the inspection group to approach the SEDR and land on it. By its dangerous manoeuvres, CGS "Pytlivyi" obviously breach the requirements of navigational safety and good maritime practice.
> [The rig *Petro Hodovanets* was not cited]
>
> …
>
> **The impossibility for the inspection groups from the ship of the State Border Guard Service of Ukraine to come aboard the SEDR (SP) to conduct a full set of legitimate control procedures (due to the threat of armed response on the part of the armed persons and the warship of the Russian Federation Black**

568. Given the Russian Federation's threats of armed violence, the Tribunal majority considers it unrealistic to expect any further investigations, since further investigations would have endangered the lives and safety of the *H. Kuropiatnykov*'s crew and passengers. Even though FTI itself describes these assets as being "guarded by the Russian Navy",[364] it appears to conclude (at least implicitly) that GCA should have disregarded the hazards posed by the Respondent's Black Sea Fleet.[365] In the view of the Tribunal majority, the FTI criticism is unjustified.

2. *Jack-Up Drilling Rigs*

569. Jack-up drilling rigs are rigs built on a floating hull with legs that extend to the seafloor.[366] CNG seeks compensation for four jack-up drilling rigs. The four rigs are described below:

(a) the *Petro Hodovanets*[367] (B312) was built in 2010 and purchased by CNG on 29 March 2011;[368]

(b) CNG purchased the *Ukraine* (B319) on 2 November 2011, before this rig was built.[369] It was constructed in 2012;

Sea Fleet), which in turn posed a threat to the persons, who were not members of the crew, aboard the coast guard ship on duty). [*sic*] (emphasis added)

364 Second FTI Report, ¶ 8.25(3).

365 Second FTI Report, ¶ 8.26 ("Therefore, unless GCA can show that the vessels were definitely in good working condition, undamaged, fully equipped and maintained then a discount should be applied.").

366 Second GCA Report, ¶ 382.

367 Also known as *Petro Godovanets* or *Pedro Godovanents*.

368 Supply Contract for Self Elevating Floating Drilling Unit B312 between Highway Investment Processing LLP and National Joint-Stock Company "Chornomornaftogaz", 29 March 2011 (**CE-1218**); Reissued Certificate of Ownership No. 003316 for the "Petro Hodovanets", 17 October 2014 (**CE-316**). *See also* Classification Certificate of B-312, 1 October 2010 (**FTI-145**).

369 Sales Contract for Self Elevating Floating Drilling Unit between JSC "Rigas Kugu Buvetava" and National Joint-Stock Company "Chornomornaftogaz", 2 November 2011 (**CE-1219**); Reissued Ship's Patent No. 002657 for the "Ukraine", 17 October 2014 (**CE-317**). *See also* 'Ukraine' Certificate of Classification, American Bureau of Shipping, 14 January 2013 (**FTI-146**).

(c) Construction of the *Tavrida* began in Astrakhan, USSR in 1991[370] and was completed in either Mykolaiv[371] or Kherson, Ukraine[372] in 1995; it was purchased and delivered in March of that year.[373] On 18 August 1998, CNG acquired it upon its formation;[374]

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[370] Reissued Ship's Patent No. 002626 for the "Tavrida", 1 September 2014 (**CE-281**) ("**Year and place of construction** 1991 м. Астрахань, добудова - 1995, Україна м. Миколаїв"); Reissued Certificate of Ownership No. 003527 for the "Tavrida", 1 September 2014 (**CE-282**) ("**Year and place of construction** 1991 м. Астрахань, добудова - 1995, Україна м. Миколаїв"); Certificate of Ownership No. 003527 for the Tavrida, 8 April 2015 (**RE-87**).

[371] *See*, *e.g.*, Reissued Ship's Patent No. 002626 for the "Tavrida", 1 September 2014 (**CE-281**) ("**Year and place of construction** 1991 м. Астрахань, добудова - 1995, Україна м. Миколаїв").

[372] *But see* Riglogix, Rig Fundamentals: Petro Godovanets, Nezalezhnist, Tavrida, and Sivash, 6 of PDF (**CE-923**):

Construction			
Ordered:	Mar 1995	**Delivered:**	Mar 1995
Builder:	Kherson Shipyard	**Cost:**	US$60 million
Shipyard:		**Hull Number:**	2610

Note that the Mykolaiv Shipyard and the Kherson Shipyard are both near the Dnieper's estuary.

[373] Riglogix, Rig Fundamentals: Petro Godovanets, Nezalezhnist, Tavrida, and Sivash, T-0006 (**CE-923**).

[374] Charter of National Joint-Stock Company "Chornomornaftogaz", 18 August 1998, T-0003(**CE-1229**):

> 4.2. The Company is the successor to the Chornomornaftogaz state production enterprise for oil and gas production, storage, and transportation.
> 4.3. The Company's property consists of **fixed assets and working capital owned by it** as well as assets whose value is reflected on the independent balance sheet of the Company.
> 4.4. **The Company owns**:
> – **property transferred into its ownership by the Founder**;
> – products made by the Company in the course of commercial operations;
> – income generated by its own commercial operations (including foreign trade provided for by these Articles of Association);
> – dividends accrued on shares (membership interests, equity units) that have been transferred to or are owned by the Company;
> – inventions, patents, or technologies resulting from the operations of the Company;
> – other property acquired in a way that does not contravene the law.
> The risk associated with damage to or loss of its own property as well as property made available to it for use shall be borne by the Company. The Company shall possess, use, and dispose of property belonging to it under the right of ownership in accordance with its purpose and objects.

See also Charter of PJSC "State Joint-Stock Company "Chornomornaftogaz", 6 March 2013, Articles 3.1, 3.6 (**CE-128-Am**):

> 3.1. **The Company is considered established and acquires the rights of a legal entity** from the date of its state registration.
>
> …
>
> 3.6. The Company is the owner of:

(d) A 1979 Russian-built rig named the "*Sivash*". The Sivash was built in Astrakhan in 1979.[375] Like the *Tavrida*, the *Sivash* was acquired by CNG in 1998.[376]

570. In the Amended Counter-Memorial, the Russian Federation alleges "the two '*old*' jack-up drilling rigs [were] purchased [by CNG] long before 1992 …".[377] The Russian Federation appears to be mistaken as to when the *Tavrida* was built since according to both the Ukrainian ship's patent and the independent third-party database Riglogix, construction of the Tavrida was not complete until 1995.[378] Furthermore, its construction was finished in Ukraine, rather than in Astrakhan—as the Respondent seems to suggest.[379]

571. CNG called Volodymyr I. Korchak as a fact witness. In 2014, Mr. Korchak was CNG's Head of the Engineering and Technological Control Service with specific focus on its self-elevating jack-up drilling rigs, the *Petro Hodovanets* and the *Ukraine*. In his Witness Statement, Mr. Korchak described how the jack-up rigs came into the possession of the Russian Federation:

- property transferred to it by the founder and shareholder **into ownership**, as a contribution to the charter capital;
- products produced by the Company as a result of economic activity;
- income received from own economic activity (including foreign economic activity provided by this Statute);
- inventions, industrial designs, names, other objects of intellectual property rights, including technologies obtained as a result of the Company's activities. (emphasis added)

375 Reissued Ship's Patent No. 002641 for the "Sivash", 2 September 2014 (**CE-296**); Reissued Certificate of Ownership No. 003547 for the "Sivash", 2 September 2014 (**CE-297**); Riglogix, Rig Fundamentals: Petro Godovanets, Nezalezhnist, Tavrida, and Sivash, 0008 of PDF (**CE-923**):

Construction			
Ordered:	Dec 1978	**Delivered:**	Aug 1979
Builder:	Astrakhan Shipyard	**Cost:**	US$26 million
Shipyard:		**Hull Number:**	

376 Charter of National Joint-Stock Company "Chornomornaftogaz", 18 August 1998, T-0003 (**CE-1229**); Charter of PJSC "State Joint-Stock Company "Chornomornaftogaz", 6 March 2013, Articles 3.1, 3.6 (**CE-128-Am**).

377 AmCM, ¶ 264:

> In addition to the compensation for the two "*old*" jack-up drilling rigs purchased long before 1992, Claimant Chornomornaftogaz also claims compensation for two "newer" jack-up drilling rigs purchased in 2011. These are the "Pedro Godovanets" and the "Ukraine" rigs. Those purchases occurred in highly questionable circumstances.

378 Riglogix, Rig Fundamentals: Petro Godovanets, Nezalezhnist, Tavrida, and Sivash, T-0006 (**CE-923**).

379 Certificate of Ownership No. 003527 for the Tavrida, 8 April 2015 (**RE-87**) ('**6. Place in year of build** Astrakhan, 1991").

> In mid-April 2014, when I arrived at one of the self-elevating jack-up drilling rigs on which I worked**, I encountered a group of armed men on the rig**. **The men had various types of weapons, including Kalashnikov light-machine guns, Degtyaryov light-machine guns, Dragunov sniper rifles, anti-tank guided missiles, night-vision devices, and other military armaments.**
>
> From mid-April 2014 until early 2015, **armed men with similar weapons were at all times present on the rigs on which I worked**. The men identified themselves as members of various airborne divisions of the Russian Armed Forces, including divisions based in Pskov, Tambov, and Kostroma. The men explained to me that they were expecting Ukrainian forces to try to regain control over the rigs and thus were present to prevent the Ukrainians from retaking them. The men were relieved by a new group of armed men every 15 to 20 days.[380] (emphasis added)

572. Regarding the *Petro Hodovanets* and the *Ukraine*, the Russian Federation highlights that both rigs were at the centre of a corruption prosecution. Each was purchased for USD 400 million, about double their FMV, and the excess funds were siphoned by corrupt Ukrainian government officials—notably Ukraine's former president, Mr. Viktor Yanukovych (said to be mentored by Moscow),[381] among others.[382] According to the Russian Federation, it follows that since "the BIT only offers protection to investments that have been made in accordance with the legislation of the host state",[383] these rigs cannot be protected investments under the BIT, meaning CNG is barred from seeking compensation as a matter of "international public policy".[384]

573. In the view of the Tribunal majority, the "illegal transaction" argument is ironic given the armed seizure by the Russian Federation itself in March-April 2014 as witnessed and described by Mr. Korchak and others.

574. More importantly, CNG is not seeking compensation based on the amount that it paid for the *Petro Hodovanets* and *Ukraine*, nor should it be permitted to do so in a FMV valuation. Instead, CNG relies on the valuations performed by GCA to determine the amount of compensation.[385] In the First GCA Report, GCA determined the value of these two rigs based on

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[380] Witness Statement of Volodymyr I. Korchak, ¶¶ 3-4 (translation).

[381] *See*, *e.g.*, Mikhail Zygar, All the Kremlin's Men: Inside the Court of Vladimir Putin (2016) 274-279 (**CE-719**).

[382] AmCM, ¶¶ 264-275 ("According to the evidence gathered in the investigation, some USD 95 million were transferred to accounts controlled by former president Viktor Yanukovych…").

[383] AmCM, ¶ 376.

[384] AmCM, ¶¶ 375-390.

[385] Memorial on Quantum, ¶¶ 69 *et seq*, *citing* First GCA Report, s. IV; Reply on Quantum, ¶¶ 108 *et seq*.

prevailing rates for hire and the equity value of major drilling companies.[386] This research was based on the Riglogix database, which, according to GCA, "is the most widely used and cited aggregator of data, including contracts and day rates, for offshore drilling rigs."[387]

575. The Russian Federation's experts from FTI agree with GCA that, "[t]he FMV of the two modern rigs should be based on their second-hand value, which can be estimated based on the prices at which comparable drilling rigs were sold". Second, the experts agree it is fair to assume that these two rigs were in good working order, since they were less than five years old in March 2014.[388] Third, they both agree that no adjustment is needed to the valuation based on the location of the rigs in the Black Sea.[389] Thus, FTI "agree[s] with GCA's approach to valuing the modern drilling rigs and consider that no adjustments are necessary".[390] FTI says they, "consider that GCA's approach to valuing the remaining Service Assets is not unreasonable".[391]

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386 First GCA Report, ¶¶ 389-395.
387 First GCA Report, ¶ 383.
388 First FTI Report, ¶¶ A14.14-A14.15.
389 First GCA Report, ¶ 385:

> In reaching our assessment of market transactions, we took into account that CNG's drilling rigs were located in the Black Sea, and that there would presumably be a material time and cost consideration in returning the rigs to service markets in the rest of the world. This is due to having to remove parts of the rigs' legs to transit under the bridges on the Bosporus Strait. However, the same is also true for any prospective competitors wishing to enter the Black Sea market. While there might be periods in which meaningful adjustments may be required to adjust for Black Sea-resident rigs versus those in the rest of the world, in our view these two aspects would tend to offset one another. Accordingly, we applied no premium or discount to our assessment of the rigs' value.

First FTI Report, ¶¶ A14.19-A14.20:

> An OECD report on the offshore vessel market splits demand for jack-up rigs by location. The report shows that, in 2013, total demand for jack-up rigs was 395 units. Of this demand, only 13 rigs were for Eastern Europe & Former Soviet Union, of which the Black Sea market is a subset. Therefore, the demand for rigs in the Black Sea was just 3% of the demand in the global market. The small size of the Black Sea market is further illustrated by the fact that none of the transactions in rigs which GCA has relied on for its valuations of either the modern or old rigs related to rigs located in the Black Sea.
>
> However, as at March 2014 there was also limited supply of high specification jack-up rigs in the Black Sea of 12 to 14 rigs. As this supply is similar to the demand for rigs as at March 2014, in this instance, despite the smaller size of the market, we consider it is not necessary to apply a discount.

390 First FTI Report, ¶ A14.21.
391 Second FTI Report, ¶ 8.4:

> As stated in Our First Report, **we consider that GCA's approach to valuing the remaining Service Assets is not unreasonable**, and have therefore not discussed them further in this report:
> (1) the two modern drilling rigs (although we disagree with GCA's cross-check);

576. FTI does not, however, agree with GCA's hybrid cost-market analysis.[392] GCA responded in the Second GCA Report, pointing out that the hybrid cost-market approach leads to a lower valuation of USD 200 million per rig rather than FTI's suggested weighted-average, which would yield a value of USD 230 million.[393] In reply, FTI denied that its approach would lead to a higher valuation. But it did not explain how, why or where GCA erred in applying FTI's own model.

577. Moreover, FTI does not provide its own separate opinion of value for these two rigs, while at the same time stating they "see no major issue with GCA's valuation based on these comparable transactions."[394]

578. The Tribunal is left with GCA's opinion that the *Petro Hodovanets* and the *Ukraine* each had a value of USD 200 million on 18 March 2014.

579. Notwithstanding the lack of information about the *Tavrida*'s condition, FTI agrees with GCA's valuation of the *Tavrida*, which results in a valuation of USD 34 million.[395]

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(2) Tavrida, the other old drilling rig; and
(3) the three helicopters. (emphasis added)

392 First FTI Report, ¶¶ A14.22-A14.23.

393 Second GCA Report, ¶ 293:

> Notably, and as explained in the First GCA Report, in using the cross-check methodology, GCA slightly reduces the value provided by the comparable market transactions approach. GCA's comparable market transactions approach (with which FTI concurred) indicates a weighted- average valuation of [USD] 230 million for each new rig and [USD] 34 million for the Tavrida (together a total of [USD] 494 million or approximately 10% above the high end of GCA's valuation). In other words, FTI, by agreeing the comparable market transactions approach and rejecting GCA's "cross-check" methodology would be suggesting a higher valuation of the drilling rigs.

394 Second FTI Report, ¶ 8.4, footnote 370.

395 First FTI Report, ¶¶ 8.11, A14.27-A14.28:

> For Tavrida, GCA uses the weighted average price of the rigs in the comparable transactions, but made no adjustment for the non-competitive status of the rig because it is newer than most of the rigs sold in comparable transactions. GCA concludes that the appropriate value of Tavrida is USD 34 million. We agree that the non-competitive status of the rig should be taken into account.
>
> * * * * *
>
> For Tavrida, GCA has used the weighted average price of the rigs in the comparable transactions, making no adjustment for the potentially below average condition of the asset as a result of its non-competitive status. GCA has explained that this is because "Tavrida is newer than most of the rigs that were sold in the review period". We consider that this is an appropriate method of taking into account the non-competitive status of the rig.

580. GCA values the oldest rig, the *Sivash*, as having a value of USD 16 million despite its non-competitive status.[396] GCA defines non-competitive status as "they are not available for hire in the general marketplace and are therefore less exposed to competition and constant pressure to be upgraded and maintained." GCA observes in both its reports that the *Sivash* "continued to feature in the forward drilling plans of Chornomornaftogaz".[397] The *Sivash* is listed for "[d]ecommissioning and upgrading for servicing the Subbotinsky NR",[398] suggesting that CNG planned to use the Sivash in 2015 onwards.

