Kluwer Arbitration Blog

Is 11th of March 2020 a Critical Date for Potential Investment Treaty Arbitration Disputes in Eastern Ukraine?

Olga Kuchmiienko · Monday, November 23rd, 2020

The effect on investment protection stemming from Russia's annexation, and therefore effective control over Crimea, has been a hot topic since 2014. Meanwhile, Ukraine has dealt with an armed conflict in Eastern Ukraine since April 2014 as a result of Russian expansionist maneuvers. Ukraine is now left with the difficult task to, on the one hand, maintain its pro-investment status, while, on the other, handling two territorial interferences simultaneously.

Notably, each action or official communication from the state may eventually be considered a material fact in a potential investment case by investment tribunals. This has the potential effect of working in an adverse manner against Ukraine and/or its investors.

The latest development in this situation took place on 11 March 2020. Ukrainian government intended to sign documents with non-legitimate representatives of the illegal formations within Trilateral Contact Group forum in Minsk. Fortunately, before and after that it stated that Ukraine does not recognize any other authorities in the Eastern Ukraine as legitimate. In this post I analyse what happened on that date, and its potential negative consequences for investment protection and the position of Ukraine in investment arbitration.

What are the Trilateral Contact Group and the Minsk Agreements?

On 11 March 2020, the ordinary meeting of the Trilateral Contact Group in Minsk ("TCG") took place. The main aim of this meeting, as well as previous meetings, was the resolution of the armed conflict in Eastern Ukraine.

The TCG is a forum for negotiations between Ukraine, Russia and the Organization for Security and Co-operation in Europe ("OSCE") regarding the conflict in the East of Ukraine. These negotiations produced the *"Minsk Agreements"*. The First Protocol to the Minsk Agreements was signed on 5 September 2014. The Second Minsk Agreement, named the "Complex of measures for implementation of the Minsk protocol", was agreed in February 2015.

Significantly, the Minsk Agreements are not considered to be international agreements or treaties. However, these documents are important for Ukraine because: 1) they express the official position of Ukraine concerning the situation in the East of Ukraine; 2) measures for their implementation were prescribed by the UN Security Council Resolution 2202 (2015), and therefore gained a

somewhat official status; 3) the non-performance by Russia of a package of measures for Immediate and comprehensive ceasefire in certain areas of the Donetsk and Luhansk regions of Ukraine as per United Nations Security Council Resolution is one of the grounds of the EU sanctions regime against Russia; and 4) these may carry evidentiary value in potential future investment arbitration cases.

At its 11 March 2020 meeting, the TCG adopted a Protocol to the Minsk Agreements (the "**Protocol**"). This Protocol could have potentially shifted the responsibility for any violations of international law that have taken place in certain Eastern Ukraine areas since 2014 from Russia to Ukraine. The Protocol contained the plan to sign a document called "Decision on creating of the Consulting Council" on 25 March 2020. This Decision was not signed, including but not limited to the fact that Ukrainian international law specialists and politicians were against it.

This Protocol could have jeopardized the amount of work by Ukrainian lawyers and diplomats in international courts and arbitrations; that is, a) it could have redefined the international nature of the conflict in the Eastern Ukraine, and b) it could have shifted the responsibility away from the Russian Federation for the violations of human and investors' rights in Eastern Ukraine since the inception of the territorial dispute in 2014.

May the Russian Federation be held responsible for investment arbitration purposes?

There are no Eastern Ukraine conflict-related arbitration cases for the time being, but they might arise in the future based on the ECHR and Crimea-related arbitration experience.[1)] The first question for a potentially aggrieved investor will be: who is responsible for all the violations and damages, namely, who is the Respondent? Ukraine may use the strategy widely described in Crimea-related arbitrations.[2)] In other words, Ukraine could assert that Russia holds (under protest) effective and/or general control over the territory. Therefore, it might contend on this basis that Russia is responsible for all violations in this Ukrainian area under armed conflict with Russia, including but not limited to the breach of investors' rights.

To unequivocally state that Russia is a Respondent, Ukraine must be consistent in this strategy, insisting that it is Russia that controls "separate regions of Luhansk and Donetsk districts" as illegal formations in the territory. Moreover, Ukraine does not recognize these illegal formations as separate entities.

The Protocol as of 11 March 2020 may ruin this mentioned position and jeopardize the chances of an investor would have to recover damages from Russia. The reason is that arbitral tribunals in potential arbitration cases may consider this Protocol as a matter of fact, including to read it as the *de facto* acknowledgement by Ukraine that the territories in question are not under Russian general and/or effective control. That could mean that Russia is not liable for potential disputes there. However, Ukraine reasonably has an opposite view.

In general, there were three provisions that could create big concerns and risks for the Ukrainian position in international arbitrations and courts.

