4A_396/2017[1]

Judgment of October 16, 2018

First Civil Law Court

Federal Judge Kiss, presiding,
Federal Judge Klett,
Federal Judge Hohl,
Federal Judge Niquille,
Federal Judge May Canellas
Clerk of the Court: Leeman (Mr.)

Russian Federation,
represented by Elliott Geisinger and Dr Christopher Boog, along with Dr Annabelle Möckesch,
Appellant,

v.

PJSC Ukrnafta,[2]
represented by attorneys Dr. Marc D. Veit, Michael Schneider, and Dominik Elmiger,
Respondent

Facts:

A.
PJSC Ukrnafta, of Kiev, Ukraine (Claimant, Respondent) is a company established under Ukrainian law. Between 2003 and 2006, it acquired 16 gas stations in the Crimean Peninsula. It also rented offices in the city of Feodosia, at which 30 employees worked. In 2013, having made additional investments, the Claimant controlled ten percent of the fuel market in Crimea. Crimea was part of Ukrainian territory at that time.

The Claimant asserts that in the course of the annexation of the Crimean Peninsula in 2014 – the Accession Treaty was ratified and the Accession Act was enacted on March 21, 2014 – the Russian Federation (Defendant, Appellant) took measures that affected the aforementioned assets in Crimea and led to their expropriation. The Claimant argues that the Defendant thereby violated the Agreement of November 27, 1998 (in force since January 27, 2000) between the government of the Defendant and the Cabinet of Ministers of Ukraine (Agreement on the Encouragement and Mutual Protection of

[1] Translator's Note: Quote as Russian Federation *v*. A._____ LLC, 4A_396/2017.
The decision was issued in German. The original text is available on the website of the Federal Tribunal, www.bger.ch.

[2] Translator's Note: In the original text, the Federal Tribunal anonymized the company as A._____ LLC.

Investments, hereinafter the 1998 Investment Protection Agreement or IPA 1998) in a number of ways, and is therefore obligated to pay damages.

Art. 9 of the 1998 Investment Protection Agreement, the original of which was drafted in both Russian and Ukrainian, contains the following provision on dispute resolution ("Resolution of Disputes between a Contracting Party and an Investor of the Other Contracting Party"):

> 1. Any dispute between one Contracting Party and an investor of the other Contracting Party arising in connection with investments, including disputes concerning the amount, terms, and payment procedures of the compensation provided for by Article 5 hereof, or the payment transfer procedures provided for by Article 7 hereof, shall be subject to a written notice, accompanied by detailed comments, which the investor shall send to the Contracting Party involved in the dispute. The parties to the dispute shall endeavor to settle the dispute through negotiations if possible.
>
> 2. If the dispute cannot be resolved in this manner within six months after the date of the written notice mentioned in paragraph 1 of this article, it shall be referred to:
> [...]
>
> c) an "ad hoc" arbitration tribunal, in accordance with the Arbitration Regulations of the United Nations Commission for International Trade Law (UNCITRAL).
> [...]"[3]

The other provisions of the 1998 Investment Protection Agreement that are relevant to these proceedings read as follows:

> Art. 1 (Definitions):
> 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:
>
> 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 know-how;
> 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.
>
> 2. The term 'investor of a Contracting Party' means:
>
> a) any natural person having the citizenship of the state of that Contracting Party and who is competent in accordance with its legislation to make investments in the territory of the other Contracting Party;

[3] Translator's Note: In English in the original text.

b) any legal entity constituted in accordance with the legislation in force in the territory of that Contracting Party, provided that the said legal entity is competent in accordance with legislation of that Contracting Party, to make investments in the territory of the other Contracting Party.

[...]

4. The term "territory" means the territory of the Russian Federation or the territory of Ukraine as well as their respective exclusive economic zone and the continental shelf, defined in accordance with international law.

5. The term 'legislation of the Contracting Party' means legislation of the Russian Federation or Ukraine, respectively.

Art. 2 (Encouragement and Protection of Investments);

1. Each Contracting Party will encourage the investors of the other Contracting Party to make investments in its territory and admit such investments in accordance with its legislation.

2. Each Contracting Party guarantees, in accordance with its legislation, the full and unconditional legal protection of investments by investors of the other Contracting Party.

Art. 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.[4]

B.

B.a On June 3, 2015, on the basis of Art. 9 of the 1998 Investment Protection Agreement, the Claimant initiated an arbitration proceeding against the Defendant before the Permanent Court of Arbitration (PCA), under the Arbitration Rules of the United Nations Commission on International Trade Law 1976 (UNCITRAL Rules). It requested an Order that the Defendant be required to pay damages of USD 50,314,336 plus interest.