581. Although FTI agrees with GCA's approach in valuing this rig[399] by "taking the low-end of the range of values to take account of the age of the *Sivash* is appropriate",[400] it says that "GCA made no adjustment for [its] non-competitive status"[401] citing the *Sivash*'s "**potential** poor condition" (emphasis added).[402] As pointed out above, threats of armed violence by the Russian Federation's Black Sea Fleet and members of Russia's airborne divisions made it impractical for the Claimants to inspect these assets. Consequently, the Tribunal majority is not persuaded by the Russian Federation to speculate that the *Sivash*'s condition was indeed "poor" as of the Valuation Date.[403]

> **Consequently, we agree with GCA's approach to the valuation of Tavrida**. (emphasis added)

396 First GCA Report, ¶ 399, *citing*, Chornomornaftogaz, Drilling Schedule 2012-2014 (**CE-1003**):

> With respect to the 1979 Russia-built "Sivash," there are few rigs of this age still in operation in the international contract drilling market. A review of the 383 jack-up drilling rigs that were active in the first quarter of 2014 shows that only approximately 13% of the units were older than the Sivash. By way of comparison, the oldest two jack-ups in the world's largest drilling contractor's fleet were built in 1986 and 1991 (with a 2011 refit). However, despite its age and non-competitive status, the Sivash continued to feature in the forward drilling plans of Chornomornaftogaz. Its value is accordingly assessed towards the lower end of the range observed in the 2013-2014 transactions, which we consider would be [USD] 16 million.

397 *See* Chornomornaftogaz, Drilling Schedule 2012-2014 (**CE-1003**).

398 *See* Chornomornaftogaz, Drilling Schedule 2012-2014 (**CE-1003**); First GCA Report, ¶ 399; Second GCA Report, ¶ 295.

399 First FTI Report, ¶ 8.12.

400 First FTI Report, ¶ A14.29.

401 First FTI Report, ¶ 8.12; Second FTI Report, ¶ 8.8 ("However, our point stands that GCA has not made any additional adjustments for the non-competitive status of Sivash.").

402 First FTI Report, ¶ A14.30.

403 Chornomornaftogaz, Drilling Schedule 2012-2014 (**CE-1003**).

582. The Tribunal majority accepts GCA's opinion that the *Sivash* was worth USD 16 million on 18 March 2014.[404] FTI does not provide a separate opinion of value in either of its reports.

3. *Marine Vessels*

583. CNG's fleet consisted of 22 marine vessels. Seven of these were built in or after 2009; the 15 vessels built before 1992 were acquired by CNG on 18 August 1998 as part of CNG's charter capital.[405] GCA assigned no value to four of the vessels: *Krepkii-1*, *Krepkii-2*, *Shkval*, and *Chronomorets-15*.[406] The table on the next page provides details about the fleet.

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404 First GCA Report, ¶ 399.

405 Charter of National Joint-Stock Company "Chornomornaftogaz", 18 August 1998 (**CE-1229**); Charter of PJSC "State Joint-Stock Company "Chornomornaftogaz", 6 March 2013 (**CE-128-Am**); Response to Matters Raised in the Rejoinder on Quantum, 7 September 2020, 11-13.

406 First GCA Report, ¶ 404, Table 52.

Table 52: Summary of CNN's Marine Vessels

Vessel Name	Year Built	Location Built	Length (m)	Engines/HP	Tonnage Gross	Tonnage Net	Type	GCA Value (USD MM)
Naftogaz 68	1990	Poland	Unknown	Unknown	2723	817	Tug	1.2
Fedor Uriupin	2010	Indonesia	67.2	2*6000	2921	876	Tug/Supply	8
Chernomorsk	2009	Ukraine	23.8	2*1200	220	73	Crew boat	2
Neptune 3	1991	Ukraine	46.7	3*670	1350	405	Crane	2
Gousan 5	1984	Russia	27.6	2*790	182	54	Tug	1.2
Centaur	1981	Russia	52.8	2*1450	1167	350	Supply/Work	2.4
Captain Bulgakov	2009/11	Turkey/China	106.8	n/a	8425	2527	Laybarge	20
Yarylgach	1990	Russia	Unknown	n/a	477	162	Barge	0.5
Alaid	1988	Ukraine	37.9	n/a	518	340	Barge	0.5[407]
Ocheretay	2010	Singapore	32	3*1072	168	50	Supply/SP	4
Kalos Limen	2009	Indonesia	42.9	4*1500	443	132	Supply/SP	5
Mys Tarkhankut	2010	Indonesia	67.2	2*6000	2921	876	Tug/supply	8
Inya	1984	Yugoslavia	50.7	2*2127	762	228	Supply	2.4
Krepkii -1	1991	Russia	7.8	1*100	n/a	n/a	Runaround	0
Krepkii -2	1992	Russia	7.8	1*100	n/a	n/a	Runaround	0
Shkval	1979	Russia	23	2*192	120	36	Unknown	0
Delfin	1982	Russia	Unknown	Unknown	293	87	Diver Support	0.1
Briz	1980	Russia	Unknown	Unknown	24.5	4	Standby boat	0.2
Kalkan	1981	Ukraine	Unknown	Unknown	46.9	Unknown	Skimmer	0.1
Don	1980	Yugoslavia	Unknown	Unknown	784	235	Supply/workboat	2.4
Chronomorets-15	1972	Ukraine	38.8	2*445	778	233	Crane	0
FS-645	1981	Bulgaria	62	n/a	1877	563	Floating dry dock	1.0
							Total:	**60.5**
							+/-10 percent:	**55-67**

407 There was a dispute about the Alaid and whether it was part of CNG's fleet on 18 March 2014; based on the evidence, GCA reduced its valuation from USD 500,000 to USD 80,000 as scrap. GCA summarizes the Alaid's valuation in footnote 343 to ¶ 299 in its Second Report.

584. Of these 22 vessels, about 75 percent of the estimated USD 55–67 million value is made up of the six newest vessels:

Full Name	Description	GCA Value
Captain Bulgakov	Turkey/China-made Laybarge (2009/2011)	USD 20,000,000.00
Mys Tarkhankut	Indonesian-made Tug/Supply (2010)	USD 8,000,000.00
Fedor Uriupin	Indonesian-made Tug/Supply (2010)	USD 8,000,000.00
Kalos Limen	Indonesian-made Supply/SP (2009)	USD 5,000,000.00
Ocheretay	Singapore-made Supply/SP (2010)	USD 4,000,000.00
Chernomorsk	Ukrainian-made crew boat (2009)	USD 2,000,000.00
	Total	**USD 47,000,000.00**[408]

585. GCA's analysis in the First GCA Report is based on a database that lists the prices of 179 supply vessels, 130 tugs, and 138 crew boats, produced in a Microsoft Excel spreadsheet.[409] Aside from the median vs. mean issue described below, which FTI says would reduce the values, FTI appears to agree with GCA's approach to five of the 22 vessels:

Full Name	Description	GCA Value
Inya	Yugoslavia-made Supply (1984)	USD 2,400,000.00
Centaur	Russian-made Supply/Work (1981)	USD 2,400,000.00
Don	Yugoslavia-made Supply/Workboat (1980)	USD 2,400,000.00
Naftogaz 68	Polish-made Tug (1990)	USD 1,200,000.00
Gousan 5	Russian-made Tug (1984)	USD 1,200,000.00
	Total	**USD 9,600,000.00**

408 First GCA Report, ¶¶ 402-403:

> We made exceptions for the newer and higher value vessels noted in paragraph 403 below, which were based on contemporary pricing and interpolation among other marine industry/oilfield support equipment.
> Of the 22 vessels, we consider that the most significant sources of value are:
> i. the laybarge ([USD] 20 million);
> ii. the relatively new and large Indonesian-built support vessels (together, worth [USD] 16 million); and
> iii. the newer special purpose support/crew boats (together, worth [USD] 11 million).

409 OceanMarine Brokerage Services Database, 17 August 2017 (**CE-929**).

586. Regarding the median vs. mean issue, FTI says that were the mean average to be applied to supply boats, this would reduce their price from USD 2.4 million to USD 1.2 million.[410]

587. Recalling that GCA found four vessels to be worthless, this means that the remaining seven vessels in CNG's fleet have a combined value of about USD 3.9 million, one of which (*Alaid*) was reduced to scrap value:[411]

Full Name	Description	GCA Value
Neptune 3	Ukrainian-made crane (1991)	USD 2,000,000.00
FS-645	Bulgaria-made Floating Dry Dock (1981)	USD 1,000,000.00
Yarylgach	Russian-made barge (1990)	USD 500,000.00
Briz	Russian-made Standby Boat (1980)	USD 200,000.00
Delfin	Russian-made Diver Support (1982)	USD 100,000.00
Kalkan	Russian-made Skimmer (1981)	USD 100,000.00
Alaid	Ukrainian-made barge (1988)	USD 80,000.00
	Total	**USD 3,980,000.00**

410 Second FTI Report, ¶ 8.22.

411 Second GCA Report, ¶ 299, footnote 343:

> FTI asserts that the Alaid was "no longer an asset of CNG at the Valuation date." But we understand from Naftogaz's counsel that the document FTI cites in support of this conclusion did not actually remove the Alaid from CNG's balance sheet. This said, the document FTI cites does suggest that the Alaid was possibly in poor working condition. We have therefore taken a conservative view and valued the Alaid as scrap. At the Valuation Date, scrap metal prices ranged between [USD] 300–350/mt. We calculate the weight of the barge at approximately 255 metric tons. The scrap value of the barge was therefore likely between [USD] 77,000 and [USD] 89,000. We assess value of the Alaid at the slightly narrower range of between [USD] 80,000 and [USD] 85,000. Fair Market Value Assessment of the Alaid for the Second GCA Report (14 Feb. 2014) (CE-1100). Our original calculation of the Alaid's value was [USD] 500,000, and revising our calculation to factor in the value of the Alaid as scrap metal instead does not change our overall assessment of the value of the Service Assets.

A. *Working Condition*

588. The Tribunal majority rejects FTI's objection to GCA's assumptions regarding the Service Assets being in good working condition[412] in light of the armed exclusion by Russia of the Claimants' employees effective February 2014, a month before the Valuation Date.

B. *Mean vs. Median*

589. FTI states that it "consider[s] the median of the values is a better estimate of the FMV as it excludes outlying high-value vessels"[413] and the "the averages are significantly skewed to the upside due to a small number of very high value vessels" FTI suggests that a median value would be "more appropriate";[414] therefore, it takes issue with GCA's use of mean values.

590. The Tribunal majority notes that FTI is careful with its words. It does not say that mean values are inappropriate, neither does it say mean values are unreasonable, nor does it say that mean values are inaccurate. FTI only says in its second report that the median value would be a "better estimate":

> **Had GCA used median instead of mean, its valuation of the vessels would have been lower in the 2017 database and 2020 database**. For example, in the First GCA Report, GCA valued supply boats at USD 2.4 million each based on the mean value of comparable transactions. Had GCA used the median value of comparable vessels, it would have calculated a value of USD 1.2 million. (emphasis added)

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412 *See*, *e.g.*, First FTI Report, ¶ A14.34 ("We also consider it necessary to apply a discount to account for GCA's unfounded assumption that all vessels are in 'good working condition'".); Second FTI Report, ¶ 8.26 ("Therefore, unless GCA can show that the vessels were *definitely* in good working condition, undamaged, fully equipped and maintained then a discount should be applied." (emphasis in the original)

413 First FTI Report, ¶ A14.33:

> For these five vessels, GCA uses average values obtained from Ocean Marine's Brokerage Services Database. However, we consider there are two problems with these values. First, GCA uses values as at August 2017 rather than as at March 2014. Second, the averages are significantly skewed to the upside due to a small number of very high value vessels. **We consider the median of the values is a better estimate of the FMV as it excludes outlying high value vessels.** (emphasis added)

414 Second FTI Report, ¶ 8.21:

> In the Second GCA Report, GCA did not comment on whether it would indeed be more appropriate to use median rather than mean. GCA has been inconsistent in presenting the results of parts of its 2020 revaluation of the vessels. For some vessels it presents both a mean and median, and for others it presents only a mean. It is not clear whether GCA agrees that median is a more appropriate measure than mean.

591. Thus, it appears that according to FTI a "better" estimate means a "lower" estimate. FTI **does not** say that a lower estimate would be a "more accurate" value, nor does it cite an authority to show that lower, median-based estimates are the preferred or dominant methodology in this field.

592. CNG's expert, Mr. Bill Cline of GCA, addressed his use of median averages during his examination-in-chief:

> The second criticism: FTI suggests that I should have used median rather than mean values, and that's not an unreasonable criticism or observation. However, I looked at and considered both measures, and I selected the method I thought most appropriate and representative of the data. I should point out that sometimes the mean would be higher than the median, and vice versa on other measures, *i.e.* there was no systemic bias on my selection of measures. And perhaps to assist the Tribunal and put the issue in perspective, let me just illustrate.
>
> In our first report, I valued the tug boats at their mean of [USD] 1.2 million each, versus a median of [USD] 700,000 each. Likewise, I valued the supply boats at [USD] 2.4 million, versus a median of [USD] 1.2 million. **Now, the total effect of this difference for the entire fleet is [USD] 4.5 million. Now, does FTI have a point? Sure they do. But it's narrow and immaterial.**[415] (emphasis added)

593. FTI's expert did not challenge Mr. Cline's conclusion that the difference between the median and mean averages "for the entire fleet" is "narrow and immaterial." Rather, Dr. Amor testified "the valuation of [GCA] of the service assets is not unreasonable" and FTI "agree[s] on the vast majority of the value in the service assets" even though they "continued to believe that you should apply median discounts to the Marine vessels."[416] As mentioned, the Russian Federation chose not to cross-examine Mr. Cline at all.

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[415] Tr., Hearing on Quantum, Day 5, 58:1-19. *See also* Tr., Hearing on Quantum, Day 5, 59:8-17:

> **I would submit that my election of averages and weighted averages in this case was and is appropriate to the facts observed in the marketplace.** I would also observe that while FTI has criticised the usage of means for the marine vessels, which comprise about 11 [percent] of the value attributed to the service assets, it expressed no objection to the use of means for the remainder, or 90 [percent] of the service assets valuation. **In any event, the differences between the measures are just not all that significant when assessing the value of the fleet.** (emphasis added)

[416] Tr., Hearing on Quantum, Day 5, 115:5-10, 115:17-19:

> (Slide 42) **So as Dr Moselle said earlier, in general we think that the valuation of [GCA] of the service assets is not unreasonable.** We had some minor points around the valuation of the Sivash. **We also continue to believe that you should apply median discounts to the marine vessels.**

C. *GCA's 2020 Database Valuations Are Appropriate*

594. In the First GCA Report, GCA used a database maintained by Ocean Marine Brokerage Services from 2017.[417] FTI criticized GCA for using a 2017 database when the Valuation Date was in 2014.[418] GCA accepted that it would be preferable to have a 2014 database but doubted such a thing exists. In its Second Report, GCA used that same database as of January 2020.[419] It explained, "[t]he database is 'live' and constantly being updated as vessels are listed, removed or sold. As a result, the current January 2020 database is not identical to the database that existed in mid-2017. Notwithstanding this, as will be evident in the following paragraphs, the value ranges of the vessels remain comparable to those derived in mid-2017."[420] Furthermore, GCA opined that both the 2017 and 2020 databases were conservative since "values of oilfield-related marine equipment have decreased markedly since 2014" providing a graph plotting this decline, which also featured in Mr. Cline's PowerPoint presentation at the Hearing on Jurisdiction and Liability:

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* * * * *

> **But nonetheless, I think as GaffneyCline said earlier today, we do agree on the vast majority of the value in the service assets.** (emphasis added)

417 OceanMarine Brokerage Services Database, 17 August 2017 (**CE-929**).

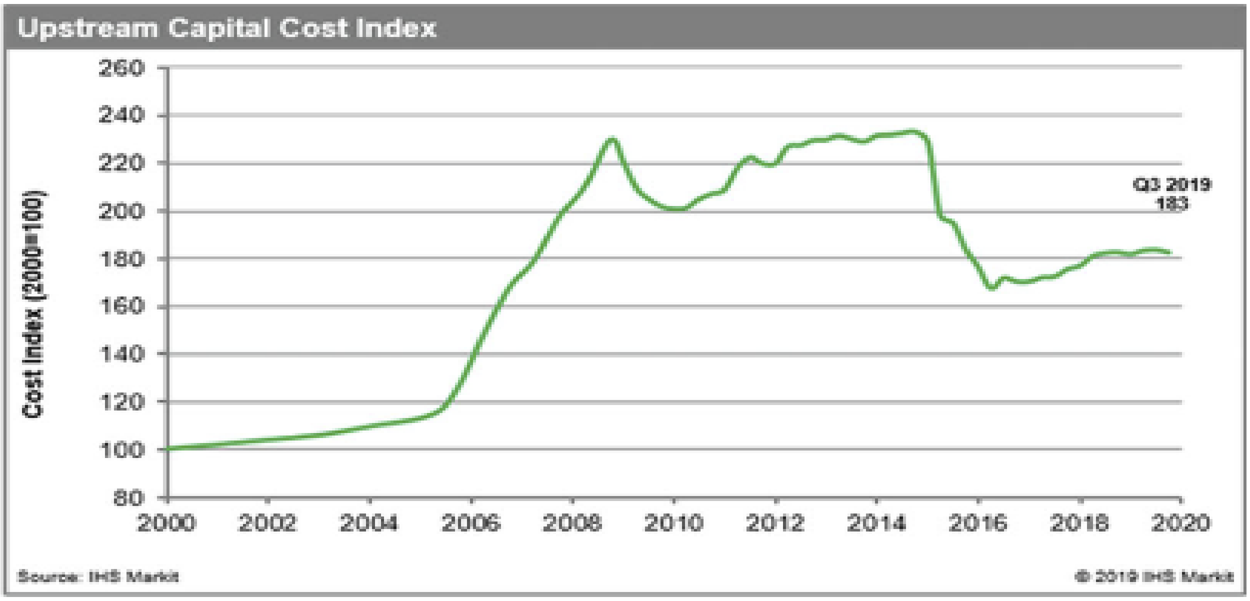
418 First FTI Report, ¶ A14.33 ("GCA uses values as at August 2017 rather than as at March 2014.").

