

## REVIEW OF JUDICIAL PRACTICE

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# CRIMEA-RELATED INVESTMENT ARBITRATION CASES AGAINST RUSSIA BEFORE INTERNATIONAL INVESTMENT ARBITRATION TRIBUNALS

**INTRODUCTION.** *The article is devoted to the analysis of the position of the Russian Federation in ten investment cases initiated by Ukrainian investors after the events in Crimea in 2014. The article also highlights current trends in the issue of confidentiality of international investment disputes. The authors analyze whether Russian strategy is effective based on the experience of foreign states, and also make assumptions about the enforceability of arbitration awards. Where the tribunals rendered awards on the merits, the authors highlight the problem of recognition and enforcement, and also assess Russia's the arguments to set aside these awards.*

**MATERIALS AND METHODS.** *This study is based on arbitral awards and information from public sources, including official press releases and interviews with Russian representatives in connection with the pending investment disputes. The authors employed the historical method, as well as such general scientific methods as analysis, synthesis, analogy, description, modeling.*

**RESEARCH RESULTS.** *The result of the study is the identification and formulation of patterns in investment disputes with respect to investments in Crimea to which*

*Russia as a party of Russia, the identification of typical arguments of the parties and the conclusions of arbitral tribunals on this type of disputes.*

**DISCUSSION AND CONCLUSIONS.** *Having analysed the awards rendered against Russia by international investment tribunals, the authors presented an overview of the parties' arguments that were presented when the arbitration considered the issue of jurisdiction and resolved the dispute on the merits. The authors assessed these arguments in terms of their credibility on the basis of existing in international investment case-law.*

**KEYWORDS:** *international investment arbitration, Permanent Court of Arbitration, Crimea, Russia, Ukraine, foreign direct investment, bilateral investment protection.*

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## ОБЗОР СУДЕБНОЙ ПРАКТИКИ

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# РАССМОТРЕНИЕ В МЕЖДУНАРОДНЫХ ИНВЕСТИЦИОННЫХ АРБИТРАЖАХ ИСКОВ К РОССИИ, СВЯЗАННЫХ С ИНВЕСТИЦИЯМИ В КРЫМУ

**ВВЕДЕНИЕ.** *Статья посвящена анализу позиции Российской Федерации десяти в инвестиционных делах, инициированных по искам украинских инвесторов после событий в Крыму в 2014 году. Также в статье освещаются современные тенденции в вопросе конфиденциальности при рассмотрении международных инвестиционных споров. Авторы приводят анализ того, является ли выбранная Россией стратегия перспективной исходя из опыта иностранных государств, а также делают предположения об исполнимости решений арбитража. Также авторы освещают проблему признания и приведения в исполнение данных решений в иностранных государствах для решенных по существу дел, а также дают оценку аргументам России при попытке аннулировать данные решения.*

**МАТЕРИАЛЫ И МЕТОДЫ.** *Основу настоящего исследования составляют арбитражные решения и информация из открытых источников, в том числе официальных пресс-релизов и интервью представителей России в связи с рассматриваемыми инвестиционными спорами. В исследовании использовался исторический метод, а*

*также такие общенаучные методы, как анализ, синтез, аналогия, описание, моделирование.*

**РЕЗУЛЬТАТЫ ИССЛЕДОВАНИЯ.** *Результатом проведенного исследования является выявление закономерностей в инвестиционных делах с участием России по поводу капиталовложений в Крыму, выявление типичных аргументов сторон и выводов арбитражей для данной категории дел.*

**ОБСУЖДЕНИЕ И ВЫВОДЫ.** *Проанализировав решения, вынесенные в отношении России инвестиционными арбитражами, авторы представили обзор аргументов сторон, которые использовались на стадиях, когда арбитражи рассматривали вопрос о юрисдикции и решали спор по существу. Авторами дана оценка этих аргументов в точки зрения их убедительности на основании существующих прецедентов в международном инвестиционном праве.*

**КЛЮЧЕВЫЕ СЛОВА:** *международный инвестиционный арбитраж, Постоянная Палата Третьейского Суда, Крым, Россия, Украина, прямые иностранные инвестиции, двусторонняя защита иностранных инвестиций.*

**ДЛЯ ЦИТИРОВАНИЯ:** Рачков И.В., Рачкова Е.И. Рассмотрение в международных инвестиционных арбитражах исков к России, связанных

с инвестициями в Крыму. – *Московский журнал международного права*. 2020. № 4. С. 119–147. DOI: 10.24833 / 0869-0049-2020-4-119-147

## Introduction

This article deals with ten cases brought by Ukrainian nationals and legal entities against Russia in connection with taking of property in Crimea after the ‘Crimean Spring’ (2014). These claims were submitted to various *ad hoc* international investment arbitration tribunals. However, all these cases have a lot in common. First, they are based on the Agreement between the Government of the Russian Federation and the Cabinet of Ministers of Ukraine on the Encouragement and Mutual Protection of Investments dated 27 November 1998 (BIT).<sup>1</sup> Second, all of these cases are being dealt with by *ad hoc* arbitral tribunals under UNCITRAL Arbitration Rules,<sup>2</sup> and the Permanent Court of Arbitration (PCA) in The Hague acts as a registry in all these cases.<sup>3</sup> Third, all claims were brought by Ukrainian investors who, at the moment when investments were made, did not qualify as ‘foreign’ investors, as the investments were made in Ukraine before 2014 (when Crimea was taken over by Russia). Last but not least, the attitude of all parties involved (claimants, the respondent – Russia, the arbitration tribunals, and Ukraine as the intervening party) is similar in each of these cases, although over time Russia’s attitude substantially changed – from abstention from participating in the arbitration to using all possible endeavors to protect its legal position.

Before we turn to the analysis of the publicly available information on the specific Crimea related cases, we would like to dedicate some space to two aspects which are of relevance for those cases: (1) confidentiality in international investment arbitration; and (2) Russia’s attitude towards the PCA.

## I. Confidentiality in the international investment arbitration

In many PCA-administered cases, parties opt to keep the proceedings confidential [Ando:15]. However, from time to time, parties to such disputes agree to hold public hearings (Abyei Arbitration; arbitration between TCW Group Inc and Dominican Energy Holdings LP v Dominican Republic).<sup>4</sup>

In general, confidentiality is one of the perceived advantages of (both commercial and investment) international arbitration [Redfern:2015]. Noteworthy, neither the UNCITRAL Arbitration Rules, nor the BIT contains provisions on confidentiality of arbitration proceedings. Depending on the conservatism of who has to deal with this topic, the conclusion may be: because the applicable legal provisions do not explicitly regulate this question, the arbitration proceedings are (i) not confidential or (ii) confidential.

In investment arbitration the necessary prerequisite to publish the information on the case is to ensure that both parties do not object to disclosing such information. It is natural that the investor is willing to disclose information on the case, while the respondent host state is objecting to it. There may be several reasons behind that, for instance the unwillingness of the respondent state to disclose its arguments as investors in other cases may use such predictability when estimating the chances to win the case, and this full range argument regarding jurisdiction of the tribunal and merits and the award itself may be used against such respondent state.

Over time, many States (as the respondents in such cases) and foreign investors (as the claimants)

<sup>1</sup> Agreement between the Government of the Russian Federation and the Cabinet of Ministers of Ukraine on promotion and mutual protection of investments (done in Moscow, 27 November 1998). URL: <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3443/download> (accessed 01.12.2020).

<sup>2</sup> U.N. Commission on International Trade Law: UNCITRAL Arbitration Rules, UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration. URL: <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/uncitral-arbitration-rules-2013-e.pdf> (accessed 07.12.2020).

<sup>3</sup> See: Permanent Court of Arbitration. URL: <https://pca-cpa.org/en/cases/> (accessed 05.12.2020).

<sup>4</sup> The most recent example of public hearing in an investment arbitration case is *Vattenfall AB and others v. Federal Republic of Germany* (ICSID Case No. ARB/12/12): by agreement of the parties, the hearing on 21–27 November 2020 was open to the public (except for any specific parts requested by either Party to be kept confidential), and video recordings of each hearing day shall be posted as soon as possible after each hearing day and will be available for viewing for one week. URL: <https://icsid.worldbank.org/news-and-events/news-releases/vattenfall-ab-and-others-v-federal-republic-germany-icsid-case-no-0> (accessed 30.11.2020).

moved away from confidentiality not only of arbitral proceedings, but also in international investment law in general.<sup>5</sup> Moreover, in international relations, confidentiality seems to disappear. This is what Fyodor Lukyanov, editor-in-chief of *Russia in Global Affairs* magazine recently said: “The Russian side proceeds from classical schemes, according to which, no matter what rumbles on the surface, there is a certain confidential political and diplomatic process, in the course of which real issues are resolved. This nostalgia for diplomacy of better times constantly comes up against, firstly, the lack of confidentiality as a category, and secondly, the fact that no one wants to, nor can, decide any real issues behind the scenes. Throwing out private talks has become a common practice. The latest example is the publication of a summary of the conversation between the Presidents of Russia and France by *Le Monde*. The Kremlin’s indignation does not find understanding in the Elysée Palace or in the administration of the Federal Chancellor [of Germany]. This is primarily due to the fact that it is much more important for Western interlocutors to build their own image for their own public than to agree on something with Moscow. The most blatant manifestation of the attack of domestic policy on foreign policy is the repeated demands of the Democrats in the United States that the White House fully discloses Trump’s negotiations with Putin, up to and including attempts to publicly interrogate translators.”<sup>6</sup>

In this vein, information on the international investment arbitration disputes becomes more and more publicly available. In furtherance of this approach, in 2013, UNCITRAL developed Rules on Transparency in Treaty-based Investor-State Arbitration.<sup>7</sup> These Rules apply to investor-State arbitration

initiated under the UNCITRAL Arbitration Rules pursuant to a treaty providing for the protection of investments or investors concluded on or after 1 April 2014<sup>8</sup> unless the Parties to the treaty have agreed otherwise. The Rules on Transparency, effective as of 1 April 2014, are a set of procedural rules for making publicly available information on investor-State arbitrations arising under investment treaties.

On 10 December 2014, UN member States adopted the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration<sup>9</sup> (so-called “Mauritius Convention on Transparency”). The Convention is an international treaty by which Parties to investment treaties concluded before 1 April 2014 expressed their consent to apply the UNCITRAL Rules on Transparency. On 18 October 2017, the Convention entered into force. Currently, the Convention is in force for Australia (starting 2021), Canada, Cameroon, Gambia, Mauritius, and – the one and only European State so far – Switzerland.<sup>10</sup>

The current trend in international arbitration is to diminish or at least to question confidentiality of arbitral proceedings as a whole. This trend is due to the arbitrations in which there is a genuine public interest, i.e. the arbitral award would affect the general public. In international investment arbitration, it is obvious that this is the taxpayer who has to pay in the event that the State loses the case. For instance, in a trio of arbitrations of former shareholders of Yukos Oil Company against Russia, the arbitral tribunal ordered the respondent (Russia) to pay in total over US\$ 58 million to the claimants (Hulley Enterprises Limited, Yukos Universal Limited and Veteran Petroleum Limited); this amount is only a portion of the costs of its legal representation of and assistance to the claimant in these arbitration

<sup>5</sup> In October 2014, the Council of the EU declassified the Directives it had given to the EU Commission for the negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America. URL: <https://data.consilium.europa.eu/doc/document/ST-11103-2013-DCL-1/en/pdf> (accessed 25.11.2020). Neither Russia, nor the Eurasian Economic Union (to which – in addition to Russia – Armenia, Belarus, Kazakhstan and Kyrgyzstan belong) publish their instructions for negotiations of international treaties: they are perceived by those countries as the *sancta sanctorum* of their ministries of foreign affairs.

<sup>6</sup> See: Journal Ogonjok. Cherez Zapad na Vostok (To the East through the West). URL: <https://www.kommersant.ru/doc/4500909> (accessed 01.12.2020).

<sup>7</sup> U.N. Commission on International Trade Law: UNCITRAL Arbitration Rules, UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration. URL: <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/uncitral-arbitration-rules-2013-e.pdf> (accessed 05.12.2020).

<sup>8</sup> For Russia, these are the following bilateral investment protection and promotion treaties: with Azerbaijan (2014), Bahrain (2014), Iran (2015), and Morocco (2016). For Ukraine, it is only its BIT with Japan (2015). Thus, in disputes arising out of these treaties, the UNCITRAL Rules on Transparency shall apply. URL: [https://uncitral.un.org/en/texts/arbitration/conventions/foreign\\_arbitral\\_awards/status](https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status) (accessed 02.12.2020).

<sup>9</sup> United Nations Convention on Transparency in Treaty-based Investor-State Arbitration. URL: <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/transparency-convention-e.pdf> (accessed 29.11.2020).

<sup>10</sup> See: UNCITRAL. URL: <https://uncitral.un.org/en/texts/arbitration/conventions/transparency/status> (accessed 01.12.2020).

proceedings<sup>11</sup>. Even if the State wins the case, it needs to pay substantial fees to its external legal advisors, and such fees may not always be collected from the losing claimant. That is why it is important to disseminate information about those cases among the citizens of the given country and to analyse the legal positions of each party and of the arbitral tribunal.