By letter from its Ministry of Justice dated August 12, 2015, and a cover letter from its ambassador in the Netherlands dated September 15, 2015, the Defendant disputed the Arbitral Tribunal's jurisdiction to hear the asserted claims.

While the Claimant named an arbitrator, the Defendant declined to name one, and thus the Secretary General of the Permanent Court of Arbitration ordered the appointment of an arbitrator.

On October 7, 2015, the Chairwoman was appointed.

On January 15, 2016, the Claimant submitted its Statement of Claim with grounds to the Arbitral Tribunal. The Defendant did not submit a reply brief within the specified time period.

On June 6, 2016, Ukraine submitted a brief to the Arbitral Tribunal as a non-disputing party. By order dated July 1, 2016, the Arbitral Tribunal denied Ukraine's request to participate in the impending hearing.

[4] Translator's Note: In English in the original text.

On July 11, 2016, an oral hearing was held in Geneva in which the Defendant did not participate.

B.b By decision dated June 26, 2017 ("Award on Jurisdiction"), the Arbitral Tribunal in Geneva ruled that it had jurisdiction.

C.
By a civil law appeal, the Defendant requested the Federal Tribunal set aside the award of the Arbitral Tribunal in Geneva dated June 26, 2017, and to rule that the Arbitral Tribunal lacked jurisdiction to adjudicate the arbitration claims.

The Respondent requests that the Federal Tribunal reject the appeal, to the extent the matter is capable of appeal. The Arbitral Tribunal waived the submission of comments.

The parties have submitted their Reply and Rejoinder.

D.
By order dated November 23, 2017, the Respondent's request for the order of a deposit to cover possible compensation was denied.

By order dated January 5, 2017, the Appellant's request for a grant of suspensive effect or an order for preliminary injunctive relief was dismissed as moot.

E.
On October 16, 2018, the Federal Tribunal held a public hearing.

Reasons:

1.
The Appellant requests that the present proceeding be combined with appeal proceeding 4A_398/2017[5] concerning the interim decision of the Arbitral Tribunal in Geneva dated June 26, 2017, in the arbitration proceeding PCA no. 2015-35. The proceedings 4A_396/2017 and 4A_398/2017 are based on a comparable set of facts; however, the appeals are not directed against the same decision and the same parties are not part of the arbitration proceedings concerned, and therefore the two appeal proceedings will not be combined.

2.
According to Art. 54(1) BGG[6] the Federal Tribunal issues its decisions in an official language,[7] as a rule in the language of the decision under appeal. Where that decision is in another language, the

[5] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/atf-4a-398-2017

[6] Translator's Note: BGG is the most commonly used German abbreviation for the Federal law of June 6, 2005, organizing the Federal Tribunal (RS 173.110).

[7] Translator's Note: The official languages of Switzerland are German, French and Italian.

Federal Tribunal resorts to the official language chosen by the parties. The challenged decision was issued in English. As English is not one of the official languages of the Court, and because the Parties have used German before the Federal Tribunal, the judgment of the Federal Tribunal is consequently issued in German.

3.
In the realm of international arbitration, a civil law appeal is possible under the requirements of Art. 190-192 PILA[8] (SR 291) (Art. 77(1)(a) BGG).

3.1 The seat of the Arbitral Tribunal was in Geneva. The challenged arbitration decision is an interim decision on jurisdiction, which can be challenged under Art. 190(3) PILA (BGE 143 III 462, at 2.2; 130 III 66 at 4.3 p. 75).

A civil law appeal within the meaning of Art. 77(1) BGG is, as a basic principle, of a purely appellate nature, *i.e*. it may only seek the annulment of the award under appeal (*see* Art. 77(2) BGG, ruling out the applicability of Art. 107(2) BGG, to the extent this empowers the Federal Tribunal to decide the case itself). To the extent the case concerns the jurisdiction or composition of the arbitral tribunal, there is, however, an exception to the effect that the Federal Tribunal may itself decide the jurisdiction (or lack thereof) of the arbitral tribunal and of the rejection of an arbitrator (BGE 136 III 605[9] at 3.3.4 p. 616 with references).

The Appellant's application is accordingly admissible and there is no reason to make any further remarks regarding the prerequisites to admissibility. It is appropriate for the Tribunal to deal with the Appeal, provided that the grounds of appeal are sufficient (Art. 77(3) BGG).

3.2 According to Art. 77(3) BGG, the Federal Tribunal only reviews the grievances raised and reasoned in the appeal: this corresponds to the duty to raise grievances in respect of the violation of constitutional rights and of cantonal and intercantonal law contained in Art. 106(2) BGG (BGE 134 III 186[10] at 5 p. 187 with reference). Unsubstantiated criticism is not admissible (BGE 134 III 565[11] at 3.1 p. 567; 119 II 380 at 3b p. 382).