419 OceanMarine Brokerage Services Database, 22 January 2020 (**CE-1113**); Marine Vessels Audit for Second GCA Report, 14 February 2020 (**CE-1120**).

420 Second GCA Report, ¶¶ 297, 304:

> GCA accepts and shares FTI's observation that it would be preferable to use a contemporary 2014 database rather than a 2017 database (or more recent 2019 data). However, we were and are unable to locate a reliable source of that vintage and further consider that use of the 2017/current database is acceptable and reasonable for the purpose of this valuation. Indeed, we would even consider that using this database is conservative in light of the fact that the values of oilfield-related marine equipment have decreased markedly since early 2014.

Figure 6: CERA-IHS Capital Cost Index (2000–2020)[392]



595. The Second FTI Report does not dispute the market decline in oilfield-related marine equipment, neither does it dispute the use of the live database as a methodology, nor does it point to the existence of historic databases, which FTI appears to suggest do indeed exist but do not name. Whether a historic database exists remains unknown. Ultimately, FTI concludes that, "[r]egardless, **we have assessed GCA's 2020 database. We consider that whilst GCA's comparable approach is reasonable**, GCA should have used a historic database consistent with the Valuation Date." (emphasis added) [421]

596. Again, the Russian Federation decided not to cross-examine Mr. Cline, leaving his evidence unchallenged on the record. Therefore, the Tribunal majority decides not to displace the valuation of the marine vessels at USD 60,580,000, which is the sum of the 22 marine vessels described above.

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[421] Second FTI Report, ¶ 8.18.

4. *Helicopters*

597. Before 18 March 2014, CNG owned three helicopters. All three were made by AgustaWestland ("**AW**").[422] The first, an AW109C (Aircraft 754//UR-CNG), was built in Italy in 1990[423] and commissioned by CNG on 29 July 2004 for UAH 14,378,873.[424] This aircraft is a lightweight, twin engine, eight-seat multi-purpose helicopter.[425] GCA values this asset at USD 700,000. FTI agrees that GCA's valuation is reasonable.[426]

598. The other two AW-made helicopters are AW139s (Aircraft 244//UR-CNW and Aircraft 787//UR-CNH). These are 15-seat medium-sized twin-engine helicopters that are, according to GCA, "widely used in oil and gas operations support."[427] GCA commissioned Aircraft 244 on 4 March 2013 at a cost of UAH 111,000,864.51.[428] It was built in 2012.[429] GCA values this helicopter at USD 10 million.[430] Again, FTI agrees that this valuation is reasonable.[431]

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422 First GCA Report, Table 48.

423 Contract No. 754 for Compulsory Insurance, 19 July 2013 (**CE-1220**).

424 Excerpt from BDO Accounting Report for Chornomornaftogaz, 13 October 2013, T-0024 (**CE-135**).

425 Leonardo Company, AW109 Power, 2017 (**CE-955**).

426 First FTI Report, ¶ A14.39:

> As the helicopters had all been purchased by CNG within the last five years as of March 2014, we consider that it a reasonable assumption that they were in a "good working condition". **Therefore, we consider that GCA's valuation for the helicopters is reasonable.** (emphasis added)

> *See also* Second FTI Report, ¶ 8.4 (3):

> As stated in Our First Report, **we consider that GCA's approach to valuing the remaining Service Assets is not unreasonable**, and have therefore not discussed them further in this report:
>
> …
>
> (3) the three helicopters. (emphasis added)

See also AmCM, ¶ 446 ("As for the three helicopters, the value of these assets should indeed be assessed on historical transactions for similar helicopters."), *citing* First FTI Report, ¶¶ 8.17, A14.39; this appears to constitute the entirety of the Respondent's submissions on the helicopters. *See*, *e.g.*, Rejoinder on Quantum, ¶¶ 691-700 (the helicopters go unmentioned).

427 First GCA Report, ¶ 407; Leonardo Company, AW139, 2017 (**CE-954**).

428 Excerpt from BDO Accounting Report for Chornomornaftogaz, 13 October 2013, T-0024 (**CE-135**).

429 Contract No. 244 for Compulsory Insurance, 15 February 2013 (**CE-1221**).

430 First GCA Report, ¶ 409.

431 First FTI Report, ¶ A14.39; Second FTI Report, ¶ 8.4(3).

599. The other AW139 (Aircraft 787) was built in 2011[432] and commissioned on 17 August 2012 at a cost of UAH 108,877,255.[433] The experts do not dispute about this valuation either.[434] Therefore, the expert witnesses agree that the three helicopters should be valued at USD 19.7 million.

600. In summary, it appears that GCA's valuation conclusion for the Service Assets has been accepted by FTI, notwithstanding its comments or disagreements on elements of the underlying methodologies.[435]

PART 18 - THE LOCAL DISTRIBUTION COMPANIES

601. The Claimants' interest in the **LDCs** consists of the following:

(a) Naftogaz's 25 percent shareholding in Sevastopolgaz;

(b) Naftogaz's 25 percent shareholding in Krymgaz; and

(c) CNG's 15.45 percent shareholding in Krymgaz.

602. The LDCs distributed gas to customers, delivering it from main pipelines to consumers using small distribution pipelines. The LDCs received a supply tariff in exchange for these services.[436] In short, they are utility companies that small consumers rely on to supply their gas.[437]

603. Both of the LDCs had had negative cash flows in 2012-2013, as illustrated below in a table from FTI's first report:[438]

	2011	**2012**	**2013**
Sevastopolgaz			
Net cash flow from operating activities	1.0	(0.1)	0.1

432 Contract No. 787 for Compulsory Insurance, 2 August 2013 (**CE-1222**).
433 Excerpt from BDO Accounting Report for Chornomornaftogaz, 13 October 2013, T-0024 (**CE-135**).
434 First FTI Report, ¶ A14.39; Second FTI Report, ¶ 8.4(3).
435 Second GCA Report, ¶ 305.
436 First GCA Report, ¶ 516.
437 Second GCA Report, ¶ 362.
438 First FTI Report, ¶ 11.8, Table 11-1.

	2011	2012	2013
Total net cash flow	0.6	(0.2)	(0.1)
Total net earnings	0.3	(0.8)	0.0
Krymgaz			
Net cash flow from operating activities	13.9	0.6	(1.4)
Total net cash flow	13.3	(0.8)	(9.2)
Total net earnings	34.6	(2.7)	(4.4)

604. The LDCs' negative cash flows in 2012-2013 has led to a dispute between GCA and FTI as to the appropriate valuation methodology to be employed to determine the value (if any) of Naftogaz and CNG's shareholdings in these two companies. Additionally, on the Valuation Date, there is evidence that indicates Krymgaz had in its position USD 24,919,342 available to repay loans it owed Naftogaz. Naftogaz seeks compensation for these now-uncollectible loans.

605. GCA said in the First GCA Report that it could not perform a market analysis because there was not enough information available about the operations of the LDC to conduct a comparison analysis.[439] FTI does not mention market comparisons in either of its two reports. The main dispute is whether these shareholding interests should be valued using an asset-based/book value approach, as GCA recommends, or be valued employing a DCF analysis, as FTI says is appropriate.

1. *Valuation Methodology*

606. GCA's opinion is that in light of the LDCs' financial results, an asset-based approach is appropriate to assess the equity value. GCA performed this by deducting the LDCs' liabilities from their assets and working capital.[440] FTI says that because these companies were unprofitable in 2012-2013, the asset-based approach is "unlikely to be a good reflection of actual economic

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[439] First GCA Report, ¶ 518.
[440] First GCA Report, ¶ 520.

value."[441] They conclude that under a DCF analysis the LDCs would have "very limited or no value, unless market conditions or company operations were expected to change significantly".[442]

607. GCA's response is that a DCF analysis relies on future rather than historic cash flow, pointing to the possibility of improved market conditions in Ukraine.[443] FTI's observation is that improvements in Ukraine's gas market that would benefit these companies were speculative.[444]

608. The Tribunal majority analyzes different valuation methodologies above. The majority notes the steep decline between Krymgaz's profits in 2011 and its 2012-2013 losses. FTI highlights that neither it nor GCA "identified any reliable way of forecasting how market developments after the Valuation Date would have affected future cash flows of the LDCs."[445] In the view of the Tribunal majority, the speculation and uncertainty involved in predicting future cash flows in both scenarios lends weight to GCA's selection of the asset-based approach, leading the majority to the conclusion that the asset-based approach is the best available and most reliable evidence of value.

609. Although FTI found what they allege to be two inconsistencies in the financial statements of both LDCs in the years leading up to the Valuation Date,[446] the Tribunal majority accepts GCA's opinion that the financial statements are valid and can be relied upon for present purposes as having been prepared in accordance with International Financial Reporting Standards ("**IFRS**").[447]

610. These two LDCs are a relatively small aspect of a large series of business concerns. GCA points to the fact that the LDCs provide an essential service[448] and would be essential to a Willing Buyer to be able to supply gas to local consumers.[449] The Tribunal majority is satisfied that a

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441 First FTI Report, ¶ 11.4.
442 First FTI Report, ¶ 11.9.
443 Second GCA Report, ¶ 360.
444 Second FTI Report, ¶¶ 11.16-11.17.
445 Second FTI Report, ¶ 11.18.
446 First FTI Report, ¶ 2.61, footnote 3; Second FTI Report, ¶¶ 11.27-11.29.
447 Second GCA Report, ¶ 363, *citing* Annual Financial Reporting of PJSC Sevastopolgaz as of 31 December 2013, SMIDA.gov.ua, 27 August 2017, T-0001 (**CE-980**); Annual Financial Reporting of PJSC Krymgaz as of 31 December 2013, SMIDA.gov.ua, 27 August 2017, T-0001 (**CE-981**).
448 Second GCA Report, ¶ 362.
449 Second GCA Report, ¶ 361.

Willing Buyer would acquire a shareholding interest in these two LDCs when purchasing the Claimants' investments as a whole, since the LDCs are the last but essential link in the Claimants' supply chain.

611. GCA has demonstrated that based on the IFRS financial statements, both companies would have had some residual value after meeting all of their obligations to creditors. The majority therefore accepts GCA's asset-based approach. The remaining value seen in the financial statements, after liabilities are removed, establishes that, in a valuation not unlike liquidation, these shareholding interests have a value of greater than zero—albeit minimal.

2. *Marketability/Control Discounts*

612. FTI suggests that discounts for marketability and control of these minority shareholdings should apply to the valuation of the LDCs.[450] It cites Appendix 12 of the First FTI Report, in which it provides a general overview of marketability discounts and control premiums/discounts applied to international transactions. Regarding marketability, these discounts range from 7 percent to 86 percent.[451] Similarly, FTI's table of implied minority discounts ranges from -7.2 percent to 39.5 percent.[452] None of these discounts reflect either the Ukrainian or Russian markets. FTI provides no opinion as to what appropriate discounts would be regarding the LDCs. GCA says that such discounts would be a non-issue because the Willing Buyer would be purchasing the entire system from gas fields to distribution.[453]

613. If such a discount were to be applied, what would it be? FTI has given the Tribunal a vast range of discounts but not recommended a specific figure. Moreover, there is no compelling evidence that the range is appropriate for either Ukraine or Russia.

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450 First FTI Report, ¶ 11.12; Second FTI Report, ¶¶ 11.20 *et seq*.

451 First FTI Report, ¶¶ A12.36-A12.37.

452 First FTI Report, ¶ A12.16, Table A12-1 (Switzerland under the Dyck and Zingales study shows -7.2 percent for an implied minority discount, while under the same study, Brazil's Implied minority discount is 39.5 percent; the Nenova study likewise varies from -3.0 percent in Hong Kong to 32.3 percent in South Korea. Neither study examined implied minority discounts in former-Soviet republics.)

453 Second GCA Report, ¶ 361.

614. GCA testified that neither discount applies. The Tribunal majority adopts GCA's opinion that no such discounts should be taken into account to reduce the amount of compensation otherwise payable.

3. *Ukrainian vs. Russian Scenarios*

615. GCA's opinion is that having analyzed the LDCs based on their balance sheets, the value of the Claimants' shareholding interests would not be subject to any "meaningful difference in the analysis" between either the Ukrainian or the Russian Scenario.[454] FTI criticizes GCA because "it has performed no analysis on the Russian gas market or on how the expected profitability of the LDCs may change under Russian laws and regulations."[455] FTI further suggests that "it is **possible that some** of the accounting values would indeed change".[456] (emphasis added). FTI does not state the likelihood of accounting values changing or which values would be likely to change in a Russian Scenario using an asset-based valuation. According to GCA, anchoring itself in the financial statements, the Russian FMV would be about the same as the Ukrainian FMV.[457]

616. The Tribunal majority is satisfied that the value of the LDCs assets and working capital net of liabilities would be approximately the same under either the Ukrainian or the Russian Scenario.

4. *Sevastopolgaz*

617. According to its last IFRS-compliant financial statements before the Valuation Date, Sevastopolgaz had assets and working capital of UAH 63.9 million, and long-term liabilities of UAH 10 million.[458] Based on its financial statements, GCA's asset-based valuation of Sevastopolgaz was UAH 53.9 million, or approximately USD 5.5 million on the Valuation Date.[459]

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454 First GCA Report, ¶ 447.
455 Second FTI Report, ¶ 11.8.
456 Second FTI Report, ¶ 11.8.
457 Second GCA Report, ¶ 447.
458 First GCA Report, ¶ 521.
459 On the Valuation Date, the UAH to USD exchange rate was UAH 9.605/ USD 1; Historical Exchange Rates, Fxtop.com, 17 March 2014. UAH 53.9 million /9.605 = USD 5.6 million (rounded) (**CE-816**). *See* First GCA Report, ¶ 521.

618. GCA's opinion of value using the asset-based approach concludes that the FMV of Naftogaz's 25 percent shareholding in Sevastopolgaz was equal to approximately USD 1.4 million.[460]

5. *Krymgaz*

619. Using the asset-based approach, GCA found that the FMV of Naftogaz's 25 percent shareholding in Krymgaz was equal to approximately USD 4.3 million.[461] The FMV of CNG's 15.45 percent shareholding in Krymgaz was equal to approximately USD 2.7 million.[462]

620. In addition to the value of its 25 percent interest in Krymgaz, Naftogaz further seeks reimbursement for USD 24,919,342 in loans Krymgaz owed to Naftogaz on the Valuation Date.[463] It alleges that the Respondent's annexation made it impossible to collect these debts.[464] These debts are dealt with separately, below.

621. However GCA determined that including these debts in Naftogaz's shareholding interest would lead to double counting. These loans are assets for Krymgaz. Naftogaz cannot receive the value of Krymgaz's assets as part of its shareholding interest and simultaneously recover the loans themselves, otherwise Naftogaz would not only receive the hypothetical repayment of the entire

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460 5.6*0.25 = USD 1.4 million (rounded). *See* First GCA Report, ¶¶ 522, 526, Table 78.
461 First GCA Report, ¶ 525, footnote 512 ("[USD] 17.5 million*0.25 = [USD] 4.4 million (rounded).").
462 First GCA Report, ¶ 525, footnote 513 ("[USD] 17.5 million*0.1545 = [USD] 2.7 million (rounded).").
463 Memorial on Quantum, ¶¶ 83-86.
464 Memorial on Quantum, ¶ 85.

loan but also 25 percent of the loans as part of its shareholding interest.[465] Accordingly, GCA subtracted these loans from Krymgaz's assets when valuing the LDC.[466]

622. According to its last financial reporting before the Valuation Date, Krymgaz had assets and working capital of UAH 430 million.[467] After deducting long-term liabilities of UAH 62 million and the Naftogaz loans, the equity value of Krymgaz was UAH 168 million, or approximately USD 17.3 million on the Valuation Date.[468] GCA valued Naftogaz's 25 percent share of Krymgaz to be USD 4.4 million.[469]

623. Consequently, in the view of the Tribunal majority, the FMV of Naftogaz's and CNG's shareholdings in the LDCs to be USD 8.5 million, as follows:

	USD Millions
NJSC Naftogaz Shareholding in Sevastopolgaz (25 percent):	1.4
NJSC Naftogaz Shareholding in Krymgaz (25 percent)	4.4
CNG Shareholding in Krymgaz (15.45 percent)	2.7
Total:	**8.5**

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465 First GCA Report, ¶¶ 523-524:

> For PJSC Krymgaz, we needed to adjust the balance sheet to account for debts that PJSC Krymgaz owed to NJSC Naftogaz on the date the financial statements were issued. In particular, PJSC Krymgaz owed NJSC Naftogaz approximately 200 million UAH under 20 construction financings agreements at the time these financial statements were issued. Although if not obvious where these loans are factored into the financial statements, the loans would normally be considered an asset on PJSC Krymgaz's balance sheet. If we did not adjust the balance sheet, NJSC Naftogaz would be double-counting the value of these loans (*i.e.*, NJSC Naftogaz would be valuing the loans it was owed by Krymgaz as well as 25 [percent] of those loans through its equity interest).
>
> To adjust PJSC Krymgaz's balance sheet, we deducted the value of the loans from PJSC Krymgaz's assets and working capital. According to its last financial reporting before the Valuation Date, Krymgaz had assets and working capital of 430 million UAH. After deducting long-term liabilities of 62 million UAH and the loans to NJSC Naftogaz, the equity value of PJSC Krymgaz was 168 million UAH, or approximately [USD] 17.3 million on the Valuation Date.

