Ongoing Territorial Challenges in Crimea Cases: Putting Everest v. Russia in Context

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After the 2014 Russian annexation of Crimea, the new local "authorities" have taken a number of privately and state-owned assets in the peninsula. Ukrainian companies have commenced at least eight investment arbitrations against the Russian Federation under the Russia-Ukraine BIT (the "**BIT**"), seeking compensation for the lost property in Crimea.[fn] *NJSC Naftogaz of Ukraine et al. (its 6 subsidiaries) v. Russia*, UNCITRAL, PCA Case No. 2017-16 (commenced in 2016); *Oschadbank v. Russia*, UNCITRAL (commenced in 2016); *Aeroport Belbek LLC and Mr. Igor Valerievich Kolomoisky v. Russia*, UNCITRAL, PCA Case No. 2015-07 (commenced in 2015); *Stabil et al. v. Russia*, UNCITRAL, PCA Case No. 2015-35 (commenced in 2015); *Everest Estate LLC et al. v. Russia*, PCA Case No. 2015-36, Award, 2 May 2018; *Privatbank and Finilon v. Russia,* PCA Case No. 2015-21 (commenced in 2015); *PJSC Ukrnafta v. Russia,* PCA Case No. 2015-34 (commenced in 2015); *Lugzor and others v. Russia*, PCA Case No. 2015-29, (commenced in 2015). Two other companies – DTEK and Ukrenergo – notified Russia about the future arbitrations, see here and here. [/fn] A number of tribunals have already found jurisdiction in Crimea cases. Only some of the reasoning behind these decisions is publicly available. Even where available, the relevant information is unfortunately second-hand, see here and here.

On 2 May 2018, the first final award was issued in one of the "Crimea cases." The investors in *Everest Estate LLC etl. v. The Russian Federation,* were awarded 150 million USD for the expropriation of several hotels and real estate properties.[fn] *Everest Estate LLC et al. v. The Russian Federation,* PCA Case No. 2015-36, Award, 2 May 2018, see 'RUSSIA HELD LIABLE IN CONFIDENTIAL AWARD FOR EXPROPRIATION…', *Investment Arbitration Reporter*.[/fn] A number of other decisions are expected in the near future.

The Russian Federation has recently filed a challenge to the *Everest* awards at the seat of arbitration in The Hague, Netherlands. At the same time, the Swiss Federal Tribunal dismissed Russia`s challenge of jurisdiction in two other Crimea cases *Stabil* and *Ukrnafta* seated in Geneva.[fn] 'Crimea awards upheld in Switzerland', *Global Arbitration Review*, 16 October 2018. [/fn]

In this post, we will address some difficult jurisdictional hurdles of the post-annexation investment

protection, which Russia may be bringing up in The Hague after the failure in Switzerland. Namely, whether Crimea is Russian territory within the meaning of the BIT and whether the BIT covers investments made in Ukraine before the annexation.

Russia – Ukraine BIT's application to a *de facto* state territory

The Crimea cases involve a unique jurisdictional issue of the BIT's territorial scope. Namely, whether occupied Crimea is now a Russian territory within the meaning of the BIT. De jure Russian sovereignty over the peninsula has been widely rebutted,[fn] For example, *Territorial Integrity of Ukraine*, UNG Res 68/262, 27 March 2014. [/fn] however, even Ukraine agrees that Crimea is under de facto Russian control.[fn] Ukraine in its third-party submission confirmed the relevant fact before the tribunal. *S*ee 'FULL JURISDICTIONAL REASONING COMES TO LIGHT IN CRIMEA-RELATED BIT ARBITRATION VS. RUSSIA', *Investment Arbitration Reporter*, 9 November 2017.[/fn] So what is the status of de facto controlled territory under the BIT? The answer will very much affect whether the Ukrainian investors or the Russian Federation prevail on the Dutch set-aside proceedings.

The BIT's substantive protections are expressly limited to the Contracting State's territories.[fn] BIT, Article 1 (1): "Investments" shall denote all kinds of property and intellectual values, which are being invested by the investor of one Contracting Party on the territory of the other Contracting Party in conformity with the latter's legislation".[/fn] Article 1(4) of the BIT defines territory as "*the territory of* [the Contracting State], *and also their respective exclusive economic zone and the continental shelf, as defined in conformity with international law*". The question for the set-aside court will therefore be whether the definition includes a territory under state de facto control and whether the phrase "in accordance with international law" only relates to the Contracting State's EEZ and continental shelf or whether it also defines the territory.

A number of the arbitral tribunals have already decided that Crimea is Russian territory within the meaning of the BIT, regardless of whether the Russian control is legal or not. Relying on the VCLT,[fn] VCLT, Article 31 (1) ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose").[/fn] each of the Tribunals in the known Crimea cases to date have construed the ordinary meaning of "territory" as covering de jure and de facto territory under state effective control. The *Ukrnafta* and *Stabil* tribunals, referred to English, Ukrainian and Russian legal dictionaries, which defined the term "territory" without the sovereignty criteria.[fn] 'FURTHER RUSSIA INVESTMENT TREATY DECISIONS UNCOVERED, OFFERING BROADER WINDOW INTO ARBITRATORS' APPROACHES TO CRIMEA CONTROVERSY', *Investment Arbitration Reporter*, 17 November 2017.[/fn] Also, the Tribunals reportedly cited the default rule under Article 29 of the VCLT, which provides that treaties apply to state's "entire territory" without any qualifications.[fn]Id.[/fn] Moreover, the Tribunals noted that over the text of the BIT the term "territory" is closely connected to the states' ability to legislate, and only the Russian Federation now legislates in Crimea.[fn] See Russian Federal Constitutional Law On Admitting to the Russian Federation the Republic of Crimea and Establishing within the Russian Federation the New Constituent Entities of the Republic of Crimea and the City of Federal Importance Sevastopol dated March 21, 2014. [/fn] The Tribunals further noted that it would be contrary to the BIT's object and purpose to leave investments in Crimea without any legal protection under the BIT.