3.3 The Federal Tribunal bases its judgment on factual findings of the arbitral tribunal (Art. 105(1) BGG). This includes the findings as to the facts upon which the matter in dispute is based, and those concerning the course of the first instance proceedings, *i.e.* the content of the case, which includes, in particular, the submissions of the Parties, their factual allegations, legal arguments, statements in the

[8] Translator's note: PILA is the most frequently used English abbreviation for the Federal Statute on International Private Law of December 18, 1987.

[9] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/independence-and-impartiality-of-a-party-appointed-arbitrator-in

[10] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/right-to-be-heard-equality-between-the-parties

[11] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/extension-of-arbitration-clause-to-non-signatories-case-of-a-gua

case, evidence, and proffers of evidence, the content of a witness statement and/or expert reports, or the findings as to a visual inspection (BGE 140 III 16 at 1.3.1 with references).

The Federal Tribunal may not rectify or supplement the factual findings of the arbitral tribunal, even where they are blatantly inaccurate, or based on a violation of the law within the meaning of Art. 95 BGG (*see* Art. 77(2) BGG, ruling out the applicability of Art. 97 BGG and Art. 105(2) BGG). However, it may examine the factual findings of the award at issue within the framework of the jurisdictional defense when certain admissible grievances within the meaning of Art. 190(2) PILA are raised or new arguments (Art. 99 BGG) are, exceptionally, taken into account (BGE 142 III 220 at 3.1, 239 at 3.1; 140 III 477[12] at 3.1 p. 477; 138 III 29 at 2.2.1; each with references). An appeal from an interim decision (Art. 190(3) PILA) for lack of jurisdiction of the arbitral tribunal (Art. 190(2)(b) PILA) is adjudicated by the Federal Tribunal on the basis of the findings of fact made by the arbitral tribunal which withstand the assertion that fundamental rights have been breached; thus, in connection with an appeal of this kind, the further grievances under Art. 190(2) PILA may likewise be raised if they directly relate to the arbitral tribunal's jurisdiction (BGE 140 III 477 at 3.1, 520 at 2.2.3 p. 525).

The party claiming an exception to the rule that the Federal Tribunal is bound by the findings of fact of the arbitral tribunal and seeks to rectify or supplement the facts on this basis must show, with precise references to the record, that corresponding assertions of fact were already been made in the arbitral proceedings, in conformity with the procedural rules (BGE 115 II 484 at 2a p. 486; 111 II 471 at 1c p. 473; each with references; *see also* BGE 140 III 86 at 2 p. 90).

3.4 Where the Appellant claims in its appeal that there is agreement between the Contracting Parties that the 1998 Investment Protection Agreement is not applicable to the facilities at issue in Crimea and in the city of Sevastopol, the Appellant is inadmissibly exceeding the binding findings of fact in the challenged decision. The same applies to the extent that the Appellant speaks in the same context of Ukraine's alleged intentions concerning Russian investments from this region. The associated arguments must be set aside from consideration.

4.
The Appellant asserts the grievance that the Arbitral Tribunal wrongfully found that it had jurisdiction (Art. 190(2)(b) PILA). First, the Appellant argues, the 1998 Investment Protection Agreement does not apply in the current case because there is no agreement between the Contracting Parties with respect to the reciprocal application of the agreement to the territory of Crimea and the city of Sevastopol. Secondly, it argues that the Respondent is not an "investor" within the meaning of Art. 1(2) IPA 1998; and thirdly, it says, the facilities in question are not "investments" within the meaning of Art. 1(1) IPA 1998.

4.1 According to Art. 190(2)(b) PILA, the Federal Tribunal reviews the jurisdictional issues freely from a legal point of view, including the preliminary material issues on which jurisdiction depends (BGE 142

[12] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/arbitration-clause-not-rescinded-subsequent-"showpiece"-contract

III 239 at 3.1; 134 III 565 at 3.1; 133 III 139 at 5 p. 141). This also applies in the case of arbitration decisions on international investment disputes; thus, with regard to the question of jurisdiction, the Federal Tribunal has interpreted the terms *contract claims*, *treaty claims* and *umbrella clause* under the agreement of December 17, 1994, of the energy charter (BGE 141 III 495[13] at 3.2), or has ruled on the term "*investissement*" in a bilateral investment protection agreement (Judgment 4A_616/2015[14] of September 20, 2016, E 3; *see also* Judgment 4A_157/2017[15] of December 14, 2017, at 3.3.4). However, even in connection with an appeal on jurisdiction, the Federal Tribunal reviews the factual findings of the award under appeal only when some admissible grievances within the meaning of Art. 190(2) PILA are raised against such factual findings or when some new evidence (Art. 99 BGG) is, exceptionally, taken into account (BGE 142 III 220 at 3.1, 239 at 3.1; 140 III 477 at 3.1; 138 III 29[16] at 2.2.1; each with references).