466 GCA understood that NJSC Naftogaz is claiming the value of these loans separately, outside the scope of their report. *See* First GCA Report, ¶ 523, footnote 510.

467 First GCA Report, ¶ 524.

468 On the Valuation Date, the UAH to USD exchange rate was UAH 9.605 / USD 1; Historical Exchange Rates, Fxtop.com, 17 March 2014. UAH 168 million / 9.605 = USD 17.5 million (rounded) (**CE-816**). *See* First GCA Report, ¶ 524.

469 First GCA Report, ¶ 526, Table 78. *See also* First GCA Report, footnote 512 (USD 17.5 million*0.25 = USD 4.4 million (rounded)).

PART 19 - KRYMGAZ DEBTS OWED TO NAFTOGAZ

624. This claim arises from the expropriation of the Midstream Assets which, Naftogaz says, prevents it from recovering a debt of USD 24,919,342 from Krymgaz.[470]

625. Naftogaz alleges that there are two categories of debts:

> (1) debts of UAH 200,484,023.92 (approximately [USD] 20.9 million as of 17 March 2014) owed to NJSC Naftogaz under various construction financing agreements, and
>
> (2) debts of UAH 38,866,251.62 (approximately [USD] 4.05 million as of 17 March 2014) owed to NJSC Naftogaz for overdue payments for the delivery of natural gas.[471]

626. On 11 April 2014, the State Council of the Republic of Crimea passed Resolution No. 2032-6/14.[472] According to the Claimants' Russian legal expert, Professor Paul B. Stephan, "[r]esolution No. 2032/6-14 [*sic*] also cancelled all of Krymgaz's financial obligations to NJSC Naftogaz, which captures lease payment and loan payment obligations owed by Krymgaz."[473]

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470 Memorial on Quantum, ¶ 83.

471 Reply on Quantum, ¶ 152.

472 State Council of the Republic of Crimea, Resolution No. 2032-6/14, 11 April 2014 (**CE-250**).

473 Expert Report of Professor Paul B. Stephan, dated 14 September 2017, ¶ 90, *citing* of State Council of the Republic of Crimea, Resolution No. 2032-6/14, Arts. 1, 7, 11 April 2014 (**CE-250**):

> 1. To establish that the following shall be the property of the Republic of Crimea:
>
> facilities of the gas-supply system located in the territory of the Republic of Crimea, operated by the Public Joint-Stock Company for Gas Supply and Gasification "KRYMGAZ" (legal address: 95001, Simferopol, Uchilishchnaya St., 42a, EGRPOU Code 03348117) in accordance with the agreement to provide on the operational management basis state property with the Ministry of Energy and Coal Industry of Ukraine (legal address: 01601, Ukraine, Kiev, Khreshchatik St., 30) and lease agreements for gas pipelines and structures on them with the National Joint-Stock Company "Neftegaz of Ukraine" (legal address: 01001, Ukraine, Kiev, B. Khmelnitsky St., 6);
>
> facilities of the gas-supply system, **unfinished construction facilities of the gas-supply system located in the territory of the Republic of Crimea, construction of which was accomplished with the financial support of the National Joint-Stock Company "Neftegaz of Ukraine" (in part of the financial support of the NJSC "Neftegaz of Ukraine")**;
>
> …
>
> 7. To establish that from the time of transfer of the facilities of the gas-supply system by the Public Joint-Stock Company for Gas Supply and Gasification "KRYMGAZ" in the manner specified by this Resolution, **all financial and other obligations of the Public Joint-Stock Company for Gas Supply and Gasification**

1. *Exhaustion of Local Remedies*

627. Naftogaz alleges that the Respondent's unlawful actions made it impossible for it to collect these debts and that recourse to local courts would have been futile given the effect of this legislation.[474] The Respondent submits "[t]his allegation is as inaccurate as it is baseless"[475] because, despite the legislation, Naftogaz could have advanced a contractual claim under its agreements with Krymgaz.[476]

628. In their Reply on Quantum, the Claimants observe that the BIT does not require exhaustion of legal remedies.[477] They also cite to other cases involving the annexation of Crimea in which tribunals have accepted the futility of commencing actions against the Russian Federation as a result of other similar expropriations.[478] In its Rejoinder on Quantum, the Respondent reasserted its position that the action would not be against the legislation itself but rather a contractual claim against Krymgaz.[479]

629. In the view of the Tribunal majority, the plain language of Resolution No. 2032-6/14 is clear that for the purposes of domestic courts, this legislation terminated "all financial and other obligations" Krymgaz owed to Naftogaz. Professor Stephan's opinion evidence supports this conclusion. Any contractual claim would, in the majority's view, be inextricably linked to the legislation passed on 11 April 2014. In the circumstances of this case, it appears unlikely to the majority that Naftogaz could have brought a contractual claim without a successful challenge to

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"KRYMGAZ" to the NJSC "Neftegaz of Ukraine" and the Ministry of Energy and Coal Industry of Ukraine relating to facilities of the gas-supply system indicated in paragraph 1 of this Resolution shall terminate. (emphasis added)

474 Memorial on Quantum, ¶ 85.

475 AmCM, ¶ 480.

476 AmCM, ¶ 481.

477 Reply, ¶ 150, footnote 359, *citing* Claimants' Answers, Question 12, ¶ 12.2. *See* BIT, Art. 9 (**CLA-99/CLA-169**).

478 *CB Privatbank and Finance Company Finilon LLC v. Russian Federation*, PCA Case No. 2015-21, Partial Award, 4 February 2019, ¶ 293 (**CLA-223**); *Everest Estate* ¶¶ 238-240 (**CLA-174**) (concluding that "the measures taken by the Republic of Crimea were driven by political considerations" and, therefore, it was "highly likely that the pursuit of remedies by the other Claimants would have met the same fate as Aerobud's pursuit."); *Ukrnafta*, ¶¶ 118-119, 185-186 (**RLA-77**) (noting the futility of the claimants' attempts to pursue local remedies following the raid of their offices and the takeover of their gas stations). *See also Copper Mesa Mining Corp. v. Republic of Ecuador*, PCA Case No. 2012-2, Award, 15 March 2016, ¶ 6.69 (**CLA-20**) (finding that an investor is not required "to pursue ineffective legal remedies when its goose is well and truly cooked.").

479 Rejoinder on Quantum, ¶ 782.

the legislation. A challenge to Resolution No. 2032-6/14 would almost certainly have failed. The Russian Federation has not argued that the legislation is invalid.

630. In its Rejoinder on Quantum, the Respondent further contended that Naftogaz had little prospect of recovering this debt from Krymgaz.[480] In the view of the Tribunal majority, the arguments of the Russian Federation on this point are speculative and unconvincing and are therefore rejected.

2. *Claim for USD 20.9 Million Arising out of Miscellaneous Construction Contracts*

631. Naftogaz's claim initially relied on a letter dated 14 September 2017 from Naftogaz; the letter is signed by Naftogaz's Deputy Chairman of the board, Mr. Konovets, and its Acting Chief accountant, Mr. Guchek.[481] The Respondent seeks dismissal of these claims because "the Claimants utterly fail[ed] to discharge their burden of proof."[482]

632. In their Reply on Quantum, the Claimants provided details about the 20 construction financing agreements, summarizing the details of reconciliation statements dated 31 December 2013, each of which is signed by Krymgaz.[483]

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480 Rejoinder on Quantum, ¶ 783.

481 Memorial on Quantum, ¶ 84; Letter of S. Konovets and A. Guchek, 14 September 2017 (**CE-161**).

482 AmCM, ¶¶ 475-481.

483 Reply on Quantum, ¶ 153, *citing* Construction Financing Agreement No. 14/385/11 Between NJSC Naftogaz and Krymgaz, T-0001 (**CE-86**); Construction Financing Agreement No. 14/387/11B Between NJSC Naftogaz and Krymgaz, 25 February 2011, T-0001 (**CE-87**); Construction Financing Agreement No. 14/386/11 Between NJSC Naftogaz and Krymgaz, 25 February 2011, T-0001 (**CE-88**); Construction Financing Agreement No. 14/388/11 Between NJSC Naftogaz and Krymgaz, 25 February 2011, T-0001 (**CE-89**); Construction Financing Agreement No. 14/384/11 Between NJSC Naftogaz and Krymgaz, 25 February 2011, T-0001 (**CE-90**); Construction Financing Agreement No. 14/1215/11 Between NJSC Naftogaz and Krymgaz, 15 June 2011, T-0001 (**CE-96**); Construction Financing Agreement No. 14/1214/11 Between NJSC Naftogaz and Krymgaz, 15 June 2011, T-0001 (**CE-97**); Construction Financing Agreement No. 14/1368/11 Between NJSC Naftogaz and Krymgaz, 25 July 2011, T-0001 (**CE-99**); Construction Financing Agreement No. 14/1367/11 Between NJSC Naftogaz and Krymgaz, 25 July 2011, T-0001 (**CE-100**); Construction Financing Agreement No. 14/1366/11 Between NJSC Naftogaz and Krymgaz, 25 July 2011, T-0001 (**CE-101**); Construction Financing Agreement No. 14/1365/11 Between NJSC Naftogaz and Krymgaz, 25 July 2011, T-0001 (**CE-102**); Construction Financing Agreement No. 14/1709/11 Between NJSC Naftogaz and Krymgaz, 12 September 2011, T-0001 (**CE-103**); Construction Financing Agreement No. 14/1708/11 Between NJSC Naftogaz and Krymgaz, 12 September 2011, T-0001 (**CE-104**); Construction Financing Agreement No. 14/1707/11 Between NJSC Naftogaz and Krymgaz, 12 September 2011, T-0001 (**CE-105**); Construction Financing Agreement No. 182 Between NJSC Naftogaz and Krymgaz, 3 November 2011, T-0001 (**CE-106**); Construction Financing Agreement No. 101 Between NJSC Naftogaz and Krymgaz, 30 July 2012, T-0001 (**CE-115**); Construction Financing Agreement No. 99 Between NJSC Naftogaz and Krymgaz, 30 July 2012, T-0001 (**CE-116-Am.**); Construction Financing Agreement No. 120 Between NJSC Naftogaz and Krymgaz, 29 August 2012, T-

633. The Claimants contend that Krymgaz has acknowledged over 99 percent of the debts it owes to Naftogaz; thus, Krymgaz does not dispute the existence and amount of those debts.[484]

634. The Respondent questions the probative value of these construction agreements since not one witness has confirmed the accuracy of these documents nor have they been audited.[485]

635. The Tribunal majority agrees with the Russian Federation's objection. In the absence of any witness evidence proffered on behalf of the Claimants about these construction financing agreements the "alleged loss" is too speculative.

0001 (**CE-118**); Construction Financing Agreement No. 100 Between NJSC Naftogaz and Krymgaz, 30 July 2012, T-0001 (**CE-144**); Construction Financing Agreement No. 119 Between NJSC Naftogaz and Krymgaz, 29 August 2012, T-0001 (**CE-637**).

Table 1: Summary of Debts Owed to NJSC Naftogaz Under Construction Financing Agreements

Contract No.	**Debt As of 31 December 2013 (UAH)**	**Exhibit**
14/385/11	28,533,389.51	(CE-86)
14/387/11 B	13,878,653.23	(CE-87)
14/386/11	2,390,074.10	(CE-88)
14/388/11	7,147,430.58	(CE-89)
14/384/11	4,057,710.83	(CE-90)
14/1215/11	673,829.37	(CE-96)
14/1214/11	1,508,487.00	(CE-97)
14/1368/11	3,621,444.00	(CE-99)
14/1367/11	4,455,364.00	(CE-100)
14/1366/11	4,612,583.00	(CE-101)
14/1365/11	1,721,891.00	(CE-102)
14/1709/11	13,209,768.00	(CE-103)
14/1708/11	10,961,699.00	(CE-104)
14/1707/11	12,502,291.00	(CE-105)
No. 182	4,532,210.00	(CE-106)
No. 101	1,234,819.21	(CE-115)
No. 99	7,268,898.98	(CE-116-Am.)
No. 120	12,126,809.11	(CE-118)
No. 100	21,860,000.00	(CE-144)
No. 119	44,186,672.00	(CE-637)
Total	**200,484,024**	

484 Reply on Quantum, ¶ 151. These documents were not accompanied by either fact or expert witness evidence. Similarly, the Claimants do not provide other business records that would corroborate the outstanding debt on the construction financing agreements.

485 Rejoinder on Quantum, ¶ 775.

636. Accordingly, the claim for USD 20.9 million for debts under the various construction agreements is rejected.

3. *Claim for Overdue Payments for Delivery of Natural Gas*

637. Regarding the second category of debts, Naftogaz relies on a reconciliation statement dated 31 December 2013 in which Krymgaz acknowledges a debt of approximately USD 4.05 million.[486] The document was signed and sealed by the Chief Accountants of both companies. Naftogaz acknowledges that the debt evidenced in this document is only about half of the claimed amount.[487]

638. The evidence was not accompanied by either fact or expert witness evidence. The reconciliation statement does not support the claim. There was no testimony of a live witness who could be cross-examined about apparent gaps and inconsistencies in the documentation. The Claimants have not met the onus of proof on this claim. The claim of USD 4.05 million is dismissed.

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486 Reconciliation Act Between NJSC Naftogaz and PJSC Krymgaz, 1, 31 December 2013 (**CE-1119**). *See* Reply on Quantum, ¶ 154. On 17 March 2014, the UAH to USD exchange rate was UAH 9.605 / USD 1. Historical Exchange Rates, Fxtop.com, 17 March 2014 (**CE-816**). UAH 37,405,965.39 / 9.605 = USD 3,894,426.38.

487 Reply on Quantum, ¶ 154, *citing* Letter from Ministry of Energy and Coal Industry of Ukraine to NJSC Naftogaz of Ukraine No. 01/13-1622, 8 June 2014 (**CE-1117**); Minutes No. 119 of the Meeting of the Board of NJSC Naftogaz of Ukraine, 18 August 2014 (**CE-1118**); NJSC Naftogaz of Ukraine, Balance of PJSC Krymgaz from 1 December 2013 to 31 December 2013 (showing balance of UAH 19,559,036.05) (**CE-1106**); NJSC Naftogaz of Ukraine, Balance of PJSC Krymgaz from 1 August 2017 to 31 August 2017 (**CE-1107**). On this record, NJSC Naftogaz represents that Krymgaz owes UAH 19,559,036.05 and Krymgaz represents that it owes UAH 37,405,965.39. The discrepancy of UAH 17,846,929.34 is explained by a Naftogaz accounting policy at the time that did not recognize revenue for the delivery of imported gas to residential consumers. That policy was subsequently reversed. *See also* Rejoinder on Quantum, ¶¶ 777-779, the Respondent denies that the Claimants proffered evidence demonstrates a change in accounting policy.

PART 20 - NON-OIL AND GAS INVESTMENTS

1. *The Claimants' Assets*

A. ***Naftogaz Assets***

639. Naftogaz owned two of what appear to be pleasure crafts, which it acquired in 2001: Yacht 737,[488] a sailing motorboat, and Olvia 1, a 16.3-m motorboat.[489] Naftogaz relies on the depreciated book value of these vessels as calculated by EY as the basis for claiming USD 813,721.[490]

B. ***UTG's Assets***

640. Of the USD 6,364,019 that the Claimants allege made up their non-oil and gas investments, counsel attributes USD 3,129,914 to UTG.[491] Of this sum, USD 50,142 is attributed to a resort complex on the Black Sea named Shtormove that was **for the use of its employees**.[492]

641. The more valuable property was **a training facility** that was under construction named "Delfin", or "Dolphin".[493] A 2006 appraisal determined the value of this training facility to be USD 3,079,772.[494] UTG does not seek any adjustments to the 2006 value for its 18 March 2014 valuation.

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[488] General State Ships Registrar Inspection No. 019386 for Yacht "737", 5 April 2001 (**CE-44**); Registrar Classification Certificate for Yacht "737" (Undated) (**CE-45**); Custody Agreement between Chornomornaftogaz and NJSC Naftogaz for "Olvia 1" and Yacht "737", 25 April 2008 (**CE-142**).