Ukraine objects to the presence of any authorized representatives in Eastern Ukraine

Firstly, the Protocol is problematic because it was signed by the representatives of the Donetsk and Luhansk regions as *"authorized representatives"*. These are pro-Russian representatives and represent an illegal formation on the Eastern territory of Ukraine, which are involved in armed conflict with Russia.

Donetsk and Lugansk are regions in a territory of Ukraine where armed forces of the Russian Federation are engaged in an international armed conflict. The status of the conflict has already been established by the International Criminal Court. In particular, the International Criminal Court's Report on Preliminary Examination Activities concluded that "direct military engagement between the respective armed forces of the Russian Federation and Ukraine, indicated the existence of an international armed conflict in eastern Ukraine from 14 July 2014 at the latest, in parallel to the non-international armed conflict."

For arbitration purposes this means that, if Ukraine signs the document together with the "authorized representatives" (as two parties of one agreement), it could indirectly be taken to have recognized the territories as separate state entities. This may cause it to lose any argument that Ukraine is not responsible for the actions of these entities because it "did not permit and objected [to the] presence of unlawful representatives" in Eastern Ukraine.

Ukraine does not recognize the power of the unlawful representatives for any actions

The second reason for concern is that the "separate regions of Donetsk and Lugansk districts" were combined in one entity based on wording of the document and its representative was empowered "*to present written proposals of the terms and mechanisms of the opening of certain checkpoints*". As these entities are not recognized by Ukraine and are illegal, it is incorrect to attribute mandate and powers to their representatives, including the authority to provide any proposals. These sentences raise deep concerns because they can jeopardize analysis of 1) the international character of the conflict and 2) who is responsible for any violations on the territory in question. In potential arbitration an agreement with such a provision may be considered to constitute the agreement of Ukraine to the substitution of state authorities in part of its territory (such that it cannot blame Russia for the activities of these authorities).

Consulting Council as an illegal entity

Finally, the Protocol dated 11 March 2020 contained the Draft of a Decision creating a Consulting Council that would have consisted of "*10 representatives of Ukraine, 10 representatives of Separate Regions of Donetsk and Lugansk Districts*." Under this Draft, firstly, Russia was not considered to be a part of the conflict anymore, having instead the status of an observer along with OSCE, Germany, and France. Secondly, representatives of Ukraine and illegal formations of Donetsk and Lugansk Districts were supposed to become members of the Council with equal rights. This could again jeopardise Ukrainian's position *vis-à-vis* investment protection: does this mean that Ukraine *de facto* acknowledged these territories as separate entities? Hopefully not.

Why is this important for investment arbitration?

How may the Protocol influence an arbitral tribunal's decision on jurisdiction, or why, in a worst case scenario, may a claimant try to file a claim against Ukraine as respondent?

If a Tribunal does not find that Russia controls the territory where the violation occurs, it can find no jurisdiction over Russia in such case. The alleged reason may be that Russia as a potential respondent is not responsible for the violations on the territory of another state. We can assume that the investor may then pursue either of two actions, namely, 1) abandon the claim and with it the possibility of any redress, or 2) initiate another case against the alleged "true" respondent – Ukraine.

Is the situation critical for Ukraine right now?

The situation is not critical, even after the concerns outlined above. Firstly, the decision on creating the Consulting Council with illegal formation representatives was not signed. Secondly, the attitude of Ukraine to the illegal formations must be assessed in general on the basis of the position of Ukrainian government, as evidenced in public officials' declarations communicated in international courts and organizations.

Finally, the temporal aspect is important. Russian control over the Eastern Ukraine started in 2014 and Ukraine has constantly communicated its objections to the situation. Theoretically, the Protocol and decision might have influence on the situation after March 2020, even though this fact might be used for the opposite position. However, I do not believe that it is the case as Ukraine persistently asserted that the formations were controlled by Russia before March 2020.

Conclusion

11 March 2020 has not become a turning point for potential investor-claimants and Ukraine as a third party. However, this document might have reduced the strength of the position of Ukraine (and Ukrainian investors) in potential investment arbitration disputes. For the time being, we are in good shape, but the task of Ukrainian arbitration practitioners is to ring the bell of investment protection interests when it is necessary, and therefore I am ringing this bell here. In order to avoid the risks associated with Minsk Agreements, Ukraine must clearly articulate its position with the international community; that is, 1) Russia holds effective control over the territory in Donbass, and 2) Russia is responsible for all violations there.

References

?1 Ukraine v. Russia (re Eastern Ukraine) (no. 8019/16).

?2 *See* O.Kuchmiienko, *How does the change in effective control over the territory influence the application of the Ukraine-Russia or other BITs*, Austrian Yearbook on International Arbitration, Wien (2020).

This entry was posted on Monday, November 23rd, 2020 at 8:40 am and is filed under Armed Conflict, Extraterritorial Jurisdiction, Ukraine
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.