Besides, the contents of the arbitral award or the course of the arbitration proceedings may become public as a result of attempts of the claimant or respondent to either set aside the award or to get it recognized and enforced: set-aside applications shall be filed with the competent State court at the arbitration seat<sup>12</sup>, and the applications for recognition and enforcement – with the competent state courts where such recognition and enforcement are sought. In this context, the national law of the appropriate country typically requires that the arbitral award be disclosed in full in the national language of such country. With this, the arbitral award becomes known to the general public.

Furthermore, the classical position of a State – that arbitration is confidential in nature – may violate constitutional rights and freedoms of such State's citizens, in particular their right to information. Given the supremacy of the Russian Constitution over international law,<sup>13</sup> such behaviour of the persons in charge of decisions on confidentiality violated the Constitution and may be challenged in the competent Russian domestic court (including the Constitution Court, as the case may be). Article 24(2) of Russian Constitution sets forth: “*The bodies of state authority and local self-government, their officials shall ensure for everyone the possibility of acquainting with the documents and materials directly affecting his or her rights and freedoms, unless otherwise provided for by law.*” – One may argue that information on an investment arbitration case brought against our State does not directly affect the rights and freedoms of a citizen, that is why the State must not disclose such information.

According to Article 29(4) of Russia's Constitution, “*everyone shall have the right to freely look for, receive, transmit, produce and distribute information by any legal way. The list of data comprising state secrets shall be determined by a federal law.*” – Under Russian law, information about international investment arbitration cases does not constitute “a State secret”,<sup>14</sup> thus, in principle, there is no reason why such information shall be kept secret from the general public.

To add, the guiding principle of the Russian judicial system is that the proceedings in all courts are open and a hearing of a case in a closed session is allowed in the cases provided for by federal law (Article 123 (1) of Russia's Constitution). Indeed, Federal Laws Nos. 382-FZ “On the arbitration (arbitral proceedings) in the Russian Federation” dated 29 December 2015 (Article 21 para. 1) and 102-FZ “On Arbitral Tribunals in the Russian Federation” dated 24 July 2002 (Article 18) stipulate that arbitration proceedings are confidential, and hearings shall be held behind closed doors unless the parties agreed otherwise, and that arbitration proceedings shall be carried out in the basis of a number of principles, among which confidentiality. However, these laws do not apply to international investment arbitration: the former law regulates the procedure for the formation and operation of arbitral tribunals and permanent arbitration institutions on the territory of the Russian Federation, as well as arbitration proceedings; and the latter law – the procedure for the formation and operation of arbitral tribunals located on the territory of the Russian Federation. ‘Judicial publicity’ or ‘open justice’ are procedural maxims which have been at the core of many domestic procedural law systems at least since or in the wake of the enlightenment. That justice be performed under the public eye, and in that sense be transparent, has become a basic legal or even constitutional and human rights-based requirement. This quest is also deeply entrenched in

<sup>11</sup> Final awards dated 18 July 2014. *Hulley Enterprises Limited (Cyprus) v. The Russian Federation*, PCA Case No. AA 226, URL: <https://pca-cpa.org/en/cases/60/> (accessed 03.12.2020), *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, PCA Case No. AA 227, URL: <https://pca-cpa.org/en/cases/61/> (accessed 03.12.2020), *Veteran Petroleum Limited (Cyprus) v. The Russian Federation*, PCA Case No. AA 228, URL: <https://pca-cpa.org/en/cases/62/> (accessed 03.12.2020).

<sup>12</sup> Awards rendered by ICSID tribunals may not be set aside by a State court though. Either party may only request annulment of the award by an application in writing addressed to the Secretary-General on one or more of specific grounds (Article 52 of the 1965 Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States). However, statistically, annulment attempts succeed very rarely.

<sup>13</sup> Para. 151 of the Working Party Report on Russia's accession to the WTO dated 17 November 2011. URL: <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN11/2.pdf&Open=True> (accessed 30.11.2020).

<sup>14</sup> See: World Trade Organization: Law No. 5485-I of the Russian Federation of 21 July 1993 “On State Secrets” (with subsequent amendments), English version (as of 2007). URL: [https://www.wto.org/english/thewto\\_e/acc\\_e/rus\\_e/WTACCRUS58\\_LEG\\_125.pdf](https://www.wto.org/english/thewto_e/acc_e/rus_e/WTACCRUS58_LEG_125.pdf) (accessed 01.12.2020).

the societal and cultural understanding of judicial institutions in democratic States.

Nevertheless, our home country is reluctant to disclose information about cases, even on their mere existence. That is why it is extremely difficult to locate and to analyse the documents related to those cases. Often the public knowledge about these cases is based on the information disseminated by the claimants to the disputes, or leaked by the arbitrators / those who work for them and/or activists. Even though the PCA regularly publishes press releases, they are of very limited usefulness and value: they concern only procedural orders, while written submissions of the parties and awards remain confidential.

This attitude of Russia – not to disclose the information about investment arbitration cases – is paradoxical, as Russia is an active user of the international system of dispute settlement between host States and foreign investors, both as the respondent and as the country of origin of foreign investors who sue the foreign host States. According to the public information available at the UNCTAD website,<sup>15</sup> 26 claims were brought against Russia so far, and 25 Russian investors brought cases against foreign states: Moldova (6 cases), Ukraine (5 cases), Lithuania (3 cases), Belarus, Kyrgyzstan and Turkmenistan (2 cases per each country), Egypt, India, Kuwait, Mongolia, Montenegro – 1 case each country). As to the publicly known 26 cases against Russia as the host State, 10 cases were brought by Ukrainian nationals and legal entities. All of these 10 cases are of similar nature: they were triggered by takings of property which oc-

curred in Crimea peninsula after its takeover by Russia in spring 2014.<sup>16</sup>

## II. Russia's attitude towards the PCA.

Russia's attitude towards the PCA is ambivalent. On the one hand, the PCA has been established thanks to efforts of – among others, of course – Fyodor Fyodorovich Martens, an outstanding Russian diplomat and international lawyer (1845 – 1909). The PCA was created by the Convention for the Pacific Settlement of International Disputes, concluded at The Hague in 1899 during the first Hague Peace Conference and revised at the second Hague Peace Conference in 1907.<sup>17</sup> Russia (and after 1917 – the Soviet Russia and then – from 1922 to 1991 – the Soviet Union) has been a Contracting Party to both Conventions which completed the Hague Conferences of 1899 and 1907: The Hague Peace Conference of 1899 had been convened at the initiative of Czar Nicolas II of Russia “with the object of seeking the most objective means of ensuring to all peoples the benefits of a real and lasting peace, and above all, of limiting the progressive development of existing armaments.” Martens has been appointed as an arbitrator a number of times. One of the first cases administered by the PCA was Russia's Claim for interest on indemnities against the Ottoman Empire.<sup>18</sup> Currently, the PCA also administers a number of cases with Russia as a party, among which two interstate arbitrations, both brought by Ukraine against our home country:

– Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen (*Ukraine v. the Russian Federation*);<sup>19</sup> and

<sup>15</sup> See: U.N. Conference in Trade and Development. URL: <https://investmentpolicy.unctad.org/investment-dispute-settlement/country/175/russian-federation> (accessed 01.12.2020).

<sup>16</sup> Although in many countries the takeover of Crimea by Russia is qualified as annexation, in Russia, most authors do not share this view, preferring to call it ‘reunification with mother Russia’ or ‘return to home harbor’. Cf. Burke J., Panina-Burke S. The reunification of Crimea and the city of Sevastopol with the Russian Federation. *Russian Law Journal*. 2017;5(3):29-68. URL: <https://doi.org/10.17589/2309-8678-2017-5-3-29-68> (accessed 01.12.2020). Rainer Hofmann. Annexation. *Max Planck Encyclopedia of Public International Law*, 2020.

<sup>17</sup> For the first time, the rules of that Convention were used as soon as in 1899 – by the arbitral tribunal consisting of two British arbitrators (Lord Collins and Lord Russell), two US arbitrators (Justice Brewer and Justice Fuller) and presided by Fyodor Martens, when deciding the boundary dispute between Venezuela and British Guyana. In 2018, Guyana filed with the ICJ its application instituting proceedings against Venezuela requesting that Venezuela comply with the Arbitral Award of 3 October 1899. URL: <https://www.icj-cij.org/en/case/171> (accessed 02.12.2020).

<sup>18</sup> Russian Claim for Interest on Indemnities (Russia / Turkey), PCA Case No. 1910-02. This case concerned a commitment by the Turkish government to indemnify the Russian government for losses suffered by Russian subjects during the 1877/1878 war. The amount was not contested by Turkey but the Turkish government postponed payment for a period of more than twenty years. Russia demanded interest by reason of the delay in payment. The Parties agreed to submit the matter to arbitration. The Tribunal ruled that, in principle, moratory interest could be granted; however, based on the diplomatic correspondence exchanged between the Parties, in which Russia had not claimed interest of any kind, the Tribunal found that Russia had renounced the interest. URL: <https://pca-cpa.org/en/cases/89/> (accessed 01.12.2020).

<sup>19</sup> Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen (*Ukraine v. the Russian Federation*), PCA Case No. 2019-28. URL: <https://pca-cpa.org/en/cases/229/> (accessed 04.12.2020).

– Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. the Russian Federation).<sup>20</sup>

Before that, the PCA was administering another interstate arbitration – the *Arctic Sunrise* Arbitration (Netherlands v. Russia),<sup>21</sup> instituted on 4 October 2013 by the Netherlands under Annex VII to the United Nations Convention on the Law of the Sea (UNCLOS). The dispute concerned the boarding, seizure, and detention of the vessel *Arctic Sunrise* in the exclusive economic zone of Russia and the detention of the persons on board the vessel by the Russian authorities. The gist of the story is this: in 2013, after a peaceful protest against oil production by Gazprom at the first Arctic offshore installation, Prirazlomnaya, built in the Pechora Sea, 30 citizens from 17 countries (including four Russians) were detained on board a Greenpeace-owned vessel *Arctic Sunrise* under the flag of the Netherlands. After the activists landed on the platform, the ship was captured in the exclusive economic zone of Russia by Russian special forces descending from a helicopter and towed to Murmansk, where the ship crew spent two months in prison on the case of "piracy", then re-qualified as "hooliganism", after which they were released under bail and then amnestied.

The distinguishing feature of that arbitration was that Russia has not appointed an agent or any other representatives and, by a Note Verbale dated 27 February 2014 addressed to the PCA indicated its "refusal to take part in this arbitration." Russia's refusal to participate in the arbitration had disastrous consequences: the arbitral tribunal rendered three awards, all against Russia - award on Jurisdiction dated 26 November 2014, award on the merits dated 14 August 2015, and award on compensation dated 10 July 2017. In the award on jurisdiction, the arbitral tribunal concluded that Russia's declaration (made upon ratification of the UNCLOS) does not have the effect of excluding the present dispute from the procedures of Section 2 of Part XV of the UNCLOS and, therefore, does not have the effect of excluding the present dispute from the jurisdiction of the tribunal. In the award on the merits, the tribunal ruled that it had jurisdiction over all the claims submitted by the

Netherlands in this arbitration and that all the claims submitted by the Netherlands in this arbitration were admissible. The tribunal also found that by boarding, investigating, inspecting, arresting, detaining, and seizing the *Arctic Sunrise* without the prior consent of the Netherlands, and by arresting, detaining, and initiating judicial proceedings against the Arctic 30, the Russian Federation breached its obligations owed by it to the Netherlands as the flag State under Articles 56(2), 58(1), 58(2), 87(1)(a), and 92(1) of the UNCLOS. Moreover, the tribunal found that, by failing to comply with paragraphs (1) and (2) of the dispositive of the ITLOS Order, the Russian Federation breached its obligations to the Netherlands under Articles 290(6) and 296(1) of the UNCLOS, and by failing to pay its share of the deposits requested in procedural directions issued by the Tribunal to cover its fees and expenses in this arbitration, Russia has breached its obligations under Part XV and Article 300 of the UNCLOS.

In May 2019, Russian Ministry of Foreign Affairs announced<sup>22</sup> that Russia and the Netherlands had come to a complete and final settlement of any and all mutual claims due to or in connection with any events connected in any way with the presence of the *Arctic Sunrise*, the *Ladoga* vessel and the Prirazlomnaya oil platform in September 2013 in the Russian exclusive economic zone. Translated from the diplomatic Russian into the mundane Russian this only means: Russia paid the bill.

PCA members are potential arbitrators who may be appointed by Contracting Parties: parties to a dispute may, but are not obliged to, select arbitrators from the list of the Members of the Court. Each Contracting Party state is entitled to nominate up to four persons of "known competency in questions of international law, of the highest moral reputation and disposed to accept the duties of arbitrators" as "Members of the Court." Members of the Court are appointed for a term of six years, and their appointments can be renewed. In addition to forming a panel of potential arbitrators, the Members of the Court from each Contracting Party constitute a "national group," which is entitled to nominate candidates for the election to the International Court of Justice (ICJ),

<sup>20</sup> Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. the Russian Federation), PCA Case No.2017-06. URL: <https://pca-cpa.org/en/cases/149/> (accessed 29.11.2020).