[489] Registrar Classification Certificate for Olvia 1 (Undated) (**CE-49**); Ship's Patent No. 03186 for "Olvia 1", 27 June 2001 (**CE-48**); Custody Agreement between Chornomornaftogaz and NJSC Naftogaz for "Olvia 1" and Yacht "737", 25 April 2008 (**CE-142**).

[490] Excerpts from EY Accounting Data for Naftogaz as of 31 December 2014, 23 July 2015, 0015 (**CE-353**). On 17 March 2014, the UAH to USD exchange rate was UAH 9.605 / USD 1. *Historical Exchange Rates*, Fxtop.com, 17 March 2014 (**CE-816**). UAH 7,815,793 / 9.605 = USD 813,721.29.

[491] Memorial on Quantum, ¶ 87, Table 2.

[492] Certificate of Ownership of the Shtormove Resort, 9 September 1999 (**CE-36**); Excerpts from EY Accounting Data for Naftogaz as of 31 December 2014, 23 July 2015, 0020 (**CE-353**). On 17 March 2014, the UAH to USD exchange rate was UAH 9.605 / USD 1. *Historical Exchange Rates*, Fxtop.com, 17 March 2014 (**CE-816**). UAH 481,616 / 9.605 = USD 50,142.21.

[493] Conclusion of the Appraiser on the Value of the Delphin Resort, 31 March 2006 (**CE-445**).

[494] Conclusion of the Appraiser on the Value of the Delphin Resort, 31 March 2006 (**CE-445**). On 17 March 2014, the UAH to USD exchange rate was UAH 9.605 / USD 1. *Historical Exchange Rates*, Fxtop.com, 17 March 2014 (**CE-816**). UAH 29,581,212 / 9.605 = USD 3,079,772.

C. *Likvo's Assets*

642. Likvo provided offshore emergency services to the Claimants, "including firefighting and preventing and remediating oil and gas fountain blowouts."[495] Likvo called Mr. Danylo V. Rymchuk, its director, to provide background about the company and its attempts to recover its assets from the Respondent. Mr. Rymchuk testified to the following:

> After the Russian Federation's occupation of Crimea, Likvo's management repeatedly asked the Crimean Ministry of Fuel and Energy and the Russian Chernomorneftegaz—the new Russian gas company that was in charge of certain gas assets in Crimea—to permit Likvo to withdraw its equipment and vehicles from Crimea.
>
> [Details attempts to recover assets]
>
> We received a response, in a letter sent on 2 October 2014, from Sergei Beim, who presented himself as yet another new Chairman of the Russian Chernomorneftegaz. Mr. Beim, on behalf of the Russian Chernomorneftegaz, again **denied Likvo's request to recover its equipment and vehicles because all of Likvo's assets in Crimea had been declared the property of the Republic of Crimea** and, on that basis, had been transferred to the Russian Chernomorneftegaz.[496] (emphasis added)

643. Likvo has provided inventory lists of various dates that list everything from a single baseball cap to a pair of army boots to steal chisels.[497] Counsel for the Claimants submit that the depreciated book value of these assets is USD 925,917.[498]

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[495] WS Rymchuk, ¶ 2; the original claimant Subsidiary Company Likvo was reorganized under Ukrainian law on 15 December 2016 to become a limited liability company, now called Likvo LLC, effective as of Likvo LLC's entry on the state register on 27 January 2017. WS Rymchuk, ¶ 4; Charter of Limited Liability Company "Likvo", 15 December 2016 (**CE-376**).

[496] WS Rymchuk, ¶¶ 5-13. *See also* State Council of the Republic of Crimea, Resolution No. 1758-6/14, 17 March 2014 (**CE-202**); Letter No. 1/345 from A.I. Gerasimchuk to N.B. Kharitonov, 7 April 2014 (**CE-244**); Likvo Letter of A.I. Gerasimchuk to S.Yu. Komissarov, 24 September 2014 (**CE-310**); Russian Chernomorneftegaz, Explanatory Memorandum of I.A. Saidov to A.I. Gerasimchuk, 29 September 2014 (**CE-312**); Chernomorneftegaz Letter No. 31-1533 of S.G. Beim to A.I. Gerasimchuk, 2 October 2014 (**CE-313**).

[497] Letter No. 1/287 from V.F. Palienko to S. Oleksandrovych, Likvo Summary of List of Fixed Assets in Crimea, 21 June 2017 (**CE-238**); Russian Chernomorneftegaz, Explanatory Memorandum of I.A. Saidov to A.I. Gerasimchuk, Inventory Sheets, 29 September 2014 (**CE-312**); Likvo Inventory Count Sheet for Chernomorskoye Unit, 25 November 2013, T-0010 (**CE-827**).

[498] Memorial on Quantum, ¶ 91. On 17 March 2014, the UAH to USD exchange rate was UAH 9.605 / USD 1. *Historical Exchange Rates*, Fxtop.com, 17 March 2014 (**CE-816**). UAH 8,893,430.08 / 9.605 = USD 925,916.72.

D. *UGV's Assets*

644. UGV owned a resort complex named "Pivdennyi", including equipment onsite, and a motorboat.[499] EY's records show that scores of televisions, linen carts, and mounted air conditioners along with other furnishings are included in the depreciated book value.[500] EY calculated the depreciated book value of the resort along with its equipment and infrastructure at USD 796,203 as at the Valuation Date.[501]

E. *UTN's Assets*

645. UTN owned a resort complex **for the use of its employees** that was under construction and more than half complete.[502] The information provided yields a depreciated book value at the Valuation Date of USD 652,890.[503]

F. *Gaz Ukraiiny's Assets*

646. Gaz Ukraiiny had assets under the terms of agreements with the Municipal Public Utility Enterprise for Heat Networks of the City of Armiansk, an individual named N.V. Kolnohuz, and SE Naftogazbezpeka.[504] These agreements list individual pieces of office, construction, and industrial equipment/inventory including vehicles. According to these agreements, the assets were valued at USD 45,374.[505]

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499 Excerpts from EY Accounting Data for Naftogaz as of 31 December 2014, 23 July 2015, 0015-0019 (**CE-353**).

500 Excerpts from EY Accounting Data for Naftogaz as of 31 December 2014, 23 July 2015, 0015 (**CE-353**).

501 On 17 March 2014, the UAH to USD exchange rate was UAH 9.605 / USD 1. *Historical Exchange Rates*, Fxtop.com, 17 March 2014 (**CE-816**). UAH 7,647,531 / 9.605 = USD 796,203.12.

502 Excerpt from Real Estate Property Register recording property rights with respect to the unfinished resort in the Autonomous Republic of Crimea, 28 November 2012 (**CE-121**). *See also* Memorial on Quantum, ¶ 93.

503 Letter No. 08-00/225 from Ukrtransnafta, 11 July 2006 (**CE-413-Am**); Advice Note No. 988 from Affiliate company Prydniprovski Mahistralni Naftoprobody of OJSC Ukrtransnafta to OJSC Ukrtransnafta, 11 July 2006, (regarding Ukrtransnafta Resort) (**CE-844**). On 17 March 2014, the UAH to USD exchange rate was UAH 9.605 / USD1. Historical Exchange Rates, Fxtop.com, 17 March 2014 (**CE-816**). UAH 6,271,006 / 9.605 = USD 652,889.74.

504 Agreement No. 17/10-100 with the Municipal Public Utility Company for Heat Supply Networks of the City of Armiansk, as Amended, 18 March 2010, T-0004-T-0006 (**CE-80**); Agreement No. 17-17/12-443 with N.V. Kolnohuz, 1 October 2012, pp. T-0004-T-0014 (**CE-119**); Agreement of Lease of Vehicles No. 17/13-77 Between SE Naftogazbezpeka and SE Gaz of Ukraine, , 15 July 2013, T-0006 (stating that the leased property's fair value, excluding VAT, was UAH 38,833) (**CE-826**).

505 On 17 March 2014, the UAH to USD exchange rate was UAH 9.605 /USD 1. *Historical Exchange Rates*, Fxtop.com, 17 March 2014 (**CE-816**). UAH 435,821 / 9.605 = USD 45,374.39.

2. *The Claimants' Use of Book Values*

647. As mentioned above, the Claimants rely on book values to establish the quantum of damages for their non-oil and gas assets. The Respondent argues that book value is an inappropriate method for determining the value of these assets on the Valuation Date. The key passages from its submissions are quoted below:

> [B]ook value often does not provide a relevant measure of the value of an asset, because it often does not reflect its actual economic value. This is why "*book value is generally not accepted as a method for determining the fair market value*".
>
> …
>
> [A]rbitral tribunals also consider book value as inappropriate for determining the fair market value of an asset.[506]

648. To support these propositions, the Respondent cited two works by Professor Irmgard Marboe on compensation and damages in international law.[507] A review of Professor Marboe's 2017 treatise shows that the key words in the above-cited submissions are "often" and "generally". Professor Marboe's lengthy analysis is more nuanced than the impression given by the submissions. She starts from the proposition "that neither the standard of [FMV] nor the principle of full reparation imply or mandate a specific valuation method" and the correct method depends on the circumstances of the case.[508] Typically, values are reached using either a market or sales comparison approach or an income approach (most notably, the DCF approach).

649. Regarding the real estate properties, the Respondent points to FTI's opinion that the instability in Crimea at the Valuation Date "inevitably affected the ability to market and sell Crimean assets, including real estate properties."[509] The majority agrees that the sudden and unexpected arrival of the Respondent's paratroopers almost certainly depressed Crimea's commercial real estate market. The principle of full reparation set out in *Chorzów Factory* cannot

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506 Rejoinder on Quantum, ¶¶ 764-765.

507 Irmgard Marboe, *Compensation and Damages in International Law the Limits of* "*Fair Market Value*," 4 TRANSNAT'L DISP. MGMT., 2007, 737 (**CLA-247**); Irmgard Marboe, *Calculation of Compensation and Damages in International Investment Law* (2nd ed., 2017), ¶ 5.217 *et seq*. and the references mentioned therein (**RLA-79-Am**).

508 Irmgard Marboe, *Calculation of Compensation and Damages in International Investment Law* (2nd ed., 2017), ¶¶ 2.118, *et seq* (**RLA-79-Am**).

509 AmCM, ¶ 487(i); First FTI Report, ¶¶ 12.38-12.41.

be said to allow the Respondent to receive a reduction as a result of the Respondent's own wrongdoing. Therefore, a market or comparable sales approach would not "re-establish the situation which would, in all probability, have existed if that act had not been committed."[510]

650. An income approach is often preferred. Professor Marboe does, however, point out that a DCF analysis is only appropriate if all or at least most of the following six criteria are met:

> (1) an established historical record of financial performance;
>
> (2) reliable projections of future cash flows, ideally in the form of a detailed business plan adopted at a time prior to the event giving rise to the claim, prepared by the company's officers and verified by an impartial expert;
>
> (3) prices at which the enterprise will be able to sell its products or services can be determined with reasonable certainty;
>
> (4) 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;
>
> (5) meaningful WACC, including a reasonable country risk premium, can be established; and
>
> (6) the enterprise is active in a sector with low regulatory pressure or the impact of regulation on future cash flows is possible to establish with a minimum of certainty.[511]

651. The pleaded case, however, discloses that many of these real estate assets and boats were for internal corporate use. UTG's Shtormove resort was for the use of its employees as was half-built UTN's resort.[512] Similarly, the Dolphin training facility, which was also still under construction, and it too was intended for employee use.[513] Likewise, Yacht 737 and Olvia 1 were both for internal corporate use.[514] Consequently, none of these assets had a record of financial performance or any expectation to generate cash flows at any point in the future.

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510 *Chorzów Factory*, 47 (**CLA-191**).

511 Irmgard Marboe, *Calculation of Compensation and Damages in International Investment Law* (2nd ed., 2017), ¶ 5.187 (**RLA-79-Am**).

512 Memorial on Quantum, ¶¶ 89, 93.

513 Memorial on Quantum, ¶ 90.

514 Memorial on Quantum, ¶ 88.

652. Professor Marboe observes that book value has been generally accepted for determining the value of office premises, office equipment and company vehicles.[515] Most of the assets claimed in this category can be described as office equipment/inventory, construction equipment/inventory, or industrial equipment/inventory. It would not be practical for the Tribunal to solicit evidence about the value of each of the dozens of mounted air conditioning units or TVs that EY included in its valuation of the Pivdennyi resort.

653. The UTG and UTN resorts that were under construction pose another valuation difficulty because to find comparable transactions, the Claimants would have needed to point to unfinished projects with no plans for cashflow in the Crimean commercial real estate market in March 2014. Professor Marboe observes that in *Wena Hotels v. Egypt*, the tribunal was asked to value two hotels only one of which had been operating for a couple of months before they were both expropriated. That ICSID tribunal valued those properties using a sunk investment/wasted costs book value.[516] Accordingly, a similar approach should be used for the UTG and UTN properties since EY's book value would yield the most reliable approximation of value.

654. It is not clear whether the Pivdennyi resort was for employee use or was income generating. As described above, a comparative analysis would not be appropriate while its motorboat, infrastructure, and equipment are best valued relying on EY's records. Accordingly, the majority

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[515] Irmgard Marboe, *Calculation of Compensation and Damages in International Investment Law* (2nd ed., 2017), ¶ 5.224 (**RLA-79-Am**):

> While book value as a measure of value for entire companies or projects has predominantly been rejected in international practice, it has not infrequently been applied for the valuation of smaller items. The Iran–US Claims Tribunal, for example, referred to it with regard to plant and equipment. In *William Pereira v Iran*, the office premises and the company car were valued under the book value. In *Computer Sciences v Iran*, *Dames and Moore v Iran*, and *United Painting v Iran*, the tribunals applied the book value for valuing office equipment in accordance with the claimants' submissions. The claimant in *Sedco v NIOC* claimed the application of book value on parts of the expropriated enterprise, in particular on the inventory. In relation to immoveable assets, however, it asked for adjustments for inflation. (citations omitted)

[516] Irmgard Marboe, *Calculation of Compensation and Damages in International Investment Law* (2nd ed., 2017), ¶ 5.239 (**RLA-79-Am**):

> The argument of the ICSID Tribunal in *Wena Hotels v Egypt* was almost identical because, of the two hotels in Luxor and Cairo, only one had been operating for a couple of months. With regard to the valuation method the tribunal agreed 'with the Parties that the proper calculation of the "market value of the investment expropriated immediately before the expropriation" is best arrived at, in this case, by reference to Wena's actual investments in the two hotels'.

agrees with the Claimants that the book value is the best approximation of this asset, along with the others.[517]

655. Finally, the Respondent alleges that the Claimants have produced deficient documentation:

> With regard to the deficient documentation on which the Claimants rely in alleged support of their claim for their non-oil and gas assets, the Claimants submit that they provided the best available evidence that they could collect. This cannot serve as an excuse for the Claimants' failure to substantiate their case. The Claimants have chosen the documents they wanted to adduce and must now bear the consequences associated with their lack of evidentiary value. **Moreover, with regard to the Claimants' allegation that the assets' "*supporting documentation* [was] *stolen by the Russian Federation*", this serious (and novel) allegation is not only unfounded and disputed, but also unsupported by any evidence.** It must thus be disregarded by the Tribunal. This is all the more so as the Claimants are unable to point to any specific documents which they were allegedly barred from obtaining. Their generic allegation must be seen for what it is: a desperate and rather obvious attempt to lower the applicable standard of proof.[518] (emphasis added)

656. The submission is mistaken. The majority's findings of fact regarding the well-documented interference of the Respondent's paratroopers in the Claimants' affairs are described in paragraphs 110-122 of the Partial Award. The Respondent was invited several times to participate in the liability phase and chose not to. The Claimants' evidence about the seizure of their offices by armed men was entered unchallenged and uncontradicted. The majority is not convinced that the business records produced in this case were unreliable.

657. In the extraordinary circumstances of this case, the majority does not consider itself bound by the limited approach to book value the Respondent's contend is warranted based on the *Siemens v. Argentina* case. The Respondent's own citation to Professor Marboe's treatise demonstrates that the *Siemens* case is one of many approaches to determining whether book value is the most appropriate method available for the majority to ensure that the majority provides the Claimants with full reparation that can "re-establish the situation which would, in all probability, have existed if that act had not been committed." It should be noted that the Claimants do not seek any upward

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517 Reply on Quantum, ¶ 157.
518 Rejoinder on Quantum, ¶ 771.

adjustments for these book values. Therefore, the majority awards the Claimants USD 6,364,019 for its non-oil and gas assets based on their book value.

PART 21 - RESPONDENT'S ALLEGATIONS OF BAD FAITH

658. The Respondent submits that the Tribunal should either dismiss the Claimants' case or significantly reduce the amount claimed to reflect the Claimants' alleged bad faith conduct.[519] It says the Claimants' bad faith is "manifest".[520] The Respondent describes the Claimants as having been "less than forthcoming with the Tribunal"[521] and having provided "dissimulating"[522] submissions for which "the Claimants must now bear the consequences".[523] The Respondent's allegations of bad faith focus on three main issues: (i) the Claimants' position on Article 12 of the BIT; (ii) CNG's purchase of two jack-up rigs that resulted in CNG making corrupt overpayments; and (iii) the risk that the Claimants could obtain double recovery for certain assets in related proceedings against the Russian Federation in other *fora*. The Claimants deny these allegations.