4.2 The Arbitral Tribunal reasoned that the following conditions must be satisfied according to the 1998 Investment Protection Agreement for there to be arbitral jurisdiction: the legal dispute must fall within (1) the territorial and (2) the temporal scope of the IPA 1998, (3) the Claimant must be an "investor" within the meaning of the agreement, and (4) it must have made an "investment" in the territory of the host country in accordance with that country's legislation. The Arbitral Tribunal emphasized that, for the assessment of its jurisdiction under Art. 9 IPA 1998, it was not required to address the question of the permissibility of the accession of Crimea into the Russian Federation or the lawfulness of the associated territorial claims. It found that the Appellant has acquired *de facto* control over the Crimean Peninsula and regards it as part of its territory. Furthermore, even though Ukraine disputes the sovereignty claims of the Russian Federation with respect to Crimea, it acknowledged in the arbitration proceedings that the Appellant exercises *de facto* control over Crimea.

The Arbitral Tribunal found that the 1998 Investment Protection Agreement is to be interpreted with reference to Art. 31 *et seq*. of the Vienna Convention on the Law of Treaties of May 23, 1969 (hereinafter: VCLT; SR 0.111). Applying this basis of interpretation, the Arbitral Tribunal concluded, regarding the territorial scope of the agreement, that the term "territory" as used in the agreement also includes an area over which a Contracting State exercises *de facto* control. Accordingly, because of the accession of Crimea into the Russian Federation, the IPA 1998 has applied to Ukrainian investments in Crimea since March 21, 2014, at the latest, the date when the Appellant ratified the Accession Treaty and enacted the Crimea Integration Law. In temporal terms ("*jurisdiction ratione temporis*"), the Arbitral Tribunal found that all investments by the Respondent were made after the key date of January 1, 1992 (the date of the dissolution of the Soviet Union), and therefore the temporal requirement under Art. 12 IPA 1998 is satisfied. Based on its interpretation of this provision in

[13] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/swiss-supreme-court-addresses-difference-between-treaty-claims-and-contract-claims

[14] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/atf-4a-616-2015

[15] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/atf-4a-157-2017

[16] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/jurisdiction-of-the-cas-upheld-a-pathological-clause-has-to-be-s

conjunction with Art. 1(1) and (4) IPA 1998, it found that the applicability of the agreement does not presuppose that the investment must have been made in the other Contracting State from the outset; the agreement offers no support for denying protection for existing investments in the event of a boundary change.

In *personal* terms ("*jurisdiction ratione personae*"), the Arbitral Tribunal found that it had been proven that the Respondent was a company established in accordance with Ukrainian law, entitled under that legal system to make investments in Crimea, and is therefore an "investor" within the meaning of Art. 1(2)(b) IPA 1998. With respect to the subject matter scope of the arbitration clause ("*jurisdiction ratione materiae*") the Arbitral Tribunal held that it could not seriously be doubted that the resources expended by the Respondent to operate gas stations ("movable and immovable property, cash, and rights to engage in the commercial activity of selling petrol" as well as "tanks, pumps, cash registers, computer equipment, land and buildings") were "investments" within the meaning of Art. 1(1) IPA 1998; it held that there was no cause to decide whether the agreement contains an objective definition of "investment" that extends beyond that contained in the aforementioned provision. Furthermore, the Arbitral Tribunal found that the requirement under Art. 1(1) IPA 1998 is met, according to which the investments must be made in accordance with the legislation of the host country. For these reasons, it found that the legal dispute falls within the scope of the IPA 1998, and the Arbitral Tribunal had jurisdiction to adjudicate the asserted claims in accordance with Art. 9 IPA 1998.

4.3

4.3.1 The Appellant first of all disputes the jurisdiction of the Arbitral Tribunal with the objection that the IPA 1998 is not applicable to the territory of Crimea and the city of Sevastopol. It contends that the term "territory" in Art. 1(4) IPA means only the territory of the Contracting Parties at the time when the agreement was made. At that time, the Crimean Peninsula and the city of Sevastopol were within the territory of Ukraine. The Appellant contends that it is not in any way evident from the provisions of the agreement that the term "territory" is to be understood dynamically: later boundary changes should be left out of account, absent further agreement. It argues that if the Contracting Parties had wanted to change the territorial scope of the Investment Protection Agreement, an agreement to that effect would have been necessary under Art. 39 VCLT or Art. 13 IPA 1998. However, no such agreement was made. There is neither an express nor a tacit agreement on the applicability of the Investment Protection Agreement to the territory of the Crimean Peninsula and the city of Sevastopol.

