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Crimea as Russian Territory for the Purposes of the Russia-Ukraine BIT: Consent v. International Law?

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The year 2022 saw French and Dutch courts upholding arbitration awards which condemned Russia for breaches of the 1998 BIT between Russia and Ukraine ("***Russia-Ukraine BIT***") through actions in the Crimea peninsula after its annexation in 2014. The arbitration cases in the context of which the awards were issued (the "***Crimea cases***") have a common pattern: the investors were Ukrainian nationals, having business ventures in Crimea prior to 2014. The investments were therefore domestic, and as such not covered by the protection of any BIT. After 2014, the Ukrainian nationals filed arbitration claims against Russia alleging that Russia failed to protect their—now foreign—investments in Crimea, and in so doing violated the Russia-Ukraine BIT.

Article 1 of the Russia-Ukraine BIT defines investments as "*property put in by the investor of one contracting party on the territory of the other contracting party in conformity with the latter's legislation*". One question that the *Crimea* cases raised was whether the domestic investments of Ukrainian nationals in Ukraine were "internationalised" with the annexation of Crimea by Russia in 2014. In other words, whether Crimea could be considered as territory of Russia from 2014 onwards, and therefore Ukrainian investments in Crimea covered by Article 1 of the Russia-Ukraine BIT.

The International Legal Framework: Annexation of Foreign Territory and State Succession in International Treaties

The application of international treaties following State succession is subject to the Moving Treaty Frontier Rule. The rule is notably enshrined in Article 15 of the Vienna Convention on Succession of States in respect of Treaties ("***VCST***"). Article 15 provides that, in principle, when part of the territory of a State becomes part of the territory of another State, treaties of the predecessor State cease to be in force in respect of the territory, and treaties of the successor State are in force in respect of the territory. Although Russia is not a signatory to the VCST, and although the VCST expressly provides that it does not apply in case of illegal annexations, the Moving Treaty Frontier Rule is generally considered as also enshrined in Article 29 of the Vienna Convention on the Law of Treaties ("***VCLT***"), which reads: "*Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory*". This Article has been considered by several courts and scholars as reflecting customary international law. (For a more detailed analysis of the rule and its application by investment tribunals see here.)

Although it has been suggested by certain scholars that Article 29 of the VCLT should be read broadly to encompass illegally annexed territories, the majority view today is that the rule applies only in respect of lawfully annexed territory.

The international community generally considers the annexation of Crimea by Russia as in violation of the *jus cogens* prohibition of the use of force, and therefore illegal. UN GA Resolution 68/262 invites all States, international organisations and specialised agencies to not recognise any "*alteration of the status*" of Crimea and "*refrain from any action or dealing that might be interpreted as recognising any such altered status*". Only very few States, such as Cuba, Nicaragua and Syria, have recognised Crimea as Russian territory so far.

This, in a nutshell, was the public international law framework within which the tribunals were asked to decide the Crimea cases and, more specifically, the question of definition of the word "territory" in Article 1 of the Russia-Ukraine BIT.

The *Privatbank and Finilon v. Federation of Russia* Case

The tribunals in the *Crimea* cases appear so far to have upheld jurisdiction, thus recognising that Crimea constitutes since 2014 Russian territory for the purposes of the Russia-Ukraine BIT. The following paragraphs will focus on the recently published 2017 Interim Award in the *Privatbank and Finilon vs Federation of Russia* case as an example of the approach followed by the tribunals.

The *Privatbank and Finilon* tribunal declared that it would not reach any view on the legality under international law of the incorporation of the Crimean peninsula by the Russian Federation. It referred to Article 29 of the VCLT, and decided that the determinative question under the Russia-Ukraine BIT is which State is responsible for the international relations of the territory in question. The tribunal held that Russia is responsible for the international relations in Crimea, in light of the following elements:

1. The Incorporation Agreement signed on 18 March 2014 between Russia and the Republic of Crimea, ratified by Russian Constitutional law;
2. Ukrainian legislation enacted in April and August 2014, establishing a special regime for Crimea, to account for the exercise of jurisdiction and control by Russia; and
3. Ukraine's acknowledgment, in its submission as non-disputing party in the proceedings, of the "*practical reality*" of the Russian exercise of jurisdiction and control over Crimea, in support of recognising an obligation for Russia to protect Ukrainian investments.