1. *Bad Faith and Article 12*

659. The first allegation of bad faith is premised on the Respondent's position that the Claimants "failed to disclose" the "significant economic activity [that] took place with respect to their purported investments long before 1 January 1992."[524] The Respondent calls the Claimants' submissions about Article 12 of the BIT an "unhelpful generality".[525] It further describes the Claimants' arguments about the acquisition of assets in 1998 as a result of the transfer of charter capital to newly-formed legal entities as "simplistic".[526]

660. Specifically, the Respondent highlights an answer to the Tribunal from Claimants' counsel during the Hearing on Jurisdiction and Liability, in which counsel stated, "[y]es, all of our investments were originally made after 1992."[527] According to the Respondent, "this is contrary

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519 Rejoinder on Quantum, ¶ 172.
520 Rejoinder on Quantum, ¶ 170.
521 Rejoinder on Quantum, ¶ 163.
522 Rejoinder on Quantum, ¶ 172.
523 Rejoinder on Quantum, ¶ 172.
524 AmCM, ¶ 301.
525 AmCM, ¶ 303.
526 AmCM, ¶ 304.
527 AmCM, ¶ 305, *citing* Tr., Hearing on Jurisdiction and Liability, Day 1, 136:17-136:18.

to the facts"[528] and "[t]he Claimants have effectively left it to the Respondent to rectify [this] misleading assertion".[529] It suggests that the Claimant's position about the pre-1992 history of certain assets is "ludicrous".[530] In making these submissions, the Respondent reasserts its position that legal succession and inheritance are central to understanding Article 12 of the BIT, despite the subsequent creation of corporations.[531]

661. The majority analyzed Article 12 of the BIT in the context of the issues above, and it finds that the Claimants discharged their burden of proving that the investments for which compensation is claimed were made after 1 January 1992. That analysis does not need to be repeated. Since the majority has accepted the Claimants' position about Article 12, it does not find that the Respondent has provided a factual basis for a finding of bad faith on this ground.

2. *Bad Faith and The Corrupt Acquisition of Jack-Up Rigs*

662. The Respondent's second submission about bad faith regards the Claimant's failure "to fully and frankly disclose to the Tribunal the true facts underlining the purchase of the [*Petro Hodovanets* and *Ukraine* rigs]".[532] The Russian Federation "would have expected more transparency regarding the facts surrounding these alleged investments" and the "significant amounts of money [that] were reported to have been transferred to officials and former officials of Ukraine".[533] It says that "the Claimants disclosed relevant information only very selectively."[534]

663. The majority has found that the corruption scheme involving former President Viktor Yanukovych,[535] among others, is not relevant to determining the FMV of these two seized assets. As previously mentioned, the majority is not convinced that the corrupt acts of Ukraine's former Kremlin-backed president[536] gives the Respondent *carte blanche* to seize the *Petro Hodovanets*

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528 AmCM, ¶ 306.
529 Rejoinder on Quantum, ¶ 165.
530 Rejoinder on Quantum, ¶ 165.
531 *See* AmCM, ¶¶ 303-304.
532 AmCM, ¶ 307.
533 AmCM, ¶ 308.
534 Rejoinder on Quantum, ¶ 166.
535 AmCM, ¶¶ 264-275 ("According to the evidence gathered in the investigation, some USD 95 million were transferred to accounts controlled by former president Viktor Yanukovych …".).
536 Mikhail Zygar, All the Kremlin's Men: Inside the Court of Vladimir Putin (2016) 274-279 (**CE-719**).

and *Ukraine* jack-up rigs without paying restitution or reparation damages at the fair market value of these Service Assets, a value which FTI does not seriously dispute. Therefore the majority does not consider these to be valid grounds on which to allege bad faith.

3. *Bad Faith and The Risk of Double Recovery*

664. The Respondent states that there are two pending cases in which Ukraine is "seeking (or potentially seeking) double recovery for the same assets in this arbitration as in other disputes."[537] The first claim was brought by Ukraine on 16 September 2016 before the PCA. It is a claim against the Russian Federation regarding coastal rights in the Black Sea, Sea of Azov, and Kerch Strait brought under the United Nations Convention on the Law of the Sea ("**UNCLOS**").[538] The second case is a claim also brought by Ukraine against the Russian Federation before the European Court of Human Rights ("**ECtHR**") seeking compensation for State assets, assets belonging to state enterprises, and two private entities and individuals that the Russian Federation allegedly expropriated.[539] Both these concerns about the risk of double recovery are premised on the fact that Ukraine is the Claimants' "sole shareholder and controlling entity".[540]

665. The Respondent's Amended Counter-Memorial did not include any case law or other legal authority to assist the Tribunal in making a determination about the risk of double recovery.

666. The Claimants say that this allegation should be rejected. First, "Naftogaz is a distinct legal entity from the Government of Ukraine, and has no control over how Ukraine pursues its claims in these other proceedings."[541] Second, it observes that "double recovery is purely theoretical at this stage", since neither the UNCLOS case nor the ECtHR case has been decided.[542] Its main legal submission is as follows:

> Where no other tribunal or court has previously ruled on a potentially overlapping damages claim, the standard practices is for tribunals to issue damage awards

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537 AmCM, ¶ 309.
538 AmCM, ¶ 310, *referring to Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait* (*Ukraine v. Russian Federation*), PCA Case No. 2017-06.
539 AmCM, ¶ 316, *citing* Ukraine's Supplement to the Application No. 20958/14 before the ECtHR, 12 June 2014 (**RE-131**); Ukraine's Memorial on Admissibility before the ECtHR, 28 December 2018 (**RE-132**).
540 AmCM, ¶ 319.
541 Reply, ¶ 249.
542 Reply, ¶¶ 249-250.

> without making any deduction to account for a potential double recovery in other proceedings, deferring to other tribunals and courts as the proper forum in which to address the matter, if necessary.[543]

667. The Claimants also directed the Tribunal to a case which addresses the role of courts in enforcing awards in which double recovery is an issue:

> Further, as neither the award nor the judgment has been satisfied in whole or in part, there is no basis to suggest that the [c]laimant has obtained double recovery or has such intention to do so. An enforcement court will in the normal course require disclosure of parallel enforcement proceedings. An award-debtor could easily bring this to the attention of the relevant forum to resist any enforcement action which could lead to double recovery.[544]

668. The Respondent did not comment on the Claimants' double recovery case law in its subsequent Rejoinder on Quantum, nor did it provide other case law or authorities for the Tribunal to consider. Rather it made submissions like the following:

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[543] Reply, ¶ 251, *citing SAUR Int'l v. Argentine Republic*, ICSID Case No. ARB/04/4, Award, 22 May 2014, ¶¶ 172-175 (**CLA-240**) ("The only certainty is that, as of the date of this Award, at most, a risk exists. This can only materialize if two judgements are handed down and give rise to indemnification. However, as far as the Tribunal is aware, the first judgement providing for indemnification will indeed be this arbitral award. Consequently, it will fall to Argentina, in the context of the other proceeding filed in parallel to this one, to make known the indemnification to which Sauri shall be entitled in accordance with this arbitral award, and it will fall to the court hearing the other case to decide upon this issue."); *Gemplus S.A., SLP S.A., Gemplus Industrial S.A. de C.V. v. United Mexican States,* ICSID Case No. ARB(AF)/04/3, Award, 16 June 2010, ¶¶ 12.60-12.61 (**CLA-184**) (accepting the [c]laimants' evidence and assurance that any separate proceedings brought in future would require the relevant court to consider any award of damages made by the [t]ribunal when determining quantum); *British Caribbean Bank Ltd. v. Government of Belize,* PCA Case No. 2010-18/BCB-BZ, Award, 19 December 2014, ¶ 190 (**CLA-12**) ("The [t]ribunal observes that the [r]espondent has raised a concern about the possibility of double recovery. In the [t]ribunal's view, however, the correct resolution of such an issue was accurately set out by the tribunal in *Ronald Lauder v. The Czech Republic*: 'the amount of damages granted by the second deciding court or arbitral tribunal could take [the prior award of damages] into consideration when assessing the final damage.'"); *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A v. Argentine Republic*, ICSID Case No. ARB/03/19, Award, 9 April 2015, ¶¶ 38-40 (**CLA-189**) ("If this [t]ribunal should award damages in these cases, it is certain that the Argentine government would make the relevant court aware of that fact. The problem of avoiding double recovery would then be a matter for the Argentine courts to consider under Argentine law if and when they are contemplating awarding damages to AASA in the cases currently subject to their jurisdiction."); *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Counterclaims, 7 February 2017, ¶ 1086 (**CLA-241**) (hereinafter "***Burlington***") ("As of the date of the present Decision, the *Perenco* tribunal has issued no decision yet on the counterclaims before it. Therefore, this [t]ribunal lacks the necessary information or basis to adopt any specific measures—to *fashion its decision*, to borrow Ecuador's phrase—to prevent double recovery, a task that it must leave to the *Perenco* tribunal as the one deciding in second place. This being said, this Tribunal nonetheless states that, as a matter of principle, the present [d]ecision cannot serve and may not be used to compensate Ecuador twice for the same damage.").

[544] *See Standard Chartered Bank (Hong Kong) Limited v. United Republic of Tanzania (II)*, ICSID Case No. ARB/15/41, Award of the Tribunal, 11 October 2019, ¶ 526 (**CLA-242**).

> Furthermore, the Claimants' allegation that "Naftogaz is a distinct legal entity from the Government of Ukraine" is misleading (to put it mildly).
>
> …
>
> In other words, this arbitration is another example of the legal war initiated by Ukraine against the Russian Federation.[545]

669. The Respondent did not cite to the evidentiary record or legal authorities to support these assertions.

670. The majority analyzes the Claimants' status as separate legal entities in its Article 12 analysis. It therefore accepts the Claimants' submissions that they are not the same legal entity as their shareholder, the Government of Ukraine.

671. The majority therefore finds that the Respondent has not made out facts that would support its allegation of bad faith on this ground. There is no evidence before this Tribunal that the Claimants themselves have been compensated in other *fora* for the same assets; there is only a risk that the Claimants' shareholder could be compensated. Claims made on behalf of the Government of Ukraine are not before this Tribunal.

672. In reviewing the cases that the Claimants have cited in support of this proposition, the majority notes the award in *Burlington Resources Inc. v. Republic of Ecuador* pointed out that the tribunal that makes the initial order lacks the necessary information or basis to foresee the future and to adopt any specific measures to prevent double recovery, a task which must be left to subsequent tribunals to determine in light of the facts existing at that future time. Of course, the majority agrees that the Claimants are not to be compensated twice for the same damage.[546] The issue of double recovery is not ripe for decision at this stage.

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545 Rejoinder on Quantum, ¶ 169.

546 *Burlington*, ¶ 1086 (**CLA-241**) ("As of the date of the present [d]ecision, the *Perenco* tribunal has issued no decision yet on the counterclaims before it. Therefore, this [t]ribunal lacks the necessary information or basis to adopt any specific measures—to *fashion its decision*, to borrow Ecuador's phrase—to prevent double recovery, a task that it must leave to the *Perenco* tribunal as the one deciding in second place. This being said, this [t]ribunal nonetheless states that, as a matter of principle, the present [d]ecision cannot serve and may not be used to compensate Ecuador twice for the same damage.").

673. Additionally, in its Rejoinder on Quantum, the Respondent raised its comments of 15 and 29 May 2020 about the Claimants' application to have the Respondent withdraw the First Paliashvili Report in other proceedings. They say the Claimants "engage[d] in procedural harassment."[547] It is not clear to the majority how the Respondent's breach of the Tribunal's confidentiality order constitutes "procedural harassment" on behalf of the Claimants. Regardless, this issue was fully dealt with in Procedural Order No. 12 and does not need to be reopened. It is not grounds for alleging bad faith against the Claimants.

674. The Parties have cited various cases regarding the standard for bad faith.[548] Since the majority has found that there is no factual basis to support any of the allegations of bad faith, it is unnecessary to examine the relevant law.

PART 22 - CONSEQUENTIAL LOSSES

675. The working gas inventory at the UGS Facility is dealt with as part of the Midstream Assets above. The Tribunal majority has concluded that whether viewed as direct damages or as consequential damages, the Claimants have established their entitlement to compensation for the expropriation of millions of cubic meters of gas (or, more precisely, as the Russian Federation acknowledges and the Tribunal majority has held, 668 million cubic meters).

PART 23 - THE CLAIM FOR INTEREST

676. The Claimants seek pre- and post-award interest at a rate of 9 percent, compounded monthly, reflecting its cost of borrowing to replace the funds rendered unavailable by the Russian Federation's wrongful acts.[549] As such, the interest component is a major element of the claims.

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547 Rejoinder on Quantum, ¶ 171.

548 Reply on Quantum, ¶ 252, *citing Cementownia S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/06/02, Award, 17 September 2009, ¶¶ 156-159 (**CLA-243**); *Europe Cement Inv. & Trade v. Republic of Turkey*, ICSID Case No. ARB(AF)/07/2, Award, 13 August 2009, ¶ 185 (**CLA-244**); *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/25, Award, 2 August 2006, ¶ 338 (**CLA-245**); Rejoinder on Quantum, ¶ 172, *citing Cementownia S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/06/02, Award, 17 September 2009, ¶¶ 153-159 (**CLA-243**); *Occidental*, ¶¶ 678-687 (**CLA-187**).

549 Memorial on Quantum, ¶¶ 104-109.

677. Naftogaz submits evidence of its cost of borrowing, showing that Naftogaz was obligated to repay a USD 2 billion facility, which Naftogaz had fully drawn upon before the date of expropriation.[550]

678. The Russian Federation acknowledges the Tribunal's discretion to choose a non-treaty-based interest rate in the case of an unlawful expropriation where "there [is] a factual basis on which to award such higher recovery."[551] Naftogaz says it has provided this factual basis in the form of its debt service requirements and the long investment horizon of an oil and gas business, both of which suggest a cost-of-borrowing approach better reflects Naftogaz's opportunity costs.[552]

679. Russia contends that the rate and compounding intervals are excessive. Moreover, (i) interest "must accrue from the date of dispossession of each (group of) asset(s)" rather than from a single valuation date, as Naftogaz requests;[553] (ii) "interest must be based on the interest rate under the BIT, LIBOR +1 [percent]" because there is "no reason" to depart from that rate. The single tribunal hearing the *Ukrnafta* and *Stabil* cases adopted that rate, and "even if customary international law were to apply, the analysis would be no different";[554] and the "monthly compounding intervals requested by the Claimants are excessive" and should be rejected in favor of annual compounding.[555]

680. Article 5 of the BIT ("Expropriation") provides for interest in paragraph 2 in respect of **lawful** expropriation as follows:

> 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

550 Term Facility Agreement Between NJSC Naftogaz and OJSC Gazprombank, 2 July 2012 (**CE-934**).
551 AmCM, ¶ 536, *citing Ioannis Kardassopoulos & Ron Fuchs v. Republic of Georgia*, ICSID Cases No. ARB/05/18 and ARB/07/15, Award, 3 March 2010, ¶ 513 (**CLA-38**).
552 Reply on Quantum, ¶ 197.
553 AmCM, ¶ 517.
554 AmCM, ¶ 518.
555 AmCM, ¶ 519.

> on the London Interbank Market (LIBOR) plus 1 [percent], and shall be effectively disposable and freely transferable.[556]

1. *The Rate of Interest*

681. The Claimants say[557] the interest rate set forth in the BIT extends only to *lawful* expropriations,[558] and it is well-established that such a treaty-specified interest rate does not apply in the event of an unlawful expropriation.[559] While a treaty rate may nevertheless be examined for the "guidance it may provide on the appropriate interest rate..."[560], the Claimants say[561] those rates are not connected to the *purpose* of the interest award in an unlawful expropriation, namely to replace the opportunities claimants lost by virtue of the respondent's wrongful acts.[562]

682. In any event, according to the Claimants,[563] the treaty rate for a lawful expropriation has no relevance to the Russian Federation's violations of other obligations of the BIT—namely its

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556 BIT, Art. 5(2) (**CLA-99/CLA-169**).

557 Reply on Quantum, ¶ 187.

558 BIT, Art. 5(2) (**CLA-99/CLA-169**).

559 *See, e.g.*, *Tenaris S.A. & Talta-Trading E Marketing Sociedade Unipessoal Lda v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/26, Award, 29 January 2016, ¶ 585 (**CLA-227**) (hereinafter "***Tenaris***") ("The [t]ribunal takes note of this [t]reaty language, but considers that, in both [t]reaties, such language is directed to lawful expropriations rather than an unlawful expropriation with which the [t]ribunal is concerned in this case."); *Yukos Universal Ltd. (Isle of Man) v. The Russian Federation*, PCA Case No. AA 227, Final Award, 18 July 2014, ¶ 1677 (**CLA-144**) ("[T]here can be no doubt that, a fortiori, in the case of an unlawful expropriation, as in the present case, Claimants are entitled to interest from Respondent in order to ensure full reparation for the injury they suffered as a result of those of Respondent's measures that the Tribunal has found to be internationally wrongful.") (hereinafter "***Yukos***"); *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award, 22 August 2017, ¶ 662 (**CLA-228**) ("The compensation owed for an internationally unlawful expropriation is not calculated in the same way as for a lawful expropriation.") (hereinafter "***Karkey Karadeniz***").