4.3.2 The Arbitral Tribunal has coherently reasoned that the term "territory" used in Art. 1(4) IPA 1998 is not to be interpreted restrictively with respect to the territorial scope of the agreement, such that it would be understood to mean only territories over which a given Contracting State lawfully has sovereignty under the principles of international law. The Appellant does not deny before the Federal Tribunal that territories that are *de facto* controlled by a Contracting State are also included in the territorial scope of the 1998 Investment Protection Agreement. Accordingly, it also does not question that it is superfluous for an examination of jurisdiction under Art. 9 IPA 1998 to assess the permissibility of the accession of Crimea into the Russian Federation or the lawfulness of the territorial claims. The Appellant complains only that the Arbitral Tribunal has incorrectly based its decision on a "dynamic" understanding of the term "territory." It thus does not claim that (because of the

circumstances of accession) the territory of Crimea is not covered as subject matter by the term "territory" under Art. 1(4) IPA 1998; rather, it founds its argument solely on the temporal fact that Crimea was a part of Ukrainian territory at the time when the agreement was made.

The Arbitral Tribunal has interpreted the term "territory" under Art. 1(4) IPA 1998 correctly, making reference to general principles of international law with respect to the territorial scope of treaties. In particular, it has taken into account that under Art. 29 VCLT, a treaty is binding on each Contracting Party "in respect of its entire territory," unless a different intention appears from the treaty or is otherwise established. The deciding point is that according to general principles of international law, in the event of territorial changes, a treaty is still applicable to the entire territory (*i.e*., the territory that is now changed) (Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties,* Leiden/Boston 2009, N. 7 on Art. 29 VCLT p. 393; Kerstin von der Decken, in: Dörr/Schmalenbach [Ed.], Vienna Convention on the Law of Treaties, 2nd ed., Berlin/Heidelberg 2018, N. 28 *et seq*. on Art. 29 VCLT concerning the so-called *moving treaty frontiers rule*). The Appellant is also unable to adduce any evidence for its thesis of a static understanding of the territory concerned (meaning a restriction to the sovereign territory at the time when the agreement was made). Therefore, nothing argues against the Arbitral Tribunal's interpretation that a change in territory that takes place after the agreement was made is to be included under Art. 1(4) IPA 1998.

The objection raised in the appeal that according to Art. 39 VCLT and Art. 13 IPA 1998, a recognition of later boundary changes would have required a further agreement by the Contracting Parties, does not hold. The Arbitral Tribunal rightly held that the territory of the Crimean Peninsula is to be considered part of the Appellant's "territory" within the meaning of Art. 1(4) IPA 1998 and is included within the territorial scope of the agreement.

4.4

4.4.1 The Appellant complains that the facilities in question are not investments within the meaning of Art. 1(1) IPA 1998. It argues that under Art. 9(1) IPA 1998, the jurisdiction of the Arbitral Tribunal is restricted to disputes that arise in connection with investments. The term "investment," it says, is defined in Art. 1(1) IPA 1998. Because the affected facilities of the Respondent do not have the right features inherent in the term, it argues, the subject-matter scope of the Investment Protection Agreement also does not come into play. It contends that the Arbitral Tribunal proceeded incorrectly: though it occupied itself across many pages of its arbitration award with questions of the territorial, temporal and personal scope of the Investment Protection Agreement, in so doing it adopted an approach characterized by a strong tendency to "compartmentalize," by trying to force the different components of jurisdiction into a tightly structured strait jacket. Yet – according to the Appellant – the tribunal failed to address the all-important question of the subject-matter scope of the 1998 Investment Protection Agreement.

Specifically, the Appellant points out, under the heading "Jurisdiction *Ratione Temporis* (Article 12)," the Arbitral Tribunal found that the agreement is applicable as to time. But, the Appellant argues, this is not a point that even comes under discussion. It contends that the Arbitral Tribunal failed to recognize that the definition of "investment" itself under Art. 1(1) IPA 1998, and thus the subject-matter

scope, already contains a temporal component. Nor is the question of the correct definition of an investment under Art. 1(1) IPA 1998 answered by determining the territorial scope of the agreement, as the Arbitral Tribunal assumes. According to the Appellant, the territorial scope provides information only about whether the Investment Protection Agreement is applicable to a certain territory, but not also whether an investment in this territory represents an investment covered by the agreement according to Art. 1(1) IPA 1998. It therefore argues that it is incorrect to believe that the question of territorial and/or temporal scope concurrently embraces the question of subject-matter scope, or in other words, whether an investment according to Art. 1(1) IPA 1998 exists. Therefore, it concludes, the crucial question remains unanswered, as to whether the definition of "investment" under this provision includes investments made in the home country that later come to be located in the host country only because of a boundary change.