<sup>21</sup> The Arctic Sunrise Arbitration (Netherlands v. Russia), PCA Case No. 2014-02. URL: <https://pca-cpa.org/en/cases/21/> (accessed 01.12.2020).

<sup>22</sup> See: Ministry of Foreign Affairs of the Russian Federation. Sovmestnoe zayavlenie Rossijskoj Federacii i Korolevstva Niderlandov o sotrudnichestve v Arkticheskoj zone Rossijskoj Federacii i uregulirovanii spora, published on 17 May 2019. URL: [https://www.mid.ru/web/guest/maps/nl/-/asset\\_publisher/dPPQX1ysEV4N/content/id/3651941](https://www.mid.ru/web/guest/maps/nl/-/asset_publisher/dPPQX1ysEV4N/content/id/3651941) (accessed 01.12.2020).

Article 4(1) of the ICJ Statute). The Members of the Court (along with the judges of the ICJ) are among a handful of groups entitled to nominate candidates for the Nobel Peace Prize. Russia – and before it the Soviet Union – used their right to nominate four members of the PCA.<sup>23</sup>

Another example of Russia's attitude towards the PCA is the attempt, by Evgeny Tarlo, a member of the Council of Federation of the Federal Assembly of Russia<sup>24</sup>, to investigate why Russia instructed foreign lawyers – Cleary Gottlieb Steen & Hamilton and Baker Botts – to represent it in the infame Yukos arbitration. In addition, he branded PCA as a 'strange The Hague Arbitration Court': *"I ask you to instruct the constitutional committee [of the Council of Federation – I.R.] to find out who and on what basis instructed the foreign law firm to recognize the jurisdiction of the incomprehensible Hague Arbitration Court, created, possibly, specifically for this case"*<sup>25</sup>. However, as of March 2016, no parliamentary investigation was instituted.<sup>26</sup> Nevertheless, in March 2016, the Investigative Committee of Russia reported that it detected violations committed during Yukos' privatization. According to the Investigative Committee, this casts doubt on the legality of the \$ 50 billion arbitral award rendered in The Hague, which awarded compensation to Yukos' former shareholders.<sup>27</sup>

Thus, although Russia gave birth, together with other 'civilized nations' of that time, to the PCA, the latter is not the mostly loved child of our country: depending on the specific case, Russia either supports the PCA or tries to defeat it. We doubt that this is a very wise attitude of a permanent member of the

UN Security Council. In a way, Russia's attitude to Crimea-related cases administrated by the PCA is similar to that of China in the Southern China Sea arbitration [Feria-Tinta: 2016].

### III. Specific cases.

Russia's official position concerning Crimean cases may be found in two interviews by Mikhail Galperin, Deputy Minister of Justice of Russia<sup>28</sup>. Mr. Galperin stated that there are currently 12 (!) arbitration cases brought before the PCA by Ukrainian persons and the total amount claimed by them amounts to 12 billion US dollars. However, Russia does not perceive these claimants as investors since they "acquired property in violation of law". The claimants did not sink any investments into their assets in Crimea, but obtained them for free, whereas the necessary prerequisite to claim the protection under the BIT is to make investments. The controversial assets were created back in the Soviet years. In fact, Ukrainian claimants are trying to privatize substantial assets that were formed when Ukraine and Russia belonged to the same country. The BIT does not cover investments of the Soviet period at all. A foreign investor may be protected under an international treaty if the investor ensures fair reciprocal provision, i.e. the investor shall pay taxes to the budget, discharge social obligations, and the like. It is obvious that those "investors" did not pay anything to the Russian budget.

The most interesting feature of the interview is the following: Mr. Galperin states that "any potential

<sup>23</sup> Currently, these are: Kirill Gevorgian (currently judge at the ICJ), Roman Kolodkin (currently judge at the UNTLOS), Kamil Bekiashev and Stanislav Tchernichenko. URL: [https://docs.pca-cpa.org/2017/07/a3dd3223-current-list-annex-1-members-of-the-court-184006-v84\\_.pdf](https://docs.pca-cpa.org/2017/07/a3dd3223-current-list-annex-1-members-of-the-court-184006-v84_.pdf) (accessed 04.12.2020). None of them was ever appointed by Russia as an arbitrator in international investment arbitration cases. Since 2018, it is no longer a surprise that ICJ judges can no longer sit as arbitrators in investor-state arbitrations: on 25 October 2018, Abdulqawi Ahmed Yusuf declared that in his first annual speech to the United Nation's General Assembly since being elected President of the ICJ. URL: <https://www.icj-cij.org/files/press-releases/0/000-20181025-PRE-02-00-EN.pdf> (accessed 02.12.2020).

<sup>24</sup> Evgeny Tarlo (1958 – 2020) represented Tambov region in the Council of Federation in 2007 – 2015. He was not only a lawyer by education, by also a former judge (Istra town court, Moscow region, 1985-1988) and an advocate (since 1993), candidate, then doctor of legal sciences. Thus, it is very regrettable that such a illiterate statement was made by such a prominent Russian lawyer.

<sup>25</sup> See: RIA Novosti: SF razberetsja, pochemu interesy RF v Gaage predstavljali inostrancy (RIA News: Russian Parliament will investigate why foreigners represented Russia in the Hague). URL: <https://ria.ru/20141029/1030710179.html> (accessed 01.12.2020).

<sup>26</sup> See: Izborskij Klub: Evgenij Tarlo. Amerikanskije juristy na sluzhbe u Rossii: "dvojnnoe dno" mezhdunarodnyh sudov (American lawyers serve Russia: "false bottom" of the international courts. URL: <https://izborsk-club.ru/8672> (accessed 28.11.2020).

<sup>27</sup> See: Kommersant: Sledstvennyj komitet doshel do Gaagi (Investigative Committee approached the Hague). URL: <https://www.kommersant.ru/doc/2948912> (accessed 01.12.2020).

<sup>28</sup> See: RIA Novosti: Mikhail Gal'perin: nado uvazhat' mezhdunarodnoye pravo ne tolko, poka udobno (It is crucial to respect international law nor only when it is convenient). URL: <https://ria.ru/20200603/1572353127.html> (accessed 02.12.2020). Mikhail Gal'perin: milliardy dollarov hotjat ukrainskie kompanii za Krym (Ukrainian companies brough billions of USD for the Crimea). URL: <https://ria.ru/20190606/1555290619.html> (accessed 02.12.2020).

statements by Ukrainian persons to the effect that their rights in Crimea were violated by Russia may fall under the BIT only if Ukraine and these persons themselves recognize the sovereignty of Russia over Crimea. However, as both Ukraine and the arbitral tribunals stated in each of those cases (9 out of 10) in which Ukraine intervened as a non-disputing party, such intervention is without prejudice to Ukraine's position concerning non-recognition of Crimea as a Russian territory. No doubt, neither Ukraine nor the claimants can deny the fact that Russia exercises effective control over Crimea. However, the recognition of that effective control does not amount to recognition of the legality of Crimea's takeover by Russia. Even if the claimants, being Ukrainian natural persons and legal entities, would recognise Crimea as an integral part of Russia, that recognition would not be binding upon Ukraine itself. Otherwise the fact that – by way of example – a UK citizen bought real estate in the Northern part of Cyprus would be qualified as recognition of the Turkish Republic of the Northern Cyprus by the UK.

### 1. DTEK Krymenergo v. Russia.

In a press release of 10 April 2020<sup>29</sup>, the Russian Ministry of Justice disclosed that in 2018, a Ukrainian power and coal producer – DTEK Krymenergo (DTEK) ultimately owned by the Ukrainian oligarch Rinat Akhmetov had initiated arbitration proceedings against Russia under the Russia-Ukraine BIT. DTEK which stands for 'Donetsk Fuel and Energy Company' claims approximately 420 million USD in damages from Russia. DTEK alleges that Russia expropriated the claimant's Crimean assets, including various coal mines.

Russia recently raised objections against the tribunal's jurisdiction. Notably, my home State relies on the findings of another tribunal which is currently hearing Ukraine's claims against Russia under Annex VII to the 1982 United Nations Convention on the Law of the Sea (UNCLOS). On 16 September 2016, Ukraine served on Russia a Notification and State-

ment of Claim under Annex VII to the UNCLOS referring to a dispute concerning coastal state rights in the Black Sea, Sea of Azov, and Kerch Strait.<sup>30</sup>

In its Award Concerning the Preliminary Objections of the Russian Federation (dated 21 February 2020), the UNCLOS tribunal consisting of five arbitrators<sup>31</sup> found that it had jurisdiction to hear Ukraine's claims, but only insofar as examining these claims would not entail deciding a dispute between Russia and Ukraine regarding their respective claims to sovereignty over Crimea. Thus, that arbitral tribunal has no jurisdiction over questions that would require handing down a judgment on Russia's sovereignty claims over Crimea. The press release of the Russian Ministry of Justice also indicates that Russia interprets the BIT's territorial scope as not extending to investments made by Ukrainian investors in Crimea. The UNCLOS arbitral tribunal also ruled that a legal dispute existed between Russia and Ukraine regarding the status of Crimea, and the territorial sovereignty question was not merely ancillary to the UNCLOS dispute. Thus, the tribunal declined jurisdiction over Ukraine's claims "to the extent that a ruling of the Arbitral Tribunal on the merits of Ukraine's claims necessarily require it to decide, expressly or implicitly, on the sovereignty of either Party over Crimea". The arbitrators also dismissed a number of other jurisdictional objections invoked by Russia, and reserved other issues for the merits<sup>32</sup>.

Russia's active participation in this case is consistent with a broader change of its strategy: couple of years ago, Russia has decided to take a more active stance in a number of Crimea-related cases, such as *Lugzor v. Russia* and *Naftogaz v. Russia* (cf. below). In contrast, Russia declined to participate in earlier cases (described in greater detail below), in which several tribunals found that they had jurisdiction over Ukrainian investments in Crimea.

On the basis of the available information we conclude that the tribunal has been constituted to hear DTEK's claims. However, the identity of the arbitrators is not publicly known yet.

<sup>29</sup> See: Ministry of Justice of Russian Federation. URL: <https://minjust.gov.ru/ru/novosti/minyust-rossii-prodolzhaet-zashchitunacionalnyh-interesov-v-krymskih-arbitrazhah> (accessed 02.12.2020).

<sup>30</sup> Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. the Russian Federation), PCA Case No. 2017-06. URL: <https://pca-cpa.org/en/cases/149/> (accessed 01.12.2020)..

<sup>31</sup> Vaughan Lowe (Ukraine's nominee), Vladimir Vladimirovich Golitsyn (Russia's nominee) and three arbitrators selected by the Vice President of the International Tribunal for the Law of the Sea: Jin-Hyun Paik, Boualem Bouguetaia, and Alonso Gomez-Robledo. Mr. Jin-Hyun Paik sat as chair.

<sup>32</sup> In the UNCLOS case, Ukraine was represented by Covington & Burling, Harold Hongju Koh, Alfred Soons, and Jean-Marc Thouvenin, whereas Russia relied on counsel from Curtis Mallet-Prevost, Ivanyan & Partners, Alain Pellet, Tullio Treves, Samuel Wordsworth, Sergey Usoskin, and Amy Sander.

## 2. Everest Estate & Others v. Russia.

In June 2015, following the physical occupation of the Crimean peninsula by Russia in February 2014 and the subsequent annexation (as the arbitral tribunal put it) of the territory under Russian law in March 2014, Everest Estate, along with 17 other Ukrainian-registered companies and a Ukrainian national – Alexander Dubilet – commenced their joint claim against Russia.<sup>33</sup> The claimants complain of an alleged expropriation by the new Crimean authorities of a range of properties (including hotels, resorts, apartment complexes, offices, industrial plants and other buildings) in Crimea acquired by the claimants prior to the annexation. Although these actions were not undertaken by the Russian Federation but rather by its new members – the Republic of Crimea and the city of Sevastopol, in accordance with the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) these actions are attributable to the federal state which is a subject of international law.<sup>34</sup>

### *Russia refused to participate in the proceedings.*

Russia has not appointed an agent. In a letter to the PCA dated 15 September 2015 attaching correspondence dated 12 August 2015, Russia stated it “does not recognize the jurisdiction of an international tribunal at the Permanent Court of Arbitration in settlement of the abovementioned claims.” In its letter of August 2015, Russia also stated that “[i]t is manifest that such claims cannot be considered under the [BIT].”

Russia also failed to appoint an arbitrator. That is why the PCA had to select an appointing authority who shall appoint the arbitrator on Russia’s behalf. PCA selected Michael Hwang as such appointing authority. Michael Hwang named Professor Rolf Knieper (Germany) to the tribunal<sup>35</sup>. Jurisdictional hearings were held in December 2016, again in Russia’s absence.