Against this background, two questions arise. First, whether the tribunal could have decided that Crimea was not part of Russian territory for the purposes of Article 1 of the Russia-Ukraine BIT although neither Russia nor Ukraine disputed this. Second, whether the tribunal should have reached a different conclusion had there not been such effective "consent" on that point by the State Parties to the BIT.

The Effect of Ukraine's Support in favour of Crimea Being Considered as Russian Territory for the Purposes of the Russia-Ukraine BIT

A condition of the State's consent to arbitration set out in Article 1 of the Russia-Ukraine BIT is the existence of an investment made in the territory of the host State. Whether territory means *de jure* territory (i.e. territory held in accordance with international law) or *de facto* territory (i.e. *de facto* controlled by the State) is a question of interpretation of the BIT provision.

Article 31 of the VCLT provides that relevant rules of international law applicable in the relations between the State Parties must be taken into account for the interpretation of an international treaty. However, the same Article also provides that a special meaning shall be given to a treaty term if it is established that the State Parties so intended (paragraph 4) and that subsequent agreements between the State Parties shall also be taken into account (paragraph 3).

In the case at hand, as in several early *Crimea* cases, Russia did not participate in the proceedings. Rather, it submitted a letter challenging jurisdiction, but only on the ground that by virtue of Article 12 of the Russia-Ukraine BIT, it had assumed an obligation to protect only investments made after the Russian Federation asserted jurisdiction over Crimea. Russia would of course not argue that Crimea was not to be considered as Russian territory due to the illegality of its occupation. As for Ukraine, and as seen above, in its submission as non-disputing party, it invited the tribunal to take into account the *de facto* control of Crimea by Russia when examining the territorial scope of the treaty.

This situation, where the position of the non-disputing State Party to the treaty coincides with the position of the Respondent State, has similarities with a joint interpretative statement by State Parties. It is generally accepted that courts and tribunals are not *bound* to take into account joint interpretative statements issued in the context of pending proceedings (see for example Singapore Court of Appeals decision in the *Sanum v. Laos* arbitration, Opinion 1/17 of the CJEU regarding CETA). However, it is generally acknowledged that tribunals may give weight to an interpretation of the treaty shared between the two State Parties to the Treaty (see for example the ILC Report on Subsequent agreements and subsequent practice in relation to the interpretation of treaties (Conclusions 9 and 10), but also the *Pope & Talbot* Damages Award and the *ADF v. United States* Award). Which is what the *Privatbank and Finilon* tribunal did, in essence.

Should the Interpretation of "Territory" Have Been Different If Ukraine Had Not Participated in the Proceedings?

In the absence of a common interpretation of the BIT by the two State Parties, the tribunal would have to balance two aspects:

1. On the one hand, recognising Crimea as part of the Russian territory would in principle amount to an interpretation of the Russia-Ukraine BIT contrary to international law, and/or would risk being considered as an indirect recognition of Crimea as Russian territory, contrary to UN General Assembly Resolution 68/262.
2. On the other hand, not considering Crimea as Russian territory would leave Ukrainian investors in Crimea in a legal vacuum—as it would be highly unlikely that, in the circumstances, they would be able to receive adequate remedies from national courts; and would allow Russia to benefit from its own illegal action.

It has been advanced in the light of *Crimea* cases that we may be in presence of a trend towards considering non-recognition of illegally annexed territories not as an absolute rule, i.e. as the legal

foundation upon which States can then impose other sanctions against the wrongdoer, but as a sanction in itself. If non-recognition is seen as a sanction rather than as an absolute norm, then it would be applicable only when non-recognition would be to the detriment of the illegally occupying State, and not in its favour.

As indicated above, this does not appear to be the position of international law today, where State succession to treaties in principle concerns situations of *de jure*, rather than *de facto* annexations of territories. Hence the emphasis by the *Crimea* tribunals that they were taking no view as to the legality of the annexation.

One should however keep in mind that State succession appears to be an area where international law norms are not always applied consistently. As an illustration, one could refer to the consequences of the non-recognition of the Federal Republic of Yugoslavia as the sole successor of the former Yugoslavia: the Federal Republic of Yugoslavia was prevented from exercising its rights as a member of the UN as a consequence of this non-recognition, but this did not affect its status as a Party to the Statute of the International Court of Justice, when what was at stake was its participation as a Respondent in the *Genocide* case (more on this case and issue may be found here).

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