The Appellant argues that it is one of the basic principles of international investment protection law that only those investments are protected which at the time of their making were made by an investor of one Contracting State in the territory of another Contracting State, and thus were cross-border investments. The case at hand, it says, does not concern a foreign investment but rather a domestic investment that the Ukrainian Respondent made in Ukraine. By definition, such an investment could not fall within the scope of an international investment protection agreement. Contrary to the Arbitral Tribunal's sparse arguments on this question, it contends that given a proper understanding of the 1998 Investment Protection Agreement, an investment made in a home country does not fall within the subject-matter scope if the relevant principles of interpretation are taken into account.

4.4.2 The Appellant rightly does not question that the principles of interpretation of Art. 31 *et seq*. VCLT are to be observed in interpreting the 1998 Investment Protection Agreement. In particular, according to Art. 31(1) VCLT a treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in light of its object and purpose. Together with interpretation in good faith, a teleological interpretation guarantees the treaty's "*effet utile*." If there are multiple possible interpretations, the term to be interpreted is to be assigned the meaning that guarantees its effective application and does not lead to a result that conflicts with the treaty's object and purpose (BGE 144 II 130 at 8.2.1; 143 II 136 at 5.2.2 p. 148-149; 142 II 161 at 2.1.3 p. 167; 141 III 495[17] at 3.5.1 p. 503). If a treaty is authenticated in two or more languages, according to Art. 33(1) VCLT the text is equally authoritative unless the treaty provides or the parties agree that, in case of divergence, a particular text is to prevail; here the terms of the treaty are presumed to have the same meaning in each authentic text (Art. 33(3) VCLT).

The Court 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 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

[17] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/swiss-supreme-court-addresses-difference-between-treaty-claims-and-contract-claims

1998 Investment Protection Agreement. Contrary to the view argued in the appeal, the wording "assets [which are] invested by an investor of one Contracting Party in the territory of the other Contracting Party" does not clearly indicate whether Art. 1(1) IPA 1998 presupposes that the investment was already made in the host country's territory from the outset, or whether the definition also includes investments made in a territory that only later came under the control of the host country. On the sole evidence of the wording of the text of the agreement as translated into English, there seems to be no more reason to rule out the position that the term "investments" entails an additional temporal restriction concerning a boundary change, than there is to rule out the Respondent's opposing position that "investments" do not necessarily have to be in the foreign state from the outset.

This situation is not altered by the reference in the appeal to an interim decision of another arbitral tribunal on Art. 26 of the Energy Charter Treaty of December 17, 1994: for one thing, other arbitration rulings in the area of international investment protection do not constitute precedent binding an arbitral tribunal; for another, the term "investment" does not necessarily have the same meaning in other treaties (Judgment 4A_616/2015[18] of September 20, 2016, E 3.4.1 with references). The Arbitral Tribunal has therefore correctly concentrated on the text of Art. 1(1) IPA 1998 in its interpretation.

If wording in other provisions of the agreement is also consulted, the verb forms used for "invest" in the authentic languages rather tend to argue against the assumption of a temporal restriction, as the Respondent comprehensibly argues in its response. While the (perfect) verb form in Art. 12 IPA 1998 (Russian *осуществленным*; Ukrainian: *здійснених*) expresses that the temporal scope of the agreement depends on a defined point in time when investments were made ("investments *made* [...] in the territory of the other Contracting State on or after January 1, 1992"), the (imperfective) verb form used in Art. 1(1) IPA 1998 (Russian*: вкладываются*; Ukrainian: *вкладаються* – corresponding to the English translation ("assets [*which are] invested* [...] in the territory of the other Contracting State") – does not describe an action that must have been completed at a certain point in time. The element of duration is furthermore indirectly included in Art. 1(1) IPA 1998, at the end, according to which a subsequent change in the type of investments is not supposed to change anything about their nature as an investment within the meaning of that provision.

When the Appellant variously argues that the term "investments" under Art. 1(1) IPA 1998 presupposes a cross-border activity performed at a certain point in time, it appears to be taking a transaction-based approach that primarily reflects older thinking about the liberalization of capital movements and ignores the aspect of the investment protection of values and rights that do not have an immediate connection with a cross-border transaction (Beatrice Grubenmann, *Der Begriff der Investition in Schiedsgerichtsverfahren in der ICSID-Schiedsgerichtsbarkeit*, 2010, p. 194). In contrast Art. 1(1) IPA 1998, which lists – not exhaustively – various assets (especially "movable and immovable property, as well as any other related property rights" according to letter (a)), clearly contains a (more broadly understood) asset-based definition (*see also,* on the differentiation between the asset-based and the transaction-based model, Engela C. Schlemmer, Investment, Investor, Shareholders, in: Peter Muchlinski et al. [Eds.], *International Investment Law*, Oxford 2008, p. 52, in conjunction with the

[18] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/atf-4a-616-2015

indication that most bilateral investment protection agreements contain a broad, asset-based definition; see also Katrin Meschede, *Die Schutzwirkung von* umbrella clauses *für Investor-Staat-Verträge*, Baden-Baden 2014, p. 28-29). If the definition of investment in a treaty is not linked to a specific transaction which can *per se* be attributed to a certain point in time, the term "investment" also does not entail a temporal restriction with respect to crossing the border, as the Appellant claims.