On 20 March 2017, the arbitral tribunal (consisting of Andrés Rigo Sureda as the chair, W. Michael Reisman and Rolf Knieper) rendered its jurisdictional award [Hepburn:2017], by which it unanimously affirmed its jurisdiction over the dispute. On 2 May

2018, the tribunal went on to award US\$150 million to the claimants.

Unfortunately, both awards – that on jurisdiction (2017) and the final one (2018) – remain unpublished. However, some information about the tribunal’s reasoning in the award on jurisdiction leaked. In particular, defeating Russia’s argument, that award hinges on the view that an investment did not need to be located in the territory of the respondent state at the time it was made, as long as it later came to be within that territory. In the tribunal’s view, rather than denying BIT protection, this reasoning would be ‘more responsive to the purposes and objects of the BIT’.

The tribunal determined that it would view Russia’s August 2015 letter as a jurisdictional objection, and (as in the parallel Privatbank and Belbek cases heard by a different tribunal, cf below) then determined on its own motion that it would bifurcate the case to address this jurisdictional objection in a preliminary phase.

Interestingly, in November 2016, the tribunal ruled that it would accept a written submission from Ukraine in the case (this phenomenon is called ‘non-disputing party submission’), although denied the investors’ home state the possibility to present oral submissions. A non-disputing party is an individual or entity that is not a party to the dispute, but asks the arbitral tribunal’s permission to file a written submission in the case. The non-disputing party’s role is to assist the arbitral tribunal in deciding the dispute by providing a perspective different from that of the parties, via the submission of a written brief. Tribunals may accept or decline submissions by non-disputing parties.<sup>36</sup> State parties to a treaty which are not parties to the dispute may have a right under that treaty to make submissions on a question of application or interpretation of the treaty. Although the BIT does not explicitly grant such right to Ukraine, in absence of such provisions in the BIT the arbitral tribunal has the power to decide this question at its discretion.

Subsequently, in early March 2017, the tribunal permitted the claimants to submit the February 2017 jurisdictional decisions in the Privatbank and Belbek cases, where the claimants were represented by the

<sup>33</sup> Everest Estate v Russia, PCA Case No. 2015-36. URL: <https://pca-cpa.org/en/cases/133/> and <https://www.iareporter.com/arbitration-cases/everest-estate-and-others-v-russia/> (accessed 01.12.2020)..

<sup>34</sup> Annex to General Assembly resolution 56/83 of 12 December 2001, and corrected by document A/56/49(Vol. I)/Corr.4. ARSIWA, Article 4, Conduct of organs of a State: “1. The conduct of any State organ shall be considered an act of that State under international law, [...] whatever its character as an organ of the central Government or of a territorial unit of the State.” URL: [https://legal.un.org/ilc/texts/instruments/english/draft\\_articles/9\\_6\\_2001.pdf](https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf) (accessed 02.12.2020).

<sup>35</sup> The appointing authority is dealt with in Article 6 of UNCITRAL Arbitration Rules. The appointing authority, as its name indicates, is the body which appoints the arbitrator in case the party or both parties fail to do that.

<sup>36</sup> See: ICSID. URL: <https://icsid.worldbank.org/services/arbitration/convention/process/ndp> (accessed 02.12.2020).

same law firm (Hughes Hubbard & Reed LLP) as the Everest Estate claimants.

In the award on jurisdiction, the following legal issues were discussed:

- Is Russia's *de facto* control over Crimea enough for the BIT to apply? – Brief answer: yes, it is.
- Does the tribunal have jurisdiction despite Russia's non-participation? – Brief answer: yes, it does.
- Does the BIT apply to Crimea? – Brief answer: yes, it does.
- What is the role of the object and purpose of the BIT in its interpretation? – Brief answer: the object and purpose of the BIT dictate that the BIT shall protect the investments of Ukrainian claimants made in Crimea, even though at the time when such investments were made there, Crimea undoubtedly belonged to Ukraine.
- Are the arbitration proceedings at hand a class action or a multi-party arbitration? – Brief answer: a multi-party arbitration. This question is important because – if the arbitration would be considered as a class action, the claim would not be admissible, as the BIT does not expressly provide for class action claims.

***Is Russia's de facto control over Crimea enough for the BIT to apply?***

In their filings, the claimants espoused the general principle: treaties are binding on a state in respect of its entire territory [Aust:2006]. Since Russia claimed Crimea now as an integral part of its ter-

ritory, the claimants argued that Russia could not avoid the conclusion that the BIT therefore applied to Ukrainian investments in Crimea.

Moreover, the claimants argued that this applied even to *de facto* exercise of jurisdiction over territory. Thus, according to the claimants' view, it was irrelevant whether Russia's annexation of Crimea was internationally lawful. Drawing a parallel between human rights treaties and investment treaties, the claimants contended that case-law from the European Court of Human Rights<sup>37</sup> and the ICJ<sup>38</sup> had found occupying states to be bound by treaties 'if non-performance of treaty obligations would adversely affect the population of that territory'.

In the claimants' view, the BIT did not require the investments to have *originally* been made in the respondent state's territory; the definition of 'territory'<sup>39</sup> for BIT purposes was movable over time, and their investments in Crimea (i.e. Ukraine) became investments in Russia when Russia's borders moved (whether *de facto* or *de iure*).

Responding to questions from the tribunal, the claimants also cited the case concerning certain German interests in Polish Upper Silesia resolved by the Permanent Court of International Justice (PCIJ) in 1925.<sup>40</sup> In that case, the PCIJ held that Poland was liable for expropriating German-owned property that was located in territory that was originally German but later became Polish. Moreover, the claimants pointed to case-law of the Ethiopia-Eritrea Claims Commission<sup>41</sup>: the latter held Ethiopia responsible

<sup>37</sup> *Loizidou v Turkey*, Admissibility, App No. 15318/89, Case No. 40/1993/435/514, A/310, [1995] ECHR 10, (1995) 20 EHRR 99, (1996) 21 EHRR 188, IHRL 3133 (ECHR 1995), 23 March 1995, European Court of Human Rights [ECHR]; Grand Chamber [ECHR].

<sup>38</sup> See: International Court of Justice. Advisory Opinion of 9 July 2004 on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory. URL: <https://icj-cij.org/en/case/131/advisory-opinions> (accessed 01.12.2020).

<sup>39</sup> Article 1 para. 4 BIT: "The term "territory" means the territory of the Russian Federation or the territory of Ukraine, as well as their respective exclusive economic zone and continental shelf, as defined in accordance with international law."

<sup>40</sup> See: Case concerning certain German interests in Polish Upper Silesia, judgement No.6 dated 25 August 1925. URL: [https://icj-cij.org/files/permanent-court-of-international-justice/serie\\_A/A\\_07/17\\_Interets\\_allemands\\_en\\_Haute\\_Silesie\\_polo\\_naise\\_Fond\\_Arret.pdf](https://icj-cij.org/files/permanent-court-of-international-justice/serie_A/A_07/17_Interets_allemands_en_Haute_Silesie_polo_naise_Fond_Arret.pdf) (accessed 01.12.2020).

<sup>41</sup> See: Permanent Court of Arbitration. URL: <https://pca-cpa.org/en/cases/71/> (accessed 01.12.2020). Following the breakout of an armed conflict between the Federal Democratic Republic of Ethiopia ("Ethiopia") and the State of Eritrea ("Eritrea") in May 1998, the governments of Ethiopia and Eritrea "permanently terminate[d] military hostilities between themselves" pursuant to an agreement signed in Algiers on 12 December 2000 (the "Algiers Agreement"). Two commissions were established under the Algiers Agreement. Article 4 provided for the establishment of a Boundary Commission and Article 5 provided for the establishment of a Claims Commission. The Claims Commission was established to "decide through binding arbitration all claims for loss, damage or injury by one Government against the other" related to the armed conflict and resulting from "violations of international humanitarian law, including the 1949 Geneva Conventions, or other violations of international law." The Parties were entitled to submit claims on their own behalf and on behalf of their nationals (including both natural and legal persons), or in appropriate circumstances, persons of Ethiopian or Eritrean origin who were not nationals. The Commission was seated in The Hague with the PCA serving as the registry. The Parties filed their claims by 12 December 2001, addressing matters including the conduct of military operations in the front zones, treatment of prisoners of war, treatment of civilians and their property, diplomatic immunities and the economic impact of certain government actions during the conflict. The Commission decided to bifurcate proceedings, dealing first with issues of liability and reserving the determination of damages for a later stage. The Commission heard the claims between December 2002 and April 2005. The Commission held two rounds of hearings on damages in April 2007 and May 2008. In total, the Commission delivered 15 partial and final awards on liability and concluded its work on 17 August 2009, when it delivered its final awards on damages.

for expropriating certain Eritrean citizens who were formerly Ethiopian, after the state deprived them of Ethiopian citizenship. In the claimants' view, these precedents indicated that property did not need to be originally foreign-owned if later events transformed the relationship.

The effective control doctrine constitutes a danger for Russia since its accession to the Council of Europe. The European Court of Human Rights (ECHR) held Russia, on a couple of occasions (for instance, *Ilaşcu, Catan, Mozer cases v. Moldova and Russia*), responsible for violation of human rights on the territories *de facto* effectively controlled by Russia [Hamid:2019], although Russia itself does not agree with that finding. Russia was not the first in the row of States who suffered from the application of the effective control doctrine (the first was Turkey in the *Loizidou* case), but this finding in cases against Russia is one of the points of tension between Russia and the ECHR. Russia already threatened ECHR that it would not enforce the *Katan* judgment, as Russia does not share ECHR's view that Russia allegedly controls Transnistria.

#### ***Does the tribunal have jurisdiction despite Russia's non-participation?***

The tribunal confirmed its powers to examine its own jurisdiction, despite Russia's non-appearance. Several other preliminary issues were then disposed of. The tribunal found that there was a "dispute" between the parties,<sup>42</sup> thus construing Russia's letter not as a rejection of a dispute as such but as a rejection of jurisdiction to consider this dispute. Further, the tribunal saw no issue with the claimants' Ukrainian nationality, or with their legal competence to make investments in Crimea, given that Ukrainian law did not restrict investment in Crimea even after the annexation. The various property holdings were also swiftly held to constitute investments under the BIT.

In addition, the tribunal noted that all parties (including Ukraine, in its non-disputing party submis-

sion) agreed that the BIT was still in force, allowing the tribunal to avoid questions of whether investment treaties 'survive and operate in an armed conflict and upon a change in the status of territory'.

#### ***Does the BIT apply to Crimea?***

Turning to more central issues, the tribunal then considered whether the investments were 'investments in Russian territory', as required for protection under the BIT. For this purpose, the arbitral tribunal applied the general principle expressed in Article 29 ('Territorial scope of treaties') of the Vienna Convention on the Law of Treaties (VCLT, 1969): "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."

The tribunal found that the BIT applied to the entire Russian territory. It was true, the tribunal said, that the BIT was expressed to apply to all territory including the two states' exclusive economic zones and continental shelves 'defined in accordance with international law'. This last phrase arguably qualified 'territory' as well as 'exclusive economic zone' and 'continental shelf', potentially requiring an assessment of whether Crimea was Russian territory as 'defined in accordance with international law'.

However, the tribunal side-stepped this argument, because both Russia and Ukraine agreed that the BIT applied to Crimea. In particular, in its non-disputing party submission Ukraine maintained that Crimea remained Ukrainian territory, but that Russia's current occupation meant that, for the purposes of the BIT, Crimea was 'presently' part of Russian territory.

Thus, for the tribunal, the territorial scope of the BIT was not in issue and had not changed; the treaty always applied one way or another, to Crimea. The question for the tribunal, in its view, was one of timing – namely, whether the BIT applied to Ukrainian investments made in Crimea before the annexation.

<sup>42</sup> The existence of a dispute between the Parties is a condition for the ICJ's jurisdiction. The ICJ has repeatedly addressed the question of whether there existed a dispute between the parties, e.g. in the following cases: *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)*; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*; *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v Colombia)*; *Immunities and Criminal Proceedings (Equatorial Guinea v France)*. Most prominently, in three cases concerning *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* for the first time the ICJ found that it lacked jurisdiction over the cases because there was no 'dispute'. In its judgments of 5 October 2016, the Court pointed out that 'a dispute exists when it is demonstrated, on the basis of the evidence, that the respondent was aware, or could not have been unaware, that its views were "positively opposed" by the applicant' (para. 38). The Court denied that the existence of a dispute may be inferred from the conduct of the parties after the institution of the proceeding by noting: 'If the Court had jurisdiction with regard to disputes resulting from exchanges in the proceedings before it, a respondent would be deprived of the opportunity to react before the institution of proceedings to the claim made against its own conduct' (para. 40).