Finally, the Tribunals invoked the good faith principle to assert that Russia cannot "blow hot and cold" by claiming territorial control over Crimea and at the same time deny the applicability of the BIT.

In *Everest v. Russia*, the Tribunal reportedly avoided detailed interpretation of the term "territory" and did not explain the meaning of the qualifier "in accordance with international law" at all.[fn] 'FULL JURISDICTIONAL REASONING COMES TO LIGHT IN CRIMEA-RELATED BIT ARBITRATION VS. RUSSIA', *Investment Arbitration Reporter*, 9 November 2017.[/fn] The Tribunal found it persuasive that the BIT was applicable to Crimea upon its entry into force, irrespective of whether the investors would have qualified at the time, and it should remain applicable after Russia got control over Crimea. It remains to be seen whether this difference in reasoning from the Ukrnafta and Stabil awards will play a role in The Hague.

The Russian Federation, which did not participate in the arbitrations, may choose to push the set-aside court on the territorial question. Without denying its allegedly "sovereign rights" over Crimea, Russia may argue that the Tribunal was required to address the legality issue mindful that without a positive answer to this question the jurisdiction cannot be established. In this context, it may challenge the tribunals' mandate under the BIT to touch territorial disputes between states.

It is likely that the set-aside court will have to deal with the qualifier "in accordance with international law" in light of the Russia's potential argument that it defines the territory as well. At least the Ukrainian version of the BIT allows the phrase to be susceptible to a double meaning. Namely, the phrase may relate only to the EEZ and the continental shelf or to the territory as well.[fn] A reputable Ukrainian linguist, Olexander Avramenko, confirmed to us that at least in the Ukrainian language the phrase is susceptible to the double meaning (last contacted, 29 July 2018). [/fn]

In light of this textual ambiguity, other factors for interpretation may take a greater relevance including the object and purpose and context of the BIT. For example, the BIT`s object and purpose likely suggests that the investments shall not be left without the BIT`s protection. At the same time, the proposition that at the time of the treaty conclusion the parties potentially did not mean to encompass a de facto control scenario may have some relevance. Also, Russia might argue that legality is a default criterion for a state territory under international law, which prohibits illegal acquisition of a state territory.[fn] For example, the Charter of the United Nations, Article 1(4): "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state".[/fn] At a minimum, it remains to be seen whether reliance on de facto control is enough for review of the jurisdictional award by set-aside court in the Netherlands.

Timing of the investments under the BIT

The Ukrainian investments in the Crimean cases were made before the Russian Federation's de facto

control of Crimea. Articles 1(1) and 12 of the BIT requires that investments shall be made by a national of the Contracting Party on the territory of another Contracting Party. Consequently, the question is whether the Ukrainian investments shall be initially made into the Russian "territory" to be covered by the BIT.

In *Ukrnafta* and *Stabil* cases, the Tribunals noted that the only temporal requirement is contained in Article 12 of the BIT, namely that the investments shall be made after January 1, 1992.[fn] BIT, article 12: "This Agreement shall apply to all investments carried out by the investors of one Contracting Party on the territory of the other Contracting Party, as of January 1, 1992.".[/fn] Both Tribunals noted that the text does not require that the investments shall be made to the Contracting State from the beginning and reasoned that the wording of Article 1(1) evinces geographical rather than temporal criteria for investments.

In *Everest v. Russia*, the Tribunal similarly concluded that the text of the BIT does not suggest that the Contracting Parties intended to limit its application to investments made within the host state territory *ab initio*. The arbitrators opined that finding otherwise would unreasonably exclude from the treaty protection a number of investments and would contradict the BIT's object and purpose. In support of this proposition, the Tribunal cited, *inter alia*, *PacRim v. El Salvador*, where the Tribunal found that the investor was not required to have proper nationality *ab initio* as long as it possessed it prior to the state breach. (*Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on Jurisdiction, 1 June 2012)

Nevertheless, the set-aside court will need to grapple with the text of the BIT itself. Both the Ukrainian and the Russian versions of Article 1 (1) of the BIT contains a phrase "are being invested" in the present tense, while defining the term "investments". At the same time, Article 12 on the temporal scope uses the phrase "carried out" in the past tense. Thus, the Russian Federation will likely argue that the past tense of Article 12 (Application of the Agreement) indicates a requirement that investments shall be initially made into the Russian territory. Russia might also say that a change of control over the territory cannot be understood as an act of investment making into Russia under the BIT. Consequently, it might add that the active investors' conduct is required in this regard, for example, reregistration of the companies under the Russian law.

Conclusion

The Ukrainian investors face thorny jurisdictional challenges before the set-aside courts. They were able to protect the jurisdictional awards in Switzerland. However, the majority of the Crimea cases are seated in The Hague, and consequently the Dutch setting aside proceedings are essential. Success at the seat is often an important prerequisite for effective enforcement of the awards against a resisting state. The fate of the Crimea awards primarily depends on the local courts' attitudes and approaches to interpretation of the Russia – Ukraine BITs' provisions under the VCLT.

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