560 AmCM, ¶ 525, *citing Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009, ¶ 539 (**RLA-82**).

561 Reply on Quantum, ¶ 188.

562 *See, e.g.*, *Karkey Karadeniz*, ¶¶ 997-998 (**CLA-228**) (noting that the contractual interest rate "has nothing to do with the rate [the claimant] could have benefited from with additional cash flows had the alleged breach not occurred" and that "[t]he appropriate interest rate should reflect the saving [claimant] would have made on its borrowings.").

563 Reply on Quantum, ¶ 189.

obligations to provide full and unconditional legal protection under Article 2(1) and most favored nation treatment under Article 3(1)[564]—to which the Treaty-based rate does not apply.[565]

683. The Russian Federation argues that the awards in the *Stabil* and *Ukrnafta* cases (decided by the same tribunal) demonstrate that the rate of interest fixed in the BIT applies to unlawful expropriations,[566] but to the extent that the tribunal ultimately applied an interest rate of LIBOR plus 1 percent, compounded annually, it did so only because it considered that was appropriate in view of "all relevant circumstances of the case[s]."[567] In *Ukrnafta*, the Russian Federation's sole treaty breach was an unlawful expropriation[568] and the claimant submitted no evidence of their cost of borrowing.[569] In this case, the Claimants say, they introduced evidence that an interest rate reflecting its cost of borrowing would better provide full reparation.[570]

The Tribunal Majority Ruling on the Rate of Interest

684. The legal purpose of an interest award in the case of an unlawful expropriation is, as stated by the International Law Commission, "to ensure full reparation."[571] "The interest rate and mode of calculation shall be set so as to achieve that result."[572] Indeed, as the tribunal in *Asian Agricultural Products Ltd. v. Republic of Sri Lanka* observed, "in assessing the liability due for

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564 Partial Award, ¶ 274(b) (reciting Russian Federation's breaches of the BIT).

565 *OAO Tatneft v. Ukraine*, UNCITRAL, Award on the Merits, 29 July 2014, ¶¶ 624-625 (**CLA-47-Am**). The tribunal rejected the host state's argument that the tribunal was bound to apply the Article 5(2) interest rate to breaches other than expropriation:

> 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 [c]laimant concerning breaches on grounds other than expropriation. The Tribunal is therefore free to define the interest rate that should apply in the present circumstances.

566 AmCM, ¶¶ 518, 524.

567 *Ukrnafta*, ¶ 394 (**RLA-77**); *Stabil*, ¶ 412 (**RLA-78**).

568 *Ukrnafta*, ¶ 261 (**RLA-77**) ("The [c]laimant does not assert that the alleged treaty breaches other than expropriation caused it separate or greater harm than the harm that it suffered through the expropriatory measures. As a result, since it held that the Respondent is liable for expropriation, the Tribunal considers that it can dispense with answering the merits of the allegations of additional treaty breaches for the sake of procedural economy.").

569 *Ukrnafta*, ¶¶ 261, 289, 391 (**RLA-77**).

570 Memorial on Quantum, ¶ 107, *citing* NJSC Naftogaz, Consolidated Financial Statements as at 31 December 2013 and 2012 and for Years Ended, 27 February 2015 (**CE-832**).

571 ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries (2001), Art. 38(1) (**CLA-73-Am**) (hereinafter "**ILC Articles**").

572 ILC Articles, Art. 38(1) (**CLA-73-Am**).

losses incurred, the interest becomes an integral part of the compensation itself".[573] While, as the ILC has noted, "[t]here is no uniform approach" to the amount of interest payable, "[i]n practice, the circumstances of each case and the conduct of the parties strongly affect the outcome."[574] Naftogaz says[575] its claim to 9 percent directly reflecting its cost of borrowing better achieves the goal of full compensation than applying the LIBOR plus 1 percent rate because only the former is actually tied to Naftogaz's loss. The Tribunal majority is not satisfied, however, that the 9 percent rate accurately reflects the interest paid or is otherwise justified.

685. The application to unlawful expropriation of the interest rate agreed to for lawful expropriation leaves a state in the same position when acting lawfully as unlawfully. In the view of the Tribunal majority, in light of the current interest rate environment, and taking into account all of the relevant circumstances, and recognizing the imminent demise of LIBOR, the Tribunal fixes the rate at Euro Interbank Offered Rate ("**EURIBOR**") published by the European Money Markets Institute plus 2 percent.

2. *Compound Interest*

686. The Claimants argue[576] that compounding interest monthly is appropriate to ensure they are fully compensated for their loss of an income stream and, with respect to post-award interest, to encourage the Russian Federation to pay any award promptly. Russia accepts that the principle of full reparation requires that interest may be compounded,[577] but Russia complains that interest should be compounded annually rather than monthly.[578] Russia contends that monthly compounding would be "punitive."[579] However, investment tribunals, including the tribunal in *EDF International v. Argentina*, have repeatedly held that the compounding of interest seeks "to

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573 *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1990, ¶ 114 (**CLA-10**).

574 ILC Articles, Art. 38, Commentary, ¶ 10 (**CLA-73-Am**).

575 Reply on Quantum, ¶ 193.

576 Reply on Quantum, ¶ 198.

577 AmCM, ¶ 542. *See also Tenaris*, ¶ 588 (**CLA-227**) ("arbitral tribunals have increasingly accepted the commercial realism of compound interest in approximating the value lost by an investor, and in ensuring 'full reparation for the injury suffered as a result of an internationally wrongful act.'") (citation omitted; emphasis in the original).

578 AmCM, ¶ 544.

579 AmCM, ¶ 543.

ensure that compensation awarded to the [c]laimant is appropriate in the circumstances."[580] Compounding monthly has been held appropriate where the claimant presented evidence that its interest obligations also compounded monthly.[581]

687. The Claimants submit that their borrowing costs from 2014 onwards averaged 9 percent per annum and they were unable to pay down significant debts they owed at the Valuation Date.[582] The Claimants called no witnesses on the issue of interest. Rather, they rely on several years of

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[580] *See, e.g.*, *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Award, 11 June 2012, ¶ 1337 (**RLA-89**) ("The [t]ribunal agrees with [c]laimants with respect to compound interest" because simple interest "would fail to account accurately for the time value of money until the date of payment"); *Compañia de Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Final Award, 17 February 2000, ¶ 104 (**CLA-18**) ("In particular, where an owner of property has at some earlier time lost the value of his asset but has not received the monetary equivalent that then became due to him, the amount of compensation should reflect, at least in part, the additional sum that his money would have earned, had it, and the income generated by it, been reinvested each year at generally prevailing rates of interest. It is not the purpose of compound interest to attribute blame to, or to punish, anybody for the delay in the payment made to the expropriated owner; it is a mechanism to ensure that the compensation awarded the [c]laimant is appropriate in the circumstances.") (hereinafter "***Compañia de Desarrollo***"); *Bernardus Henricus Funnekotter and others v. Republic of Zimbabwe*, ICSID Case No. ARB/05/6, Award, 22 April 2009, ¶ 146 (**CLA-231**).

[581] *Compañia de Desarrollo*, ¶ 104 (**CLA-18**). *See also ADC Affiliate Ltd. and ADC & ADMC Management Ltd. v. The Republic of Hungary,* ICSID Case No. ARB/03/16, Award, 2 October 2006, ¶ 522 (**CLA-2**) (noting that in *Compañía del Desarrollo*, "the Tribunal recognized that the reason for compound interest was not 'to attribute blame to, or to punish, anybody for the delay in the payment made to the expropriated owner; it is a mechanism to ensure that the compensation awarded the [c]laimant is appropriate in the circumstances'. Accordingly, the Tribunal determines that interest is to be compounded on a monthly basis in the present case."); *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, 16 May 2018, ¶¶ 662-665 (**CLA-232**) (compounding interest monthly in case of breach of fair and equitable treatment requirement of Energy Charter Treaty); *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain*, ICSID Case No. ARB/14/11, Decision on Jurisdiction, Liability & Quantum Principles, 12 March 2019, ¶ 676 (**CLA-233**); *Eiser Infrastructure Ltd. & Energía Solar Luxembourg S.A.R.L. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Final Award, 4 May 2017, ¶ 478 (**CLA-234**); *Novenergia II, SICAR v. Kingdom of Spain*, SCC Case No. 2015/063, Final Award, 15 February 2018, ¶¶ 846-847 (**CLA-235**) ("The Tribunal notes that the [monthly] compounded basis on the interest is in conformity with international law and practice in investment arbitration").

[582] Memorial on Quantum, ¶ 107 ("According to its consolidated financial statements from 2013, at the valuation date Naftogaz's US dollar denominated cost of borrowing averaged 9 percent **per annum** on debts of approximately USD 4 billion." (emphasis added)).

NJSC Naftogaz's consolidated financial statements,[583] two loan agreements NJSC Naftogaz has or had,[584] and counsel's submissions.

688. The consolidated financial reports produced by Deloitte do show that Naftogaz's U.S. dollar denominated cost of borrowing was about 9 percent **per annum**.[585] It should, however, be

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583 NJSC Naftogaz, Consolidated Financial Statements as at 31 December 2013 and 2012 and for Years Ended, 27 February 2015 (**CE-832**); NJSC Naftogaz, Consolidated Financial Statements as at and for the Year Ended 31 December 2014, 31 July 2015 (**CE-833**); NJSC Naftogaz, Consolidated Financial Statements as at and for the Year Ended 31 December 2015, 29 July 2016 (**CE-834**); NJSC Naftogaz, Consolidated Financial Statements as at and for the Year Ended 31 December 2016, 4 May 2017 (**CE-836**); NJSC Naftogaz, Consolidated Financial Statements as at and for the Year Ended 31 December 2017, 16 May 2018 **(CE-817)**; NJSC Naftogaz, Separate Financial Statements as at and for the Year Ended 31 December 2018, 19 April 2019 (**CE-818**).

584 Term Facility Agreement Between NJSC Naftogaz and OJSC Gazprombank, 2 July 2012, (**CE-934**); Loan Agreement No. 151108K48 Between NJSC Naftogaz of Ukraine and OJSC Ukreximbank, 18 July 2008 (**CE-991**).

585 NJSC Naftogaz, Consolidated Financial Statements as at 31 December 2013 and 2012 and for Years Ended, 27 February 2015, 43 (**CE-832**):

The effective interest rates and currency denomination of borrowings were as follows:

In millions of Ukrainian hryvnias	31 December 2013		31 December 2012		1 January 2012	
	Balance	% per annum	Balance	% per annum	Balance	% per annum
UAH	27,232	14%	38,910	13%	39,227	13%
US Dollars	32,326	9%	38,228	9%	27,436	10%
Total	**59,558**		**77,138**		**66,663**	

NJSC Naftogaz, Consolidated Financial Statements as at and for the Year Ended 31 December 2014, 31 July 2015, 40 (**CE-833**):

The effective interest rates and currency denomination of borrowings were as follows:

In millions of Ukrainian hryvnias	31 December 2014		31 December 2013	
	Balance	% per annum	Balance	% per annum
UAH	25,014	15%	27,232	14%
US Dollars	35,919	9%	32,326	9%
EUR	75	12%	-	-
Total	**61,008**		**59,558**	

NJSC Naftogaz, Consolidated Financial Statements as at and for the Year Ended 31 December 2015, 29 July 2016, 42 (**CE-834**):

The effective interest rates and currency denomination of borrowings were as follows:

In millions of Ukrainian hryvnias	31 December 2015		31 December 2014	
	Balance	% per annum	Balance	% per annum
UAH	24,462	20%	25,101	15%
US Dollars	47,352	9%	36,085	9%
EUR	5	12%	75	12%
Total	**71,819**		**61,261**	

NJSC Naftogaz, Consolidated Financial Statements as at and for the Year Ended 31 December 2016, 4 May 2017, 43 (**CE-836**):

noted that Naftogaz's U.S. dollar costs of borrowing declined in 2016-2017 to between 6.4 and 8 percent per annum, before rising again to 8.7 percent per annum in 2018.

689. The loan agreements Naftogaz has proffered reflect the average per annum cost of borrowing seen in its consolidated financial reports. For example, in the definitions section of Naftogaz's unsecured USD 2 billion Term Facility Agreement with Gazprombank, the definition for "Interest Rate" says, "means 8.5 per cent per annum."[586] Article 8.1 deals with the calculation of interest and says "[t]he rate of interest on each Loan for each Interest Period shall be equal to the Interest Rate [8.5 percent per annum]."[587] The Interest Periods are monthly.[588] However, compounding is only mentioned within the context of default (unpaid) interest.[589]

In millions of Ukrainian hryvnias	31 December 2016		31 December 2015	
	Balance	% per annum	Balance	% per annum
UAH	27,315	19%	24,407	20%
US Dollars	43,316	8%	47,352	9%
EUR	213	7%	5	12%
Total	**70,844**		**71,764**	

NJSC Naftogaz, Consolidated Financial Statements as at and for the Year Ended 31 December 2017, 16 May 2018, 39 (**CE-817**):

In millions of Ukrainian hryvnias	31 December 2017		31 December 2016	
	Balance	% per annum	Balance	% per annum
UAH	21,162	18%	27,315	19%
USD	26,706	7%	43,316	8%
EUR	11,447	2%	213	7%
Total	**59,315**		**70,844**	

NJSC Naftogaz, Separate Financial Statements as at and for the Year Ended 31 December 2018, 19 April 2019, 40 (**CE-818**):

The effective interest rates and currency denomination of borrowings were as follows:

In thousands of Ukrainian hryvnias	31 December 2018		31 December 2017	
	Carrying amount	% per annum	Carrying amount	% per annum
UAH	21,775,023	19.7	20,551,422	17.6
US dollars	14,409,662	8.7	25,559,046	6.4
Euro	12,537,814	2.1	10,593,347	1.9
Total	**48,722,499**		**56,703,815**	

586 Term Facility Agreement Between NJSC Naftogaz and OJSC Gazprombank, 2 July 2012, 8 (**CE-934**).

587 Term Facility Agreement Between NJSC Naftogaz and OJSC Gazprombank, 2 July 2012, 17 (**CE-934**).

588 Term Facility Agreement Between NJSC Naftogaz and OJSC Gazprombank, 2 July 2012, 19, Article 9.1.3 (**CE-934**):

> The duration of each subsequent Interest Period for a Loan shall start on the first calendar day of each calendar month and end (for the purposes of calculating interest) on the last calendar day of that calendar month except that where an Interest Period would otherwise overrun the Termination Date for that Loan, that Interest Period shall be shortened so that it ends on the day prior to the Termination Date.

589 Term Facility Agreement Between NJSC Naftogaz and OJSC Gazprombank, 2 July 2012, 17, Article 8.3.3 (**CE-934**):

690. The second loan agreement is a secured lending agreement and shows a U.S. dollar interest rate of 12 percent per annum.[590] Under this agreement, the interest accrues "on a monthly basis on the amount of the actual debt" and the lender "carr[ies] over the arrears of outstanding interest on the Loan to the overdue interest account."[591] The Tribunal did not have the assistance of witness testimony to interpret either of these loan agreements. On the face of the documents, it is not entirely clear whether both charge compound or simple interest. Specifically, the loan from Gazprombank only refers to compounding in the context of default interest, while the use of an overdue interest account in the Ukreximbank agreement may suggest that interest is not compounded.

691. The Claimants submit that regarding the loan from Gazprombank, "Naftogaz had fully drawn upon [this loan] before the date of expropriation."[592] The Claimants cite the 70-page document without specifying where it shows that Naftogaz was fully drawn.[593] Nor do the Claimants cite to other business records kept in the usual course that would corroborate the loan being fully drawn at the Valuation Date. It is not possible to conclude whether this loan was fully drawn—or drawn at all—on the Valuation Date.

> Default interest (if unpaid) arising on an overdue amount will be compounded with the overdue amount at the end of each Interest Period applicable to that overdue amount but will remain immediately due and payable.

590 Loan Agreement No. 151108K48 Between NJSC Naftogaz of Ukraine and OJSC Ukreximbank, 18 July 2008, T-0004, Article 3.2.6 (**CE-991**).

591 Tr., Hearing on Quantum, Day 1, 131:19-132:4; Claimants' Presentation, Hearing on Quantum, slide 150; Loan Agreement No. 1511081K8 Between NJSC Naftogaz of Ukraine and OJSC Ukreximbank, 18 July 2008, T-0004, Articles 3.5.1-3.5.2 (**CE-991**):

> 3.5.1. The Borrower shall pay the Bank interest on the Loan in the amount set out in Clause 3.2.6 of this Agreements, in the Loan Currency. Such interest shall accrue on a monthly basis on the amount of actual debt under the Loan based on the actual number of days of the Interest Period and the Banking Year, in the Loan Currency. The Bank shall, not later than on the 2nd day of each month, provide the Borrower with the calculation of Interest for the previous month. The interest shall be paid by the 7th day of each month to the account referred to in Clause 3.8 of this Agreement. During that period, the interest shall be paid for the previous month. Interest for the last Interest Period shall be paid not later than on the next Banking Day after the principal debt under the Loan is repaid.
> 3.5.2. If the interest under the Loan is not paid by the due date as set out in Clause 3.5.1 of this Agreement, the Bank shall carry over the arrears of outstanding interest on the Loan to the overdue interest account.