***Role of the object and purpose of the BIT in its interpretation.***

Any arbitral tribunal has to apply and to interpret the international treaty applicable to the case before that tribunal. According to Article 31 para. 1 VCLT, the general rule of interpretation of international treaties is this: “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.” That is why in the case at hand the arbitral tribunal assessed the BIT’s purpose and object. In doing so, the tribunal first gave an example from the law of armed conflicts: by occupying a territory, the occupying State assumes obligations towards the inhabitants of that territory. Thus, the occupation of Crimea by Russia created obligations for Russia as the occupying State; such obligations did not previously exist, the tribunal said.

The tribunal then noted that the claimants clearly must make an investment, i.e. an injection of assets, and that the investment must be in the respondent State’s territory – but it was less clear whether these requirements must both be satisfied simultaneously.

Firstly, a textual analysis of the BIT did not suggest any need for simultaneity. Although the BIT used the word ‘invested’ in the past tense, this did not mean that the territory had to be part of the respondent when the investment was made, the tribunal said. Otherwise, BIT protection would be denied to some investors ‘purely as a result of the location of the investment’.

Secondly, in the tribunal’s view, BITs sought to encourage investment, and granted investment protection in order to do so. This ‘essential synallagmatic character’ persisted even in the post-annexation circumstances: Russia benefited from the investments, and the claimants benefited from BIT protection. For the tribunal, allowing the BIT to apply was thus ‘more responsive to the purposes and objects of the BIT’, provided that the investment was in the re-

spondent’s territory by the time of the alleged breach.

The tribunal also cited the *PacRim v El Salvador* case<sup>43</sup>: that tribunal held that the claimant was not required to have the correct nationality before making its investment, as long as it did so prior to the alleged breach.

Lastly, the tribunal approved of the claimants’ references to the *Certain German Interests* case and the *Ethiopia-Eritrea Claims Commission* case-law. The tribunal commented that the claimants had not sought to exit Crimea after the annexation, since Russian law had (at least initially) maintained their rights. Moreover, for the tribunal, it would be an unreasonable interpretation to hold that investments nationalised by Russia ‘and/or its subjects’ were found to be outside Russian territory; ‘[i]n fact, the nationalization presupposes that the investments were on Russian territory’.

Thus, the tribunal held that the investments were made on Russian territory, for the purposes of the BIT claim. Unlike in the *Privatbank and Belbek* cases (cf. below), in the *Everest* case, the tribunal did not nominate a specific day from which Russia was bound by BIT obligations in respect of Crimea.

Following this conclusion, the tribunal confirmed that the investments were made in accordance with Russian law, finding that transitional laws had preserved rights previously created under Ukrainian law, and that Russia had never alleged any non-compliance.

***Class action or multi-party arbitration?***

A class action is a type of lawsuit where one of the parties is a group of people who are represented collectively by a member of that group. The class action originated in the United States and is still predominantly a U.S. phenomenon, although some other countries of the world (including Russia) recently introduced amendments to allow certain groups of claimants (e.g. consumers) to bring claims on behalf of all members of such groups.

<sup>43</sup> The *Pac Rim* tribunal was the first to interpret the denial of benefits clause contained in CAFTA – the Dominican Republic–Central America–United States Free Trade Agreement. *Pac Rim* argued that it was protected under CAFTA due to its incorporation in the U.S. State of Nevada. The CAFTA provision (Article 10.12.2) permits a CAFTA state party to deny the benefits of treaty protection (including access to ICSID arbitration) to an investor if two cumulative conditions are met. First, the investor has “no substantial business activities in the territory of any Party.” Second, persons of a non-Party to CAFTA own or control the enterprise that is making the investment. As to this last condition, the tribunal accepted El Salvador’s argumentation and found that *Pac Rim* was owned by *Pacific Rim Mining Corporation*, which in turn was a Canadian entity. According to the tribunal, the fact that the ultimate owners or controllers of *Pac Rim* had postal addresses in the United States was insufficient for them to qualify as U.S. nationals under CAFTA (see Annex 2.1, CAFTA). CAFTA provides that for the United States, natural persons mean U.S. nationals, that is, American citizens or persons who owe permanent allegiance to the United States of America, as per the requirements of the U.S. Immigration and Nationality Act (para. 4.81, decision on jurisdiction). Consequently, the tribunal declined to exercise jurisdiction over *Pac Rim*’s CAFTA claims. However, it upheld its jurisdiction based on El Salvador’s investment law (para. 5.48, decision on jurisdiction). URL: <https://www.italaw.com/cases/783> (accessed 01.12.2020).

As to this final issue, the tribunal recalled its questions to the parties about the ‘apparent lack of relationship’ between the nineteen claimants, and inquired into whether Russia could be said to have consented to a multi-party claim by (potentially) unrelated claimants, particularly when the UNCITRAL rules did not expressly contemplate such claims.

In response, the claimants argued that they were all associated with, or perceived by Russia to be associated with, Ukrainian oligarch Igor Kolomoisky, and that this association had prompted all the alleged expropriations.

The tribunal noted that the BIT referred both to an ‘investor’, in the singular, and to ‘investors’, in the plural. Agreeing with the approaches of tribunals in the *Abaclat* and *Ambiente Ufficio* cases,<sup>44</sup> the tribunal considered that the BIT’s silence on the specific question of multi-party claims did not indicate a lack of consent; instead, ‘[t]he State and each investor have given their consent’.

Moreover, although there might be a minimum link necessary between all the claimants in a multi-party arbitration (as the *Ambiente Ufficio* tribunal had suggested), the link was clearly sufficient here. The claimants had submitted their claim jointly, the same legal provisions were in issue, each investor had ‘similar circumstances’, and ‘substantially identical’ relief was sought by each.

Thus, this (purely hypothetical though) objection from Russia was also rejected.

In order to round up the coverage of this case, it makes sense to pay attention to Russia’s efforts to prevent the recognition and enforcement of the awards rendered against it in favor of the above 19 claimants. These attempts have to do with: setting aside efforts (combined with stay of enforcement and security for costs); and Russia-Ukraine ‘recognition and enforcement war’.

***Russia’s attempts to set aside the arbitral awards and applications to stay enforcement or to order the claimants to deposit security for costs.***

Although Russia refused to participate in the arbitral proceedings, it has opted to challenge the awards at the seat in The Netherlands. These set-aside proceedings are still pending before the Hague Court

of Appeal. Concurrently, Russia filed an ancillary request with the same court in The Netherlands to stay the enforcement of the awards or, alternatively, to order the claimants to post security for potential costs which Russia may incur. An order for security for costs is an order of a State court or the arbitral tribunal requiring a party to pay money into court, or to provide a bond or guarantee or an insurance policy as security for their opponent’s costs of the proceedings or a part of the proceedings.

In its judgment<sup>45</sup>, The Hague Court of Appeal has refused to stay the enforcement of the above two UNCITRAL awards (on jurisdiction and on the merits) obtained by Everest Estate LLC and others against Russia or, alternatively, to order the claimants to post security. In particular, the Court held that Russia’s set aside request against the two awards in this case did not have a “high” chance of success, thus obviating suspension of the award’s enforcement.

Hughes Hubbard & Reed LLP, a US law firm, represented the claimants in the underlying arbitral proceedings. Before the Dutch court, Mr. RS Meijer acted for Russia, and M. van de Hel-Koedoot for the claimants.

In declining to grant Russia’s request, the Court weighed as a relevant factor Russia’s chances to prevail on the merits, thus shedding light on the six reasons invoked by Russia to set the award aside. (The judgment indicates that Russia raised other grounds, but these have not been pleaded in the state’s request for suspension.)

These reasons include arguments that the BIT does not apply to this case as the investments were made in Crimea when the peninsula was still part of Ukraine. However, the Dutch judges noted that, while a complex debate, multiple arbitral tribunals as well as the Swiss Federal Tribunal (when hearing a set aside petition in the *Stabil v. Russia* case, cf. below) have been unconvinced by these arguments, which did not bode well for Russia’s arguments in these set aside proceedings.

Russia also argued that the investments should be denied protection under the BIT for illegality, but the Court observed that these allegations only concern, at most, a few of the 18 claimants – such that Rus-

<sup>44</sup> In *Abaclat*, at issue were claims by some 60,000 claimants purporting to have ownership interests in Argentine sovereign bonds. URL: <https://www.iareporter.com/arbitration-cases/abacat-formerly-beccara-and-others-v-argentina/> (accessed 01.12.2020). In *Ambiente Ufficio*, the arbitration proceedings were brought by some 90 claimants. However, in both cases, the arbitral tribunals concluded that neither of them constitutes a “class action” or a “mass claim” but rather “multi-party” or collective proceedings.

<sup>45</sup> The Hague Court of Appeal, Case No. 200.250.714-01, judgement dated 12 June 2019. URL: <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2019:1452> (accessed 01.12.2020).

sia could only hope for a partial annulment of the award.

The Court was also unimpressed by Russia's argument that the claimants relied on allegedly fraudulent documents, observing that the state did not contest these documents before the arbitral tribunal nor opted to re-open the proceedings for a revision.

Further, and more originally, Russia claimed that the tribunal should have refrained from ruling before any resolution of the territorial dispute concerning Crimea, a dispute that should proceed under Article 10 of the BIT ('Resolution of Disputes Between the Contracting Parties') which contains provisions for state-to-state arbitration. However, according to publicly available information, no such arbitration between Ukraine and Russia is currently ongoing.

The Dutch Court of Appeal saw this ground as unpersuasive, as the BIT does not provide for such a limit on the tribunal's jurisdiction, and it was possible for the tribunal to decide the claims without ruling on the territorial dispute.

Finally, Russia contested the tribunal's decision to rule on a multi-party claim, and argued that the BIT did not provide for this kind of proceedings. However, as explained above, the tribunal held that there was a sufficient link between the claims, as the investors were all related to Ukrainian tycoon Kolomoisky. The judges were unconvinced by that latter argument raised by Russia, and – at least for the time being – agreed with the claimants that the BIT's language did not rule out multi-party claims.

All in all, therefore, the Court concluded that Russia had failed to prove that its challenge to the awards had a "high" probability of success. Since no other consideration applied, the Court thus declined to stay the enforcement of the award.

***Recognition and enforcement of the award on the merits in Ukraine.***

In 2019, the claimants have secured a ruling for recognition and leave to enforce from the Kiev Court of Appeal. More recently, Ukraine's Supreme Court upheld these rulings of the lower court, in a decision rendered this month. The award-creditors are targeting shares in two Ukrainian banks that are owned by Russian state-owned financial institutions.

According to Russian news agency Interfax, Russian state-owned bank Vnesheconombank ("VEB") has notified Ukraine of a dispute under the BIT on 14 September 2018<sup>46</sup>. The move follows a decision by Ukrainian courts (rendered in in September 2018) to seize assets from the Ukrainian subsidiaries of three Russian state-owned banks, VEB (and its subsidiary Prominvestbank), Sberbank and VTB. The Kiev Court of Appeal ordered the seizure in the context of the recognition and enforcement proceedings of the above \$150 million arbitral award against Russia obtained by Ukrainian investors earlier in 2018.

Such levy of execution in the property owned by a Russian bank which in turn is controlled by Russia is contrary to the international law provisions on sovereign immunity, as the property of VEB is distinct from that its shareholder (Russia). In accordance with Russian domestic law, VEB is not liable for the obligations of the Russian Federation, and the Russian Federation is not liable for the obligations of VEB.<sup>47</sup> VEB has the legal status of a "State corporation". A State corporation is a non-commercial legal entity. According to a more general provision of Russian law, a legal entity is an organization that has separate property and is liable for its obligations, can, on its own behalf, acquire and exercise civil rights and bear civil obligations, be a plaintiff and defendant in court.<sup>48</sup>

***Russia's revenge on Ukraine.***

On 21 May 2008, the Russian company OJSC "Tatneft" ("Tatneft") filed a notice of arbitration and statement of claim against Ukraine pursuant to the UNCITRAL Arbitration Rules.<sup>49</sup> Tatneft claimed that Ukraine violated the BIT because Tatneft and other foreign shareholders were deprived of the right to effectively control their investments in Ukraine – Ukrtatnafta. Tatneft's claim amounted to US\$ 2.4 billion. On 29 July 2014, the arbitral tribunal found that Ukraine had violated the BIT, and ordered Ukraine to pay Tatneft a compensation equal to US\$112 million (plus interest equal to three-month LIBOR plus 3 per cent., payable from when Tatneft was deprived of the right to control its shareholding in Ukrtatnafta).<sup>50</sup> The arbitral tribunal dismissed the other claims.

<sup>46</sup> See: Interfaks. VJeB iniciiruet process protiv Ukrainy iz-za aresta akcij Prominvestbanka (VEB initiates proceedings against Ukraine due to forfeiture of shares of Prominvestbank). URL: <https://www.interfax.ru/business/629314> (accessed 01.12.2020).

<sup>47</sup> Article 5 para. 2 of Federal Law No. 82-FZ "On the State Development Corporation "VEB.RF" dated 17 May 2007 (as amended on 31 July 2020).

<sup>48</sup> Article 48 para. 1 of the Civil Code of the Russian Federation.

<sup>49</sup> PCA Case No. 2008-08. URL: <https://www.italaw.com/cases/4736> (accessed 01.12.2020).

