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The ECHR findings in the Case Ukraine and The Netherlands v. Russia Dated January 25, 2023 and Investment Arbitration "Crimean Cases": Any Positive News for Ukrainian Investors?

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On January 25, 2023 the Grand Chamber of the European Court of Human Rights (ECHR) issued the preliminary decision in the case Ukraine and The Netherlands v. Russia where it clearly stated that certain *"areas [of Ukraine] were, from 11 May 2014 and subsequently, under the effective control of the Russian Federation*" (para. 695). This decision together with the positive practice of the previous investment arbitration "Crimean cases" may become another turning point for the question of how to protect the investments in the sovereign territory of one State Party that has been illegally controlled by the Other State Party to a bilateral investment treaty.

Before finding the solution for other affected territories of Ukraine, it is important to take into account several issues analyzed below.

How the Effective Control Concept Was Applied in the Crimean Cases?

The previous Crimean cases were focused on the application of Ukraine–Russia BIT ("BIT") and the doctrine of de facto control. Generally, the criteria of effective control over the territory cover the wrongdoer state's actions:

1. ability to legislate;
2. substitution of the state authorities; and
3. obtaining a permission of the other state to the wrongdoer's presence in the territory etc. (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).)

From the publicly available sources, it seems that in the Crimean cases these criteria of effective control were considered and applied to a certain extent letting the Tribunals to come to the following conclusions:

1. practical application of the Russian law in Crimea does not depend on the recognition of the Russia's authority in Crimea by Ukraine;
2. the word "territory" under the BIT covers more than "sovereign territory" (including the territory

under effective control);
3. neither state has terminated the BIT, so it is applicable; and
4. Russia was setting its authorities in Crimea.

This means that recognition of the Russian control over the Crimea by arbitration tribunals in Crimean cases enabled arbitrators to find grounds for the protection of Ukrainian investors in Crimea.

How the Situation Differs in Other Affected Territories?

Key Facts and Why They Are Important

Other parts of the territory affected by the Russian war in Ukraine cover the entire territory of Ukraine. However, the main difference from the Crimean situation is that each part of the territory was affected by factually different actions of Russia. If the entire Crimean territory has been under a de facto control of Russia since 2014, the situation of each part differs. For example:

1. Eastern Ukraine (Donetsk and Luhansk Regions) has been affected by effective control of Russia since May 2014;
2. Kyiv Region, parts or Kharkiv region has been affected by temporary physical presence of Russian army, including physical damages to the private property and infrastructure; misappropriation, etc.; and
3. Western Ukraine has been affected mainly by missile attacks, including infrastructure in Lviv region, civilian objects in Vinnytsya, etc.

These facts are important as they help define how investment was lost or damaged and what exactly has happened in the territory causing the loss of investment. Evaluating and qualifying the actions of Russia and its army in the different parts of the Ukrainian territory from an international law standpoint help define which legal concept to apply to a particular action. By having answers to these, one can determine whether the investment arbitration can be the best available way to seek the compensation and, if yes, how to prove that Russia is responsible for the damage.

What Are the Possible Legal Consequences of These Facts?

The most affected territories of Ukraine during 2022 were those of the Donetsk, Luhansk, Zaporizhia, Kherson regions. But was it a de facto control? Let’s check!

1) . . . for Donetsk and Luhansk regions: can the ECHR Decision in the case of Ukraine and the Netherlands v. Russia be of help?

Between 2014 and February 2022, Russia did not recognize its military or administrative presence in the territory of Donetsk and Luhansk. In 2022, the situation drastically changed—since February 22, 2022, Russia has admitted its presence in Donetsk and Luhansk regions and issued important pieces of legislation and official statements with respect to these regions, in particular:

1. Issuance of Decrees of the President of the Russian Federation on recognition of the

independence of the illegal Russia-backed proxies, Donetsk People's Republic ("DPR") and Luhansk People's Republic ("LPR");
2. Speech of the President of the Russian Federation on the theory of origin of Ukraine, which de facto denies Ukrainian sovereignty;
3. Signing and ratification of the Agreement on Friendship, Cooperation and Mutual Assistance between the Russian Federation and the Donetsk People's Republic and the Agreement on Friendship, Cooperation and Mutual Assistance between the Russian Federation and the Luhansk People's Republic, incl. Art. 10 of these agreements on "diplomatic protection of citizens of the DPR and LPR by the Russian Federation" and Art. 8 "on dual citizenship";
4. Convening the Federation Council of the Russian Federation on February 22, 2022 and approving the use of the Russian army abroad; and
5. Deploying the armed forces of the Russian Federation in DPR and LPR.

The ECHR decision has brought even more light to the legal assessment of Russian presence in the territory by referring to the criteria of effective control from May 11, 2014:

1. certain events that took place in the territory under separatist control from May 11, 2014 accordingly fall within Russia's jurisdiction in the meaning of Article 1 of the Convention (para 696);
2. decisive degree of influence and control Russia enjoyed over the areas under separatist control in eastern Ukraine (para 695); and
3. Russia's military, political and economic support to the separatist entities (para 695).

2) . . . for other affected regions

Firstly, Russian actions or even presence in other regions of Ukraine started a few days after the day of the full-scale invasion of Ukraine, and in most cases Russia did not actively object that it was done by the Russian army. On the other hand, Russia did not issue any relevant legislation in respect to these regions for months to say that Russia has fulfilled one of the criteria of the effective control referred above – "ability to legislate". For example, Russian presence in the south regions Kherson and Zaporizhya started during first weeks of the war, while the relevant legislation was issued by Russia on October 5, 2022 (for example, Decree of the President of Russian Federation on Specific Regulations on use atomic energy on the territory of Zaporizhzhia region (on transferring ownership of the Zaporizhzhia Nuclear power plant to Russia) dated October the 5th 2022.). This means that a claimant might need to put an extra effort to prove that its investment was lost during the period of the potential Russian effective control over the territory or due to its other actions in the territory.

Secondly, there is no need to prove the presence of Russia's effective control over the territory to enjoy investment protection and claim damages in other than Crimea or Donetsk and Luhansk regions. The damages might have been caused by Russia's other actions during the Russian War in Ukraine (missile attacks, hostilities, etc).

Which Lessons of Crimean Cases Might Be Relevant For Other Potential Investment Arbitration Cases?

Before arbitration tribunals decide whether Russia has enjoyed the effective control in affected territories or Russian actions had a different nature, the lessons of the so-called Crimean cases and

ECHR decision may be used by the investors to build a robust arbitration case, in particular:

1. Investors who experienced loss or damage of their investments in the territories of Donetsk and Luhansk can consider initiating investment arbitration cases based on the Russian effective control over the territory where the investment was situated;
2. Investors who experienced loss or damage of their investments in the territories of Zaporizhia and Kherson region perhaps may try to prove that Russia enjoyed effective control over certain parts of the territories as well starting from 2022; and
3. The date October 5, 2022, which was when the Russian legislation regarding these regions was issued, can be a good evidence of Russia's intention or ability to legislate with respect to the region even without any obligatory actual physical presence of Russian troops in the territory in question.

Conclusion

Any potential claimants may use the positive practice of the previous investment arbitration "Crimean cases" and the ECHR decision based on the facts of what actually happened in the territory where the investment suffered damages. The key "effective control" approach might be seen as one of the strategies for certain territories, but not all parts of the affected territory of Ukraine. However, there is a general lesson that can serve as inspiration for future potential cases. Firstly, there is no rule of precedent in investment arbitration. Secondly, the Tribunal must decide on a case on the basis of the facts and law applicable to the particular case. The criteria used in other cases are consultative only and not binding. This means that ECHR findings in the ECHR decision can be useful for potential arbitration cases in terms of investment protection in Ukraine.

This entry was posted on Monday, March 13th, 2023 at 8:42 am and is filed under BIT, Crimea, European Court of Human Rights, Investment, Territory
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