That the host country is willing to guarantee protection only to investments that are in harmony with its legislation ("assets [which are] invested [...] in accordance with its legislation"), is a prerequisite inherent in the system, from which nothing conclusive can be deduced concerning the question of the influence of a boundary change. The Arbitral Tribunal examined whether the investment was consistent with the relevant Russian legislation at the point in time when the investment was within the sphere of protection of the agreement (*i.e.,* in March 2014), and affirmed that it was; nor is this disputed in the appeal. There is no question, moreover, that the investments made by the Respondent also fall in terms of subject matter within the definition under Art. 1(1)(a) IPA 1998.

4.4.3 As is already evident from the title ("Agreement [...] on the Encouragement and Mutual Protection of Investments") and from the preamble ("intending to create and maintain favorable conditions for mutual investments" and "desiring to create favorable conditions for the expansion of economic cooperation between the Contracting Parties"), the Investment Protection Agreement is intended both to encourage and to mutually protect investments. This is also expressed in Art. 2 IPA 1998 ("Encouragement and Protection of Investments"). Neither the Appellant's arguments on the agreement on cooperation in the area of investment activity of December 24, 1993, mentioned in the preamble of the IPA 1998, nor its arguments on Art. 12 IPA 1998 are able to undermine the Arbitral Tribunal's finding that this dual purpose of encouraging and mutually protecting investments is material to the interpretation of the agreement in question. First of all, the Appellant does not engage with the Arbitral Tribunal's finding that the idea of protection was already significant under the 1993 agreement, which likewise served a dual purpose ("cooperation 'in the development and implementation of investment policy' and protection of foreign investment"). Furthermore, Art. 12 IPA 1998 actually argues against the view that the purpose of protection is secondary to the purpose of encouraging investment, such that protection under the agreement presupposes that the agreement first of all encouraged a cross-border investment that was made at a particular time – especially because according to this provision, investments that were made between January 1, 1992, and the effective date of the agreement (January 27, 2000) are also protected, and logically, those could not yet have been "encouraged" by the agreement. This means that protection certainly was not supposed to be generally ruled out for investments that had not been encouraged by the agreement, or for which no protection could initially be expected under the agreement.

Contrary to the view advanced by the Appellant, the Arbitral Tribunal's interpretation that investments that become located in the territory of the other Contracting State after a boundary change are covered by the subject-matter scope of the 1998 Investment Protection Agreement does not conflict with the agreement's object and purpose. Starting from the basic idea that the host country cannot nullify investments by citizens of the other Contracting State without consequences, one must rather focus on the point in time of the breach – here, the alleged expropriation. Only then does the

protection guaranteed by the agreement come into play, and forms a barrier against unjustified interventions, as the Contracting States intended. This is also consistent with the principle that the prerequisites for jurisdiction *ratione personae* (nationality of a natural person or registered office of a legal entity) must be satisfied at the time of the breach (Zachary Douglas, *The International Law of Investment Claims*, Cambridge 2009, para. 542 *et seq*., pp. 290 ff.; McLachlan/Schore/Weiniger, *International Investment Arbitration*, 2nd ed., Oxford 2017, para. 5.193 *et seq*.; Bungenberg/Griebel/Hobe/Reinisch, *International Investment Law, A Handbook,* Baden-Baden 2015, p. 633 para. 46-47 with references; see also Cottier/Nadakavukaren Schefer [Ed.], *Elgar Encyclopedia of International Economic Law*, 2017, p. 319; Hanno Weland, Investment Treaty Arbitration, in: Balthasar [Ed.], *International Commercial Arbitration, A Handbook*, Munich 2016, p. 171 para. 40).

4.4.4 The systematic arguments adduced by the Appellant also do not lead to the narrow interpretation that it advances for the term "investments" under Art. 1(1) IPA 1998. The Arbitral Tribunal did not fail to understand the systematic value of Art. 12 IPA 1998, but instead correctly held that this provision governs the temporal scope of the agreement. Contrary to the view argued by the Appellant, the Arbitral Tribunal did not, for example, apply Art. 12 in order to alter the content of the term in question as it had already been defined in Art. 1(1) IPA 1998. On the contrary, it is the Appellant who attempts to do so by trying to infer a narrow definition of "investment" from Art. 1(1) IPA 1998 that cannot be found from the description in this provision.