<sup>50</sup> OAO Tatneft v Ukraine, PCA Case No. 2008-8, Award on the Merits. URL: <https://www.italaw.com/sites/default/files/case-documents/italaw8622.pdf> (accessed 01.12.2020).

Ukraine later submitted a motion to the Paris Court of Appeals for the annulment of the arbitral award. This was ultimately rejected. Subsequently, Ukraine submitted an appeal of the arbitral award to the Court of Cassation of France. That court declined the appeal.

Concurrently, Tatneft submitted applications for recognition and enforcement of the arbitral award in the United States, Russia and the United Kingdom. In June 2017, the *Arbitrazh* Court of the city of Moscow terminated the proceedings for recognition and enforcement of the arbitral award in the territory of the Russian Federation, recognising Ukraine's judicial immunity in this case, as Ukraine did not provide direct consent to the jurisdiction of Russian courts.<sup>51</sup>

On 1 August 2017, Tatneft filed an appeal against that ruling of the *Arbitrazh* Court of the city of Moscow. On 29 August 2017, the *Arbitrazh* Court of the Moscow District adopted a resolution reversing the ruling of the *Arbitrazh* Court of the city of Moscow and remanded the case to the court of first instance for a new trial.

On 20 February 2018, the *Arbitrazh* Court of the city of Moscow ruled to postpone the trial of the case until 24 April 2018 having found it necessary to file an enquiry with the Federal Service for State Registration, Cadastre and Cartography of the Russian Federation regarding the official list of Ukraine's properties in the territory of the Russian Federation. Tatneft was seeking to enforce against the premises of the Cultural Centre of Ukraine in Moscow, the Ukraine Health Centre in the city of Yessentuki (Stavropol Region), the Semashko Health Centre the city of Kislovodsk (Stavropol Region) and the "Gea" Recreation Centre in the village of Natalevka (Rostov Region).

On 15 June 2018, the *Arbitrazh* Court of the city of Moscow issued a ruling transferring the suit to the *Arbitrazh* Court of the Stavropol Region (in Russian: kray) because the main asset of Ukraine not protected by that State's sovereign immunity – Semashko Health Centre – is located in that region. On 11 March 2019, the *Arbitrazh* Court of the Stavropol Region recognized and ordered to enforce the arbitral award. On 21 June 2019, the cassation court upheld that judgment. On 21 October 2019, a sole judge of the Supreme Court of the Russian Federation decided not to transfer the case for examination

to the Supreme Court's Judicial Collegium for Economic Disputes.<sup>52</sup>

### 3. Kolomoisky and Aeroport Belbek v. Russia; Privatbank and Finilon v. Russia

Belbek airport near Sevastopol is an airport of joint military-civil operation. Before 2014, it was ultimately controlled by Igor Kolomoisky, whose civil airlines used the airport for flights outside Ukraine. Since 2014, the airport has been renovated, but was not used for civil aviation. It is expected that Belbek airport will resume its operation for civil aviation flights in 2021. The construction of the civil sector of Belbek airport is planned by the federal special-purpose program for the development of the Republic of Crimea and Sevastopol. The approximate cost of that project amounts to 1.7 billion rubles. Belbek civil airport shall become a branch of the international airport Simferopol, accepting civil flights and business aviation. It is planned to construct a 500 square meter building with one boarding gate. The terminal will operate from 1 May to 30 September and will receive up to two flights during peak hours. In 2014, the military airport Belbek has been forcibly taken over by Russian troops.

Privatbank was established by Igor Kolomoisky and his business associates in 1992. Privatbank became the largest commercial bank in Ukraine, in terms of the number of clients, value of assets, loan portfolio and taxes paid to the Ukrainian budget. On 18 December 2016, the bank was nationalized by the government of Ukraine to protect its 20 million customers and to preserve financial stability in the country. A forensic audit performed by Kroll (an international detective agency) discovered that the bank had been subject to large scale coordinated fraud before nationalisation resulting in losses of at least US\$5.5 billion.

In 2014, when Crimea came under Russian control, Ukrainian banks scaled down their presence there. However, the question remained: how can private clients of those banks get back their deposits? To satisfy these debts, Russia established the Fund for Protection of Depositors in April 2014. The Fund took over the duty to pay compensations to the Crimean clients of Ukrainian banks and to represent before Russian courts their interests in collecting debts from banks. Deposits placed with Ukrainian

<sup>51</sup> Case No. A40-67511/2017. URL: <https://kad.arbitr.ru/Card/f541a5b1-ebae-4581-83f9-461efa202274> (accessed 05.12.2020).

<sup>52</sup> Cases No. A63-15521/2018, F08-4119/2019 and 308-EC19-17745. URL: <https://kad.arbitr.ru/Card/ee150159-c578-4958-9f65-692cf439cb71> (accessed 27.11.2020).

banks before 2 April 2014 were subject to compensation; the amount of payments did not exceed 700 thousand rubles per depositor in one bank.

Over the entire period of its work, the Fund for Protection of Depositors has paid out 29 billion rubles, said in early April 2017 the Minister of Economic Development of Crimea Andrey Melnikov, who previously held the post of Deputy Director General of the Russian Deposit Insurance Agency. About 219 thousand private clients received these payments by the end of 2016.

On 25 April 2014, the Central District Court of the Republic of Crimea transferred all the property of the Crimean divisions of Privatbank to the Fund for Protection of Depositors for trust management. The Fund announced a tender for the lease of three lots of Privatbank property: bank offices (39), ATMs (359) and payment terminals (557). On the same day, Privatbank posted on its website a petition addressed to Vladimir Putin with a request to allow " Bank of Moscow or any other Russian bank to become the successor of Privatbank's infrastructure, assets and liabilities in Crimea." 4.9 thousand people signed up for that petition.

In May 2014, Privatbank filed an (ultimately unsuccessful) appeal against the decision of the Crimean District Court to transfer the property of its offices on the Crimea peninsula to the Fund. In April 2016, the Fund for Protection of Depositors transferred PrivatBank's previously nationalized real estate and plots of land to the government of Crimea.

In a pair of interim awards (which remain confidential) rendered on 24 February 2017 by identically constituted arbitral tribunals (in each case: Pierre-Marie Dupuy – chair, Daniel Bethlehem – claimants' nominee, and Vaclav Mikulka – arbitrator chosen by an appointing authority), hearing these two parallel claims against Russia, certain key jurisdictional objections raised by Russia have been dismissed [Peterson:2017]. In particular, arbitrators have accepted the principle that Russia could be liable under the BIT for the mistreatment of investors in the Crimean Peninsula following the date when Russia *de jure* incorporated Crimea into the Russian Federation.<sup>53</sup> To the best of our knowledge this is the first instance where a tribunal has ruled to extend BIT protection to circumstances such as these.

The claimants in the Privatbank and Belbek airport cases are represented by the law firm Hughes

Hubbard and Kaj Hober, a Swedish lawyer and an outstanding arbitrator. Ukraine was allowed to file a third-party submission; Ukraine was represented in its intervention by Covington & Burling.

As in the Everest case, Russia has not appeared to defend itself in these cases. However, in its letters sent to the Permanent Court of Arbitration (the administering authority of these cases), Russia has contended that the "[Ukraine-Russia BIT] cannot serve as a basis for composing an arbitral tribunal to settle [the Claimants' claims]" and that it "does not recognize the jurisdiction of an international arbitral tribunal at the [PCA] in settlement of the [Claimants' claims]."

Despite Russia's failure to file a statement of defence, or to set out jurisdictional objections, the tribunals in both the Privatbank and Belbek airport cases decided to bifurcate their proceedings so as to address certain jurisdiction and admissibility issues.

The tribunals have dismissed certain of the key objections, while leaving certain other jurisdictional questions (such as the presence of protected investments) to a later phase of the case.

In particular, the tribunals have determined that Russia had obligations to protect Ukrainian investors in Crimea under the Ukraine-Russia BIT from 21 March 2014 onward. Although the claimants had pushed for an earlier date, owing to earlier Russian occupation of the territory, the tribunal pointed at 21 March 2014 – the date when Russian President Vladimir Putin signed the federal laws incorporating Crimea into the Russian Federation.

The arbitrators have held that the BIT protections can be invoked by the claimants at hand in relation to alleged mistreatment of their respective investments in banking enterprises and a commercial airport in Crimea.

The arbitrators have sidestepped the thorny question as to the lawfulness of the Russian occupation and annexation of Crimea, instead zeroing in on the effectiveness of the occupation and the consequent finding that Russia should be liable for protection of Ukrainian investors in that territory.

Ukraine had intervened as a non-disputing party in the arbitration and presented its own arguments, including ones which portrayed the occupation as unlawful, but ultimately effective, such that Russia should subsequently bear the responsibility of protecting Ukrainian investors under the BIT.

<sup>53</sup> On 21 March 2014, President Vladimir Putin signed the federal law on the ratification of the treaty on joining Crimea and Sevastopol to Russia and a federal constitutional law on the procedure for their adherence to Russia and the transitional period of their integration as new subjects of the Federation.

However, the tribunal had elected to reserve the consideration of other jurisdictional questions, including the existence of treaty-protected investments, for the merits phase of the proceeding. These remaining jurisdictional questions, as well as the liability issues have been resolved in still-unpublished awards rendered by the tribunals on 4 February 2019 [Peterson:2019].

Separate proceedings to assess the quantum of the damages to be reimbursed by Russia to the claimants will be held in each case. In the Privatbank case, the claimants are seeking in excess of \$1 billion for loss of their Crimean banking operations.

#### 4. *Lugzor & Others v. Russia.*

In this case, there are five claimants: 4 Ukrainian limited liability companies (Lugzor, Libset, Ukrinterinvest, and Aberon Ltd) and a DniproAzot, a public joint stock company.<sup>54</sup> The case was initiated in 2015 by a group of Ukrainian investors over the alleged expropriation of the claimants' real estate assets located in Crimea.

The claimants are represented by a team comprising Fieldfisher LLP, and barristers Zachary Douglas and Luis González García of Matrix Chambers. Russia relies on counsel by the Geneva office of Schellenberg Wittmer (a Swiss law firm), and by Ivanyan & Partners in Moscow.

The case is being heard by a tribunal consisting of Donald McRae (president), Bruno Simma (claimants' appointee), and Eduardo Zuleta (appointed by the appointing authority – Andrés Rigo Sureda, for Russia, as Russia initially refused to participate in the proceedings). As in the other Crimea-related cases, Russia submitted letters in August and September 2015 stating that it did not recognise the tribunal's jurisdiction. The tribunal, as in the other cases, allowed written submissions from Ukraine.

The tribunal has upheld its jurisdiction over the dispute and found the claims admissible. The specialty of this case was this: having concluded the jurisdictional hearings in July 2017, in August 2017 the tribunal informed the parties that it intended to uphold its jurisdiction but would explain its reasons in a final award in which it would also address Russia's responsibility and any resulting compensation to the claimants.

The tribunal's upholding of its jurisdiction follows in the heels of similar rulings in other Crimea-related arbitrations. However, what is unique is the tribunal's decision to issue a single final award despite bifurcating the proceedings: in the other Crimea-related arbitrations, separate jurisdictional decisions have been issued.

In November 2017, the tribunal sent several questions on responsibility and quantum to the parties, but Russia declined to submit any answers.

However, on 5 April 2019, after the tribunal invited the respondent to make comments on the claimants' costs submissions, Russia suddenly changed its defense strategy, and decided to participate in the proceedings. While re-emphasizing its position that the tribunal lacked jurisdiction over the dispute, Russia stated that "[p]articipation has simply become a practical necessity because some recent tribunal decisions have gone awry on basic principles of public international law". As a consequence, the respondent asked the tribunal to organize a new jurisdictional phase in bifurcated proceedings.

On 7 June 2019, the tribunal issued its procedural order No. 6, noting that Russia's application was submitted at a very late stage of the proceeding, when the tribunal was already preparing to render a final award. Nevertheless, the tribunal allowed Russia to make one "single, comprehensive submission on all issues of jurisdiction, admissibility, responsibility and quantum". According to a press release issued by the PCA on 28 November 2019, Russia made its comprehensive submission on 17 October 2019<sup>55</sup>.

An untrivial move was the claimants' application for a security for costs. That application was prompted by Russia's belated (April 2019) decision to participate in the proceeding, and its desire to present comprehensive legal arguments after the tribunal had already concluded its merits and damages phase and requested costs submissions in the case. The claimants protested that Russia should post security that might defray against the claimants' legal costs arising from this new phase. In two letters submitted in July and August 2019, the claimants asked the tribunal to order that Russia shall bear all costs incurred by the claimants in relation to the respondent's comprehensive submission, and they requested that Russia post security for costs equal to €200,000.

<sup>54</sup> See: IA Reporter: limited liability company Lugzor v Russian Federation. URL: <https://www.iareporter.com/arbitration-cases/limited-liability-company-lugzor-v-russia/> (accessed 01.12.2020).