592 Memorial on Quantum, ¶ 108.

593 Memorial on Quantum, ¶ 108, footnote 203.

692. The Claimants say "[u]nder the terms of this agreement [with Gazprombank], and others, Naftogaz is required to pay compound interest at monthly intervals."[594]

693. There is, however, a vast difference between paying annual interest at monthly intervals and paying interest that compounds monthly.

694. The further claim that "Naftogaz was unable to pay down significant debts that it owed at the valuation date"[595] is not readily apparent from reading the consolidated financial statements, which show the following carrying amounts:

Date	In millions of Ukrainian hryvnias
1 January 2012	66,663
31 December 2012	77,138
31 December 2013	59,558
31 December 2014	61,008
31 December 2015	71,819
31 December 2016	70,844
31 December 2017	59,315
31 December 2018	48,722

695. It seems Naftogaz's debt before and after the expropriation of their assets was roughly within the same range. Without witness testimony it is not possible to conclude that "Naftogaz was unable to pay down significant debts that it owed".

The Tribunal Majority Ruling on Interest

696. The award of interest recognizes the time value of money. Payment of an award in 2023 is worth less than payment on the Valuation Date because the Claimants have not only lost the use

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594 Memorial on Quantum, ¶ 108.

595 Memorial on Quantum, ¶ 107 ("As a result of the loss of revenues from the assets described above, and the failure to promptly compensate Naftogaz for the value of such investments, Naftogaz was unable to pay down significant debts that it owed at the valuation date.").

of that money since 2014 but on the evidence have had to replace it with alternate sources of finance at significant cost.

697. In the absence of expert testimony, the credit facility put in evidence by Naftogaz[596] is not self-explanatory, nor are the related accounting records sufficient to satisfy the Claimants' burden of proof to justify out-of-pocket interest costs and thereby to justify such a high rate of interest and frequency of compounding.

698. In the circumstances, the Tribunal majority awards interest at the rate of 6-month EURIBOR +2 percent compounded semi-annually. Interest will run from the Valuation Date (17/18 March 2014) until the date of the payment.

PART 24 - COSTS

699. The Parties agree that while "the costs of arbitration shall in principle be borne by the unsuccessful party", the Tribunal has the authority to shift costs under the UNCITRAL Rules "if it determines that apportionment is reasonable".[597]

700. Pursuant to Article 38 of the UNCITRAL Rules, "[t]he arbitral tribunal shall fix the costs of arbitration in its award." Article 38 defines "costs" as follows:

> The term "costs" includes only:
>
> (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 reasonable 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;

596 Term Facility Agreement Between NJSC Naftogaz and OJSC Gazprombank, 2 July 2012 (**CE-934**).

597 Reply on Quantum, ¶ 254, *citing* UNCITRAL Rules, Arts. 40(1)-(2); AmCM, ¶¶ 545-546; Claimants' Submission on Costs, 17 June 2022 (hereinafter "**Claimants' Submission on Costs**"), ¶¶ 3-6; Respondent's Submission on Costs, 17 June 2022 (hereinafter "**Respondent's Submission on Costs**"), 2.

> (f) Any fees and expenses of the appointing authority as well as the fees and expenses of the Secretary-General of the Permanent Court of Arbitration at The Hague.

701. In respect of allocation of costs, Article 40 (1) and (2) of the UNCITRAL Rules provide:

> 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.

702. The Claimants deposited EUR 825,000 with the PCA to cover the costs of arbitration. The Respondent deposited EUR 575,000 with the PCA to cover the costs of arbitration.

703. The deposit has been disbursed as follows:

(i) Dr. Charles Poncet's fees amount to EUR 264,187.50.

(ii) Professor Dr. Maja Stanivuković's fees amount to EUR 250,281.25.

(iii) Judge Ian Binnie, C.C., K.C.'s fees amount to EUR 386,034.74.

(iv) Mr. David Campbell's fees amount to EUR 79,450.00.

(v) The registry fees of the PCA amount to EUR 198,966.00.

(vi) The Tribunal and the PCA also incurred expenses in the amount of EUR 8,825.43.

(vii) Other arbitration expenses, including expenses relating to court reporting, AV/IT support, catering, printing, courier services, bank charges, and others amount to EUR 212,255.08.

704. Accordingly, the costs of arbitration, comprising the items covered in Article 38(a) to (c) of the UNCITRAL Rules, are fixed at EUR 1,400,000.00.

705. The Claimants request that the Tribunal order the Russian Federation to bear the full costs of this arbitration to date, including Naftogaz's costs of representation and assistance, as summarized below.

706. The Claimants have incurred USD 29,854,058.58 and EUR 71,794.87 in "legal representation and assistance" costs under Article 38(e) of the UNCITRAL Rules as follows:[598]

Opening Submissions	
Counsel and Assistance Fees	USD 931,475.19
Expert Witnesses	USD 3,750.00
Other Disbursements	USD 317,916.54
Total	**USD 1,253,141.73**
Written Submissions on Jurisdiction and the Merits	
Counsel and Assistance Fees	USD 5,300,783.53
Expert Witnesses	US 1,270,893.30
Other Disbursements	USD 1,196,005.74
Total	**USD 7,767,682.57**
Hearing on Jurisdiction and the Merits	
Counsel and Assistance Fees	USD 1,912,834.94
Expert Witnesses	USD 195,364.56
Other Disbursements	USD 667,889.71 + EUR 49,175.33
Total	**USD 2,776,089.21 + EUR 49,175.33**
Written Submissions on Quantum	
Counsel and Assistance Fees	USD 7,392,313.38
Expert Witnesses	USD 1,694,939.53
Other Disbursements	USD 1,316,713.26
Total	**USD 10,403,966.17**
Hearing on Quantum and Post-Hearing Briefing	
Counsel and Assistance Fees	USD 5,047,943.34

598 Claimants' Supplemental Submission on Costs, 12 December 2022 (hereinafter "**Claimants' Supplemental Submission on Costs**"), ¶¶ 3-4, Table 1.

Expert Witnesses	USD 1,236,059.42
Other Disbursements	USD 828,002.00 + EUR 22,619.54
Total	**USD 7,112,004.76 + EUR 22,619.54**
Additional Post-Hearing Submissions (June-November 2022)	
Counsel and Assistance Fees	USD 229,516.01
Other Disbursements	USD 47,120.41
Total	**USD 276,636.42**
Counsel and Assistance Fees Arising from Procedural Issues	
Procedural Dispute Caused by Russia's Belated Appearance and Subsequent Requests to Reopen Jurisdiction and Postpone the Quantum Phase in July through October 2019	USD 128,265.93
Procedural Disputes Arising from Russia's Multiple Requests for the Extension of the Deadline for the Submission of the Rejoinder on Quantum in April through May 2020	USD 39,573.95
Costs Incurred by the Claimants in April and May 2020 in Connection with the Application Concerning the Russian Federation's Breach of Confidentiality	USD 30,164.92
Procedural Disputes Related to the Format and Dates of the Hearing on Quantum and Russia's Multiple Requests to Reschedule the Hearing on Quantum in February through May 2021	USD 66,532.92
Total	**USD 264,537.72**
Tribunal and PCA Administrative Costs	
Filing Fee	USD 2,138.26
Appointing Authority Fee	USD 1,078.07
PCA Advances	EUR 775,000 (+ EUR 50,000)
Total	**USD 3,216.33 + EUR 825,000**
GRAND TOTAL	**USD 29,857,274.91 + EUR 896,794.87**

707. The Claimants have also incurred USD 3,216.33 and EUR 825,000 in other "costs of arbitration" under Articles 38(a), 38(b), and 38(f) of the UNCITRAL Rules, including their share

of the PCA and Tribunal fees.[599] The grand total of costs incurred by the Claimants in the course of the arbitration is USD 29,857,274.91 and EUR 896,794.87.[600]

708. In addition, the Claimants request that the Tribunal order interest on the amount of these costs, at a rate of 9 percent compounded monthly from the date of the award.[601]

709. The Respondent submits that it has incurred EUR 7,921,169.91 as arbitration costs.[602] (It will be recalled that the Russian Federation did not participate in the jurisdiction and liability stages of this this proceeding). This amount is composed of: (i) EUR 5,761,501.75 in counsel fees; (ii) EUR 1,406,941.20 in expert witnesses' fees; (iii) EUR 575,000 in Tribunal and PCA Administrative Costs; and (iv) EUR 177,726.96 in disbursements.[603] The Respondent requests that the Tribunal order the Claimants to pay its costs in full, plus post-award interest thereon, as of the date of the final award at the commercial rate that the Tribunal deems appropriate, and on a compound basis.[604] Alternatively, the Respondent submits that if the Tribunal awards only partial compensation to the Claimants, the allocation of costs should reflect the proportion of the sums actually awarded, on the one hand, and the amount initially claimed by the Claimants, on the other hand.[605]

The Tribunal Majority Ruling on Costs

710. The Tribunal majority considers it appropriate to follow the general rule that the costs of the arbitration and the costs of legal representation and assistance should be borne by the unsuccessful party. The award should reflect not only the result but the time and skill of Claimants' counsel in achieving the result. The Respondent's treaty violations and in particular its failure to pay for the assets it expropriated call for appropriate compensation. The Claimants assert a claim

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599 Claimants' Supplemental Submission on Costs, ¶ 3.
600 Claimants' Supplemental Submission on Costs, ¶ 3.
601 Claimants' Supplemental Submission on Costs, ¶ 7.
602 Respondent's Submission on Costs, 4; Respondent's e-mail dated 20 July 2022; Respondent's letter dated 12 December 2022.
603 Respondent's Submission on Costs, 4; Respondent's e-mail dated 20 July 2022; Respondent's letter dated 12 December 2022.
604 AmCM, ¶ 533; Rejoinder, ¶ 864; Respondent's Submission on Costs, p. 4.
605 AmCM, ¶ 554; Rejoinder, ¶ 865; Respondent's Submission on Costs, p. 4.

for costs of legal representation and assistance of USD 29,857,274.91 plus EUR 71,794.87 and a claim for other costs of arbitration of USD 3,216.33 and EUR 825,000.

711. Regarding other costs of arbitration, the Tribunal majority awards the Claimants **USD 3,216.33 and EUR 825,000**, comprised as follows: (i) USD 3,216.33 for the fees of the PCA Secretary General and the Appointing Authority, (ii) EUR 700,000 for the Claimants' share of the arbitration deposit, and (iii) EUR 125,000 for the Claimants' substitute payment of the Respondent's share of the arbitration deposit.

712. With respect to costs of legal representation and assistance, in the view of the Tribunal majority, a bill of costs that a client agrees to pay counsel does not automatically generate a reciprocal obligation on the Respondent for reimbursement. The terms accepted by client and its counsel is their business. The amount of costs ordered by the Tribunal majority must be reasonable in accordance with Article 38(e) of the UNCITRAL Rules, having regard to the circumstances of the case. In this case, the Tribunal's examination of the Claimants' bill of costs discloses that in some instances counsel for the Claimants have delivered a level of service the cost of which cannot fairly be imposed on the Respondent. For example, according to their bill of costs, the Claimants incurred costs of USD 264,537.72 on purely "procedural issues" including USD 66,532.92 for "procedural disputes related to the format and dates of the hearing on Quantum and Russia's multiple requests to reschedule the hearing on quantum in February through May 2021."

713. The Claimants allege that unnecessary costs arose from the procedural tactics of the Russian Federation, which they say detracted from the efficiency of the proceeding.[606] In fact, however, both sides engaged in a measure of procedural skirmishing. In the Tribunal majority's view, taking an objective view of the amount of work involved, it would be unfair to burden the Respondent with the level of costs claimed by the Claimants for these "procedural issues". Then again, the Claimants seek **USD 17,792,607.35 plus EUR 22,619.54** in respect of the quantum phase of the proceedings compared with the Respondent's total claim for the quantum phase, the only phase in which it participated, of EUR 7,871,169.91 (approximately **USD 8,557,929.48** at current exchange rates) which is less than half the Claimants' claim for the same quantum phase.

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606 *See* Claimants' Submission on Costs, Section III.C.

Clearly, there was more work for the Claimants putting together their quantum case than for the Respondent to attack it, yet for work *after* putting together its quantum case the Claimants seek USD 7,112,004.76 plus EUR 22,619.54 for the quantum hearing itself. (In light of the resignation of the Respondent's counsel shortly after the conclusion of the oral hearing, the post-hearing written submissions were dispensed with). Again, while there is clearly no exact parallel between the workload of the Claimants and that of the Respondent, the comparison of the respective bills of costs is striking and persuades the Tribunal majority that the Claimants' entire costs burden should not be shifted to the Respondent. Having regard to all the circumstances, the Tribunal awards the Claimants 80 percent of their claim for costs of legal representation and assistance, which the Tribunal majority finds reasonable, namely **USD 23,885,819.93 and EUR 57,435.90**. The Respondent shall bear its own costs of legal representation and assistance.

714. In sum, therefore, the Tribunal majority awards the Claimants costs in the amount of **USD 23,889,036.26 and EUR 882,435.90**.

715. The Tribunal majority considers it appropriate to grant the Claimants interest on the aforementioned amounts on the same terms and conditions as the compensation, *i.e.*, awarded at the rate of 6-month EURIBOR +2 percent compounded semi-annually from the date of this Final Award until the date of full payment.

PART 25 - DISPOSITION

716. As set out in the table that follows, the Tribunal by majority determines that the quantum of compensation due to the Claimants based on the Fair Market Value of the Claimants' expropriated investments in Crimea on the Valuation Date is USD 4,222,875,858.81.

	Naftogaz	CNG	UTG	Likvo	UGV	UTN	Gaz Ukraiiny	Total
Upstream Assets	USD 151,000,000.00	USD 2,140,000,000.00	USD 940,000,000.00	—	—	—	—	USD 3,231,000,000.00
Midstream Assets								
Pipeline Systems	—	USD 14,500,000.00	USD 8,000,000.00	—	—	—	—	USD 22,500,000.00
UGS Facility	—	USD 46,500,000.00	—	—	—	—	—	USD 46,500,000.00
Gas Inventories								
Cushion Gas	—	USD 142,000,000.00	—	—	—	—	—	USD 142,000,000.00
Pipeline Fill	—	USD 4,000,000.00	—	—	—	—	—	USD 4,000,000.00
Working Gas	—	USD 181,731,839.81	—	—	—	—	—	USD 181,731,839.81
Other Midstream Assets	USD 11,000,000.00	USD 4,000,000.00	USD 35,000,000.00	—	—	—	—	USD 50,000,000.00
Service Assets								
Drilling Rigs								
Petro Hodovanets	—	USD 200,000,000.00	—	—	—	—	—	USD 200,000,000.00
Ukraine	—	USD 200,000,000.00	—	—	—	—	—	USD 200,000,000.00
Tavrida	—	USD 34,000,000.00	—	—	—	—	—	USD 34,000,000.00
Sivash	—	USD 16,000,000.00	—	—	—	—	—	USD 16,000,000.00
Marine Vessels	—	USD 60,580,000.00	—	—	—	—	—	USD 60,580,000.00
Helicopters	—	USD 19,700,000.00	—	—	—	—	—	USD 19,700,000.00
LDCs								
PJSC Sevastopolgaz	USD 1,400,000.00	—	—	—	—	—	—	USD 1,400,000.00
PJCS Krymgaz	USD 4,400,000.00	USD 2,700,000.00	—	—	—	—	—	USD 7,100,000.00
Krymgaz Debts Owed to Naftogaz	—	—	—	—	—	—	—	
Non-Oil and Gas Investments	USD 813,721.00	—	USD 3,129,914.00	USD 925,917.00	USD 796,203.00	USD 652,890.00	USD 45,374.00	USD 6,364,019.00
Consequential Losses	—	—	—	—	—	—	—	
Interest								
								USD 4,222,875,858.81

717. The Tribunal by majority therefore:

(1) Orders the Respondent to pay to the Claimants compensation in the amount of USD 4,222,875,858.81 plus interest on this amount at the rate of 6-month EURIBOR +2% compounded semi-annually from 18 March 2014 until the date of full payment;

(2) Orders the Respondent to pay to the Claimants USD 23,889,036.26 and EUR 882,435.90 in reimbursement of the costs of arbitration, including the Claimants' reasonable costs of legal representation and assistance, plus interest on these amounts at the rate of 6-month EURIBOR +2% compounded semi-annually from the date of this Final Award until the date of full payment;

(3) Dismisses all other claims, counterclaims, and requests for relief.

Place of Arbitration: The Hague, the Netherlands

Signed, this 12th day of April 2023

Dr. Charles Poncet
Arbitrator

Professor Dr. Maja Stanivuković
Arbitrator
Subject to the attached dissenting opinion

Judge Ian Binnie, C.C., K.C.
Presiding Arbitrator