It is also not clear how the definition of the term "investor" as a natural person according to Art. 1(2)(a) IPA 1998 ("[...] who is competent in accordance with its legislation to make investments in the territory of the other Contracting Party") is supposed to argue for a temporally restricted reading of Art. 1(1) IPA 1998. Nor can one deduce, from the obligation of each Contracting Party under Art. 2(1) to encourage investors of the other Contracting Party to make investments in their territory and to permit such investments in accordance with their legislation, a restricted understanding that would exclude from the subject-matter scope investments that originally were not made across borders, but rather came to be on the other Contracting State's territory only after a boundary change. Moreover, in this context as well the Appellant disregards the purpose of protecting investments, which is pursued in addition to promoting investments. According to Article 2(2) IPA 1998, each Contracting Party guarantees full, unconditional legal protection for investments by investors of the other Contracting Party, in accordance with its legislation ("Each Contracting Party guarantees, in accordance with its legislation, the full and unconditional legal protection of investments by investors of the other Contracting Party"); this cannot support the Appellant's view that, in any event, the agreement is only supposed to protect investments that were already cross-border from the outset. Nor are the Appellant's further arguments on the substantive protection provisions of IPA 1998 able to show in what way the Arbitral Tribunal incorrectly interpreted the term "investments" according to Art. 1(1) in connection with the question of jurisdiction (cf. Art. 9 IPA 1998).

The narrow reading of Art. 1(1) IPA 1998 argued in the appeal does not withstand a systematic interpretation.

4.4.5 Finally, with its arguments on interpretation in good faith the Appellant is also unable to demonstrate a breach of the law. It once again argues from a purported general understanding of scholarship and case law in international investment protection, but in this context as well is unable to advance specific evidence for its contention that the term “investment” is temporally restricted in international law, such that the element of border crossing must be fulfilled at a very specific point in time. Its arguments do not show in what way the principle of good faith is supposed to lead to the restrictive interpretation that the Appellant advocates, which would exclude investments from the scope of the agreement in the event of boundary changes. Such a narrow reading would exclude from the subject-matter scope of the agreement, and thus from the associated protection, those investments in the other Contracting State’s territory that were located in that territory at the time of the boundary change. Accordingly, even if such existing investments were made within the agreed temporal scope (Art. 12 IPA 1998), they would be excluded from the agreed protection. This would be equivalent to introducing an additional restriction of the temporal scope that is limited to a certain region – a restriction which would furthermore be brought about by a Contracting Party itself. Such an interpretation would be incompatible with the principle of good faith and would lead to a result which would conflict with the intent and purpose of the 1998 Investment Protection Agreement.

There is no need to discuss any historical or supplementary means of interpretation (*cf*. Art. 32 VCLT), especially as the Appellant itself states that the preparatory work (*travaux préparatoires*) introduced in the proceedings is incomplete and is thus irrelevant.

4.4.6 The grievance set forth in the appeal that the Respondent is not an investor within the meaning of Art. 1(2) IPA 1998 has no independent content from the grievance asserted that the investments concerned do not possess the conceptual features of Art. 1(1) IPA 1998. Rather, the Appellant once again bases its grievance only upon the reason that the Respondent made an investment in the Ukraine and continually maintained an investment on the territory of Ukraine until the purported expropriation. The Appellant does not address the detailed reasoning in the challenged decision, according to which the Respondent is a company duly established in accordance with Ukrainian legislation, and is entitled under that law to make investments in the territory of the Russian Federation and on the Crimean Peninsula.

4.4.7 The grievance asserted that the Arbitral Tribunal incorrectly interpreted the 1998 Investment Protection Agreement and incorrectly found that it had jurisdiction on the basis of Art. 9 IPA 1998 is therefore unfounded.

5.
The Appeal is therefore dismissed, to the extent the matter is capable of appeal. In accordance with the outcome of the proceedings, the Appellant is liable for costs and damages (Art. 66(1) and Art. 68(2) BGG).

Therefore, the Federal Tribunal pronounces:

1.
The appeal is rejected, to the extent the matter is capable of appeal.

2.
The judicial costs set at CHF 115'000 shall be paid by the Appellant.

3.
The Appellant shall pay the Respondent a total amount of CHF 165'000 for the Federal judicial proceedings.

4.
This judgment shall be communicated in writing to the Parties and to the Arbitral Tribunal seated in Geneva.

Lausanne, October 16, 2018

On behalf of the First Civil Law Court

The Presiding Judge:	The Clerk of the Court:
Kiss	Leemann