<sup>55</sup> See: PCA press release: "Arbitration between limited liability company Lugzor and four others as claimants and the Russian Federation as respondent" dated 28 November 2019, URL: <https://pcacases.com/web/sendAttach/5688> (accessed 01.12.2020).

However, on 30 August 2019, the tribunal rejected the claimants' security for costs application in its procedural order No. 7 (which remains undisclosed though) [Bohmer:2019].

Finally, the tribunal decided to appoint its own quantum expert, who was allowed to make submissions during a June 2018 hearing. In January and February 2019, the claimants made their costs submissions [Bohmer:2019].

### 5. Naftogaz v. Russia.

The claim is being heard by Charles Poncet (appointed by the claimants), Maja Stanivukovic (appointed on behalf of Russia by the appointing authority) and Ian Binnie (chair), while the case is administered by the PCA.<sup>56</sup>

On 1 March 2019, Ukraine's state-owned oil & gas major Naftogaz has announced that it prevailed on the merits in an arbitration against the Russian Federation under the BIT.

According to the investor's press release<sup>57</sup>, the tribunal upheld jurisdiction over the case and found Russia liable for the expropriation of assets formerly owned by Naftogaz (and half-a-dozen related claimants) in Crimea. After that, the tribunal turned to the investor's claims for \$5 billion in damages. A dissenting opinion accompanies the award (apparently that of the arbitrator appointed on behalf of Russia), but its scope is unknown.

A visual aide included in the investor's recent press release describes the investment as including special permits for offshore exploration or for sub-soil use in the Black Sea, gas pipelines, gas stocks and supply vessels and equipment.

As in other cases arising out of its seizure of the Crimean Peninsula, Russia did not appear before the tribunal and contested its jurisdiction merely in a letter sent to the tribunal at the outset of the case.

It remains to be seen if Russia will choose to challenge the award at the seat of arbitration, in the Netherlands (Russia's challenge to the jurisdiction of a Swiss-seated tribunal operating under the same BIT failed in November 2018).

Neither party has released the partial award yet.

Naftogaz (together with its co-claimants) has an-

nounced the sum of interest claimed against the Russian Federation. In a statement released on its website on 17 February 2020<sup>58</sup>, Naftogaz revealed that it had filed its reply memorial in the latest round of submissions on quantum, claiming a total of US\$8 billion (interest included), whereas the previously reported amount of the claim was \$5 billion (US).

Notably, the statement also reveals that, despite its previous refusal to take part in the PCA-administered arbitration, in December 2019 Russia has submitted a counter-memorial on quantum (claiming that the claimants were entitled to no damages). This is coherent with Russia's decision to take a more active role in a number of Crimea-related arbitrations in which the state previously refused to participate, as illustrated by Russia's recent security for cost application in *Lugzor v. Russia* (analysed above).

According to Naftogaz, the hearing on quantum should have been held in The Hague in May 2020, while the final award can be expected in mid-2021.

### 6. Oschadbank v. Russia.

On 26 November 2018, the tribunal comprised of David Williams (chair), Charles Brower and Hugo Perezcano-Diaz found Russia liable for the expropriation of the bank's assets and business in Crimea. Oschadbank was represented by Quinn Emanuel in the arbitration proceedings.<sup>59</sup>

Russia did not originally participate in this case, but has since then hired the law firm Foley Hoag to make a request for revision, which is based on the French Code of Civil Procedure (the arbitration was seated in Paris).

The Russian government is now seeking to revise an UNCITRAL award that ordered it to pay \$1.3 billion to a Ukrainian investor – one of Ukraine's largest banks for the expropriation of its banking business and assets in Crimea. In its application dated 19 August 2019, Russia claims that new evidence has surfaced that should lead the tribunal to revise its findings of jurisdiction over the Ukrainian investor's claims under the BIT.

Russia's application is based on alleged evidence that Oschadbank's investment was made before 1 January 1992, and thus was not covered by the 1998

<sup>56</sup> See: IA Reporter. *Naftogaz v Russian Federation*. URL: <https://www.iareporter.com/arbitration-cases/naftogaz-v-russia/> (accessed 01.12.2020).

<sup>57</sup> See: Naftogaz Group press release. URL: <https://www.naftogaz.com/www/3/nakweben.nsf/0/90E8ACADAC9BA783C22583B0005C7E88?OpenDocument&year=2019&month=03&nt=News&> (accessed 01.12.2020).

<sup>58</sup> See: Naftogaz Group press release dated 17 February 2020, URL: <https://www.naftogaz.com/www/3/nakweben.nsf/0/22251098DBC9850C2258511002C1D94?OpenDocument&year=2020&month=02&nt=News&> (accessed 01.12.2020).

<sup>59</sup> See: IA Reporter: *Oschadbank v. Russian Federation*, URL: <https://www.iareporter.com/arbitration-cases/oschadbank-v-russia/> (accessed 02.12.2020).

BIT's temporal scope. The BIT's Article 12, in the version used by the tribunal, provides: "This Agreement shall apply to all investments, made by the investors of one Contracting Party in the territory of the other Contracting Party as of 1 January 1992."<sup>60</sup>

According to Russia's submission, the BIT was meant to cover investments that postdate the dissolution of the Soviet Union in December 1991, and Oschadbank's Crimean branch was established before that date, as Oschadbank was part of the former Savings Bank of the Soviet Union. Russia's application relies on a statement in this sense made by Ukraine, which suggests that the investor's home state intervened in the arbitral proceedings.

This evidence only surfaced, Russia says, when it carried out a research in Kiev in support of set aside proceedings currently pending before the Paris Court of Appeal. Russia further contended that Oschadbank hid this evidence from the tribunal and thus committed procedural fraud, which should warrant a revocation ("rétractation" in French) of the award<sup>61</sup>. Russia asks the tribunal to issue a new award confirming its lack of jurisdiction over the case.

The tribunal's orders and awards in this case remain confidential.

### 7. *Stabil & Others v. Russia; Ukrnafta v. Russia.*

In total, at least five claims under the Ukraine-Russia BIT have been brought to arbitration by companies controlled by a Ukrainian oligarch, Igor Kolomoisky. *Stabil* case is one of them<sup>62</sup>. Mr. Kolomoisky served until recently as the governor of the Dnipro (former Dnepropetrovsk) province of Ukraine, and has been in the news frequently in relation to his backing of a private militia that was mobilized to defend parts of Eastern Ukraine's from Russian-backed forces and "rebels".

*Stabil's* and *Ukrnafta's* arbitrations relate to the nationalisation of the claimants' network of petrol stations and other associated assets (including con-

venience stores and equipment at the stations, associated permits and licences, and the companies' offices). The claimants allege that the nationalisation was a result of their association with Mr. Kolomoisky.<sup>63</sup>

The claimants are represented by Hughes Hubbard & Reed LLP. In both cases (*Stabil LLC and Others v. Russia*; *PJSC Ukrnafta v. Russia*), the claimants nominated former U.S. Government official Daniel M. Price as the arbitrator. Since Russia defaulted on appointing an arbitrator, the PCA designated Singapore-based arbitrator Michael Hwang as the appointing authority. In turn, Mr Hwang then appointed Brigitte Stern as Russia's arbitrator. Subsequently, Mr. Price and Ms. Stern agreed on Swiss arbitrator Gabrielle Kaufmann-Kohler as the chair of those both arbitral proceedings.

Both cases relate to the alleged expropriation of petrol stations throughout Crimea, following Russia's 2014 takeover of that territory. On 27 June 2017, two identically-constituted tribunals rendered interim awards dismissing all objections to jurisdiction in parallel proceedings brought under the BIT.

As in other Crime-related cases, Russia has refused to participate in the arbitration proceedings on these two cases, claiming that the investments at issue do not fall under the protection of the BIT. So far, this position has not found legal support in the decisions rendered by arbitral tribunals. Similarly, the arbitrators in both cases at hand held that protection under the BIT extends to Ukrainian investors in the Crimean Peninsula from the date when Russian President signed federal laws incorporating Crimea into the Russian Federation. Moreover, the two tribunals – whose rulings are essentially identical (apart from differences in the factual description of the two claims) – found no indication that the scope of the treaty was limited to investments that were made, from the beginning, in Russian territory.

The awards (which currently remain unpublished) follow closely in the footsteps of earlier

<sup>60</sup> An online translation of the BIT, available on the UNCTAD website, contains different language: "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 1 January 1992." See: UNCTAD. URL: <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2233/download> (accessed 03.12.2020).

<sup>61</sup> Recently, a claimant successfully obtained such a *rétractation* under French law, in the case *Slim Ben Mokhtar Ghena v. Libya* (detailed information unavailable).

<sup>62</sup> The other cases are: *Igor Kolomoisky and Aeroport Belbek LLC v. Russia*, PCA Case No. 2015-07, URL: <https://pca-cpa.org/en/cases/123/> (accessed 01.12.2020); *Privatbank and Finilon v. Russia*, PCA Case No. 2015-21, URL: <https://pca-cpa.org/en/news/pca-press-release-jsc-cb-privatbank-and-finance-company-finilon-llc-v-the-russian-federation/> (accessed 01.12.2020); *PJSC Ukrnafta v. Russia*, PCA Case No. 2015-34, URL: <https://pca-cpa.org/en/cases/121/> (accessed 01.12.2020); and *Everest Estate LLC and others v. Russia*, PCA Case No. 2015-36, URL: <https://pca-cpa.org/en/cases/133/> (accessed 01.12.2020).

<sup>63</sup> See: IA Reporter: *Stabil and others v Russian Federation*. URL: <https://www.iareporter.com/arbitration-cases/stabil-and-others-v-russia/> and <https://www.iareporter.com/arbitration-cases/ukrnafta-v-russia/> (accessed 01.12.2020).

Crimea-related rulings (e.g. in the Everest Estate v. Russia case) [Hepburn, Kabra:2017]. Like the Everest Estate and other Crimea-related cases, Russia declined to participate in the arbitrations, but submitted letters in August and September 2015 stating that it did not recognise the tribunal's jurisdiction. The letters were treated as stating Russia's jurisdictional objections.

The UNCITRAL-rules tribunal, as in the other cases, also allowed written submissions from Ukraine, but a request to make oral submissions was declined. The claimants were permitted to submit the February 2017 jurisdictional decisions in the Privatbank and Belbek cases and the April 2017 jurisdictional decision in the Everest Estate case.

Given the factual and legal commonalities between the two cases, the tribunal ruled in December 2015 that proceedings in the two cases would be coordinated to avoid duplication and unnecessary costs. Accordingly, jurisdictional hearings were held jointly in July 2016, and the claimants were allowed to file a single post-hearing brief for both cases.

In a brief preliminary analysis, the tribunal referred to problems created by Russia's non-appearance in the case. It noted that, despite Russia's absence, it nevertheless had a duty to satisfy itself that it had jurisdiction in the case. This could include application of the principle of *iura novit curia*, requiring the tribunal to apply the law on its own motion even without arguments from the parties (as long as due process considerations were still satisfied).

Furthermore, as in other cases where both Ms. Kaufmann-Kohler and Ms. Stern have sat together on the tribunal (such as Quiborax v. Bolivia<sup>64</sup>), the award includes a paragraph setting out Ms. Kaufmann-Kohler's view that tribunals should ordinarily follow consistent case-law precedents "absent contrary grounds" – and a dissenting footnote from Ms. Stern clarifying her own view that cases must instead be considered "independently of any apparent jurisprudential trend".

The claimants primarily argued that the BIT's territorial scope extends to the entire territory under a State's control. In the claimants' view, Russia's *de facto* control over Crimea entitled Ukrainian investors to seek the BIT's protection for their Crimean investments.

The arbitral awards on these two cases are of interest as they may set a precedent for subsequent

awards in similar cases, in particular in the following aspects:

- Effective control doctrine;
- Territorial application of the BIT (and eventually other international treaties) in the Russian-Ukrainian context;
- Relevance and significance of unilateral declarations;
- Application of the BIT *ratione temporis*; and
- Application of the BIT *ratione personae*.

#### ***Effective control doctrine.***

Noting the claimants' argument, the tribunal first declared that in its limited mandate of determining jurisdiction under the BIT, it was not required to comment on the legality of Russia's occupation of Crimea. Instead, the tribunal was satisfied that Russia had established effective control over Crimea through a combination of physical and legal acts, including by physically occupying Crimea in February 2014, by formally incorporating Crimea into Russia under federal laws enacted in March 2014 and by adopting a constitution for Crimea, and also by repeatedly emphasizing in domestic Russian legislations that Crimea was an integral part of its territory. The tribunal was also persuaded by Ukraine's own acknowledgment that Crimea was under Russia's occupation and effective control.

#### ***Territorial application of the BIT.***

Turning next to the territorial scope of the BIT, the tribunal engaged in a detailed interpretative exercise to conclude that the BIT's protection extended to the entire territory under Russia's effective control, whether lawfully occupied or not.

Applying the rules of interpretation under the VCLT, the tribunal first found that the ordinary meaning of the term "territory" was sufficiently broad to cover the entire territory under Russia's control. Several reasons supported this conclusion, the first being that English, Russian and Ukrainian legal dictionaries defined territory without reference to the principle of sovereignty.

