The Protection of Investments in Disputed Territories: A Panel Hosted by BIICL's Investment Treaty Forum

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On March 14th the Investment Treaty Forum at The British Institute of International and Comparative Law hosted a panel of experts to discuss practical and legal aspects of investments protection in the context of territorial disputes.

Territorial disputes sometimes lead to the annexation of the territory of one state by another, of which the annexation of Crimea by the Russian Federation is a good example. International Law provides for the means intended to apply in cases of territorial transfer. However, these concern cases of lawful changes of sovereignty, and not the circumstances described above where no lawful transfer of territory occurred. The result is that investors that were normally protected by treaties signed by the predecessor state may find themselves with no legal recourse. Different legal questions regarding what is, apparently, a legal vacuum emerge; in particular, the possibility that treaties signed by the annexing state would apply in the annexed territory.

Professor Yarik Kryvoi, head of the Investment Treaty Forum, who chaired the panel, introduced the reasons behind the decision to hold such seminar. He spoke about the importance of the issue in light of the many ongoing territorial disputes around the world. Examples of such disputes are the West Sahara-Morocco dispute, The Occupied Palestinians Territories-Israeli dispute, disputes in the South China Sea, Cyprus-Turkey dispute and, more recently, the dispute between the Ukraine and The Russian Federation regarding the Crimea Peninsula.

He further mentioned that large countries are currently involved in territorial disputes – Russia, France, China and India. He pointed out that, surprisingly, the control over territories is the subject of disputes which are currently pending even in Western Europe.

This background makes it clear that protection of investments in disputed territories is a hot and still relevant topic. Professor Kryvoi introduced a panel of experts among them Dr. Daniel Costelloe of WilmerHale and Dr. Tom Grant, of Cambridge University.

The Territorial Application of Treaties and Succession to Investment Treaties in Annexed Territory

Dr. Daniel Costelloe began his presentation by giving a general description of the territorial application of treaties under general international law and, more specifically, the application of the

moving treaty-frontiers rule. He discussed these rules with a focus on the question whether an investment treaty applies territorially in annexed territory. Specifically, he analyzed the rule reflected in Article 29 of the Vienna Convention on the Law of Treaties and in Article 15 of the Vienna Convention on Succession of States in Respect of Treaties in the context of annexed territories.

Dr. Costelloe emphasized that the term ”territory” in Art 29 and Art 15, respectively, refers to territories over which the treaty party has sovereignty in accordance with international law. In light of this reading, he concluded that, in the event of an annexation of territory, Art 29 and Art 15 respectively do not apply, because no legal transfer of territory occurred. He noted, at the same time, that in the event of an annexation of territory the application of the moving treaty-frontiers rule becomes difficult.

The second issue Dr. Costelloe addressed concerned the interpretation of references to the term “territory” in treaty provisions, again in the context of annexed territory. The provisions of investment treaties and other types of treaties typically refer to the treaty parties’ territory. Dr. Costelloe cautioned that in interpreting and applying a treaty provision referring to a party’s “territory” a tribunal might be required to take at least some position with respect to the territorial dispute.

Dr. Costelloe pointed out two potential objections to a tribunal’s jurisdiction in these circumstances. First, a respondent, annexing state could – theoretically – object to the tribunal’s jurisdiction on the basis that the treaty does not apply in the annexed territory. This objection is extremely unlikely, however, because it is inconsistent with the annexing state’s claim for the territory. The more likely strategy would simply be non-appearance.

A second potential jurisdictional objection is that a tribunal cannot hear a claim if deciding the claim would require the tribunal to make a legal determination in relation to the underlying territorial dispute. Dr. Costelloe noted that this objection is a plausible one, in light of an investment treaty’s functions – to decide investment disputes rather than territorial disputes – and the jurisdictional limitations it operates under in doing so.

Dr. Costelloe’s conclusions were –

• Where an annexation of territory leads to a *de facto*, if not a legal, transfer of territory, a strict application of the rule reflected in Articles 29 and 15 mentioned above has the potential to lead to injustice.
• In certain circumstances, there may be room to acknowledge a limited exception to the moving treaty-frontiers rule, even in relation to treaties, such as investment treaties, that, unlike human rights treaties for example, *prima facie* do not call for extraterritorial application.
• It seems possible to acknowledge such a limited exception without prejudice to the merits of the underlying territorial dispute.

The Ukraine – Russia BIT: The Crimea Case

Dr. Tom Grant spoke about the annexation of the Crimea Peninsula by the Russian Federation and arbitrations which emerged from it.

He mentioned the proceedings instituted by Ukraine against Russia in the International Court of Justice. Ukraine argues, *inter alia*, that, Russia being a party to the Committee on the Elimination of Racial Discrimination (CERD) and Russia in fact controlling Crimea, the legal obligations under CERD follow Russia to Crimea. Similar argumentation would seem to underpin the claims of investors against Russia under the Russia-Ukraine BIT.

In the arbitrations now pending it seems that Russia will not appear. Nevertheless, each tribunal must

ordinarily decide whether it has jurisdiction to hear the case or not and give reasons for its decision. Dr. Grant suggested potential jurisdictional problems, including:

Firstly, the Russia-Ukraine BIT specifically provides that “territory” means territory held in “conformity with… international law”. This proviso might lead to the conclusion that the BIT does not apply in Crimea. To deal with this problem Dr. Grant suspects that, like Ukraine at the International Court, the claimants in the BIT cases will say that the substantive protections of the relevant treaty apply to the occupied territory. The difficulty for the BIT claimants is that the BIT might be interpreted to cover a narrower range of situations than CERD Art. 3 or ECHR Art. 1. Critical will be how much a tribunal is willing to interpret these jurisdictional terms as analogous. BITs might be assimilated into a general category of human rights protections—at a level of principle; but as a matter of practical application each treaty must be interpreted and applied on its own terms.

Secondly, a further potential obstacle which might prevent the application of the BIT is that Ukrainian national law now seems to prohibit investments in the occupied territories. Because the BIT requires investments to be in conformity with national law — including, expressly here, of the sending State — this might prevent a tribunal from applying the BIT. A possible rebuttal is that national law does not alter rights and obligations under international law, certainly not ex post adoption of a national law. Practice, though rich in claims about host State laws, is sparse in regard to laws of the State of origin.

On a final note, Dr. Grant suggested that, if one or more of the investment tribunals indeed finds that jurisdiction is lacking, then a future possibility is that Ukraine invokes Art 10 of the BIT to institute proceedings against Russia in regard to a dispute over the interpretation of the BIT.