Secondly, the tribunal noted that the BIT applied to all territory including the states' exclusive economic zones and continental shelves "defined in accordance with international law". In the tribunal's view, this latter phrase was used in the BIT only to decipher the extent of the two states' exclusive economic zones and continental shelves, but did not qualify the term "territory". The tribunal confirmed its con-

<sup>64</sup> Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia, ICSID Case No. ARB/06/2. URL: <https://www.italaw.com/cases/885> (accessed 01.12.2020).

clusion by noting that the phrase only appeared in investment treaties that Russia had concluded with states having maritime borders with Russia.

Thirdly, the tribunal noted that the two states had tied the definition of territory to sovereignty in other investment treaties, but had not done so in the Russia-Ukraine BIT. Declarations by both Russia and Ukraine that Crimea was part of Russian territory were also found relevant.

Additionally, the tribunal looked to the VCLT's Article 29, under which a treaty is presumed to apply to a state's "entire territory". Citing the Everest Estate and Belbek cases, the tribunal noted that "entire territory" under Article 29 was not limited to territory under a state's lawful occupation. Finding no evidence of a contrary intention in the Russia-Ukraine BIT, the tribunal declared that the BIT's territorial scope therefore extended to Crimea.

Focusing next on a contextual interpretation, the tribunal noted that other provisions of the BIT linked the meaning of territory to a state's ability to legislate in a particular area. Russia was the only state with the effective ability to legislate in Crimea and had, in fact, made extensive use of this prerogative, the tribunal said.

Approaching the issue teleologically (similar to the Everest Estate case), the tribunal next stated that the BITs two-fold object and purpose – to enhance economic operation and to safeguard foreign investments – did not permit a restrictive interpretation of the BIT which "would exclude investments that ended up being located on a Contracting State's territory as the result of that State's territorial expansion". The tribunal reasoned that it would be incompatible with the BIT's purpose to "leave without protection foreign investments on a territory over which a State exercises exclusive control [...] particularly in circumstances where that State is not only the main beneficiary-State of these investments but also the only State in a position to protect foreign investments".

The tribunal buttressed its conclusion by citing *Sanum v. Laos*<sup>65</sup> (on which Ms Stern also sat), in which an UNCITRAL tribunal similarly held that extending the China-Laos BIT to Macao was perfectly compatible with that BIT's object and purpose.

### ***Relevance and significance of unilateral declarations.***

Finally, turning to a good faith interpretation of the treaty, the tribunal stated that good faith prevented Russia from "blowing hot and cold": Russia could not claim territorial control over Crimea and simultaneously deny BIT protection to Ukrainian investments there. Such an approach would be contrary to the good faith principle of consistency, the tribunal said. Drawing support from the International Law Commission's 2006 Guiding Principles Applicable to Unilateral Declarations of States,<sup>66</sup> as well as the Nuclear Tests case of the ICJ,<sup>67</sup> the tribunal held that Russia's repeated unilateral public declarations that Crimea is part of its territory gave rise to legal obligations which could be relied upon by third parties.

### ***Application of the BIT ratiōne temporis.***

In its letters, Russia appeared to object to the tribunal's jurisdiction because the claimants' investments were made in Crimea before it became part of Russian territory.

As a preliminary matter, the tribunal held that the claimants had met the only temporal condition in the BIT's Article 12 – their investments were made after 1 January 1992 (the date of dissolution of the Soviet Union).

Engaging with Russia's objection, the tribunal declared that the BIT imposed no requirement that an investment be made in the territory of the other State *ab initio*. For the tribunal, a combined reading of Article 12 and the definitions of "investment" and "territory" in Article 1 of the BIT suggested this conclusion.

Firstly, the tribunal referred back to its conclusion that Russia's territory under the BIT encompassed Crimea and that Ukrainian investments in Crimea were to be protected by Russia under the BIT from the date of Russia's incorporation of Crimea into its territory.

Secondly, the tribunal concluded that the definition of investment set a *geographical* and not a temporal limitation on the making of an investment. To support this conclusion, the tribunal pointed to certain requirements in the definition of investment, such as the duty to comply with host state legislation. The tribunal reasoned that the legality of an invest-

<sup>65</sup> *Sanum Investments Limited v. Lao People's Democratic Republic*, UNCITRAL, PCA Case No. 2013-13. URL: <https://www.italaw.com/cases/2050> (accessed 04.12.2020).

<sup>66</sup> UN General Assembly International Law Commission: Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, with commentaries thereto, adopted in 2006. URL: [https://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_9\\_2006.pdf](https://legal.un.org/ilc/texts/instruments/english/commentaries/9_9_2006.pdf) (accessed 04.12.2020).

<sup>67</sup> International Court of Justice: Case of Nuclear Tests (Australia v. France), Judgement dated 20 December 1974. URL: <https://www.icj-cij.org/en/case/58/judgments> (accessed 30.11.2020).

ment could only be tested under a host state law if the state exercised control over the area in which the investment was made.

***Application of the BIT racione personae.***

The next issue was the question of personal jurisdiction over the claimants. The tribunal held that it had to determine two questions: whether the claimants were “competent” to make the investments, as required by the BIT; and the time at which this competence must be assessed.

On the first question, the tribunal held that competence was tantamount to having legal capacity under the laws of the home state. This was swiftly held satisfied under Ukrainian law.

Turning then to the question of timing, the tribunal mused that in light of the situation’s specificity, competence could be determined at one of two times – at the time of making the investment, or at the time of Crimea’s incorporation into Russia.

However, the tribunal side-stepped a ruling on this question, holding instead that the claimants were competent to make the investments at both times. Additionally, the tribunal also held that sanctions imposed on Russia had no bearing on this question, as they were imposed after (and not on the date when) Russia took control of Crimea.

The final issue before the tribunal was whether the investments had been lawfully made. Reverting to the question of timing, the tribunal first asked whether legality should be assessed at the time when the investment was initially made (i.e. under Ukrainian law) or when Russia took control of Crimea (i.e. under Russian law).

To the tribunal, the relevant time for assessing legality was the date on which the investment came under the treaty’s protection. The tribunal found this date to be 21 March 2014, when the federal laws incorporating Crimea into Russia were signed by the Russian president.

Following this conclusion, the tribunal confirmed that the investments were lawfully made under Russian law, holding that Ukrainian investments could continue operations under transitional laws, that the requirement to re-register as a Russian company after the transition period did not affect rights during the transition period, and that the investments

qualified as foreign investments within the meaning of pre-existing Russian laws.

Thus, the tribunal therefore upheld jurisdiction in the two cases, which will now continue to the merits phase. No costs order was made at this phase of the proceedings.

***Russia’s efforts to set aside the awards on jurisdiction.***

Although Russia has not participated in these arbitral proceedings, it has since moved to set aside the awards at the seat of arbitration in Switzerland. In so doing, Russia also asked the Swiss court to stay the ongoing arbitral proceedings – which are slated to see hearings on the merits in February of 2018.

The Swiss Federal Tribunal<sup>68</sup> has first decided a cross-application by the investors seeking a security for costs order from the Russian Federation. In its ruling handed down on 23 November 2017, the Swiss court decided on the investor’s demand that Russia post a guarantee to cover any damages or costs accruing because of the set aside proceedings. The Federal Tribunal ultimately dismissed that request, after finding that Russia could rely on The Hague Convention of 1 March 1954 on Civil Procedure that shields nationals of state parties from such requests in the courts of other state parties (both Russia and Switzerland are state parties)<sup>69</sup>. The Federal Tribunal also declined Russia’s request for provisional measures suspending the arbitral proceedings.

On 16 October 2018, the Swiss Federal Tribunal declined Russia’s request to annul both awards on jurisdiction rendered of the arbitral tribunal in both cases. Notably, the Federal Tribunal considered that the territorial scope of the BIT was “dynamic”, and that the relevant territory did not have to be Russian at the time of the investment, but only at the time of the alleged breach of the BIT. Hence, the Federal Tribunal refused to set aside the two jurisdictional awards, and it ordered the Russian Federation to bear the costs of the proceedings, as well as the investors’ expenses.

In its decisions, the Federal Tribunal also rejected Russia’s petition to consolidate the two cases, considering that the parties to the two disputes were different, and that the tribunal had rendered two different awards on jurisdiction. However, the reasoning of

<sup>68</sup> According to Swiss procedural law, applications to set aside an arbitral award rendered in Switzerland shall be considered by the Swiss supreme court – the Federal Tribunal. This guarantees consistency and uniformity of application and interpretation of the local court practice dealing with such applications. Article 389 of the Code of Civil Procedure of Switzerland. URL: <https://www.admin.ch/opc/fr/classified-compilation/20061121/index.html> (accessed 01.12.2020).

<sup>69</sup> Swiss federal tribunal, case No. 4A\_396/2017, resolution dated 23 November 2017. URL: [https://www.bger.ch/ext/eurospider/live/fr/php/aza/http/index.php?highlight\\_docid=aza%3A%2F%2Faza://23-11-2017-4A\\_396-2017&lang=fr&zoom=&type=show\\_document](https://www.bger.ch/ext/eurospider/live/fr/php/aza/http/index.php?highlight_docid=aza%3A%2F%2Faza://23-11-2017-4A_396-2017&lang=fr&zoom=&type=show_document) (accessed 01.12.2020).

the Federal Tribunal is identical in the two cases, except for the summary of the facts and ruling on costs.

Before turning to Russia's jurisdictional arguments, the Federal Tribunal outlined the scope of its review of the awards under the Federal Statute on Private International Law (PILA). According to the court, an award on jurisdiction is a "preliminary award" in the sense of PILA article 190(1)(3), and can therefore only be set aside under specific circumstances (in particular, when the arbitral tribunal wrongly accepted jurisdiction over the dispute). Article 190(1)(2)(b) of PILA states that an arbitral award may be annulled "if the arbitral tribunal wrongly accepted or declined jurisdiction".

The Federal Tribunal added that it could only consider arguments advanced by the petitioner (i.e. Russia), and that it could not review any factual determinations made by the arbitral tribunal. In particular, the Federal Tribunal reasoned that it could not consider any factual arguments that had not previously been submitted to the arbitral tribunal.

As a consequence, the Swiss court considered that two factual arguments submitted by Russia which had not been raised in the arbitration proceedings were outside the scope of its analysis:

- (i) that Russia and Ukraine agreed that the BIT was not applicable to Crimea or to the city of Sevastopol and
- (ii) that Ukraine had no intention to offer protection under the BIT to Russian investors originating from Crimea.

Russia first argued that the territorial scope of the BIT only encompassed the territory of the two parties to the BIT at the time when the treaty was concluded (in 1998). Since Crimea and Sevastopol were part of Ukraine at that time, the territorial scope of the BIT did not extend to Crimea as a Russian territory.

The Federal Tribunal rejected this argument. In particular, the Swiss court agreed with the arbitral tribunal's approach, interpreting the BIT in light of general rules of public international law. Thus, the arbitral tribunal could validly find that Article 29 VCLT indicated a "dynamic" approach to the territorial application of the BIT, and conclude that the BIT applied to a territory acquired by Russia after the treaty was concluded.

The Swiss court added that Russia failed to submit any convincing argument supporting its "static" interpretation of the territorial scope of the BIT. The Federal Tribunal also rejected Russia's argument that the parties to the BIT should have concluded a special agreement regarding the application of the BIT

to Crimea when the peninsula was annexed by Russia in March 2014.

The Swiss court dedicated a major part of its analysis to Russia's second jurisdictional objection. Russia argued that the claimants' assets in Crimea did not fulfill the definition set out in the BIT since article 1(1) of the BIT defined 'investments' as "assets [which are] invested by an investor of one Contracting Party *in the territory* of the other Contracting Party". In particular, Russia submitted that the arbitral tribunal failed to consider the "temporal" and the "spatial" elements of the term 'investment'.

The Federal Tribunal declined that argument as well. The Swiss court noted that the arbitral tribunal rightly applied Article 31 VCLT to the definition of the term 'investment' in the BIT.

The Swiss court first reasoned that the ordinary meaning of Article 1(1) of the BIT did not allow a conclusion that the BIT only protected Ukrainian investments originally made in Russian territory.

The court further found irrelevant Russia's reliance on the interpretation of the term 'investment' found in an (unidentified) arbitral award rendered under the Energy Charter Treaty (ECT), considering that there was no doctrine of precedent in international investment arbitration, and that different treaties confer different meanings to the term 'investment'.

The Federal Tribunal next turned to the context of article 1(1). According to the Swiss court, a comparison between article 1(1) of the BIT (referring to assets that are "invested" in the territory of the respondent State) and article 12 of the BIT (stating that the treaty shall apply to any investment "made [...] in the territory of the other Contracting state on or after 1 January 1992") led to the conclusion that article 1(1) did not contain any temporal restriction.

The Federal Tribunal added that Russia's argument reflected an outdated conception of investments as simple cross-border transactions, and which was in contradiction to the broad definition of the term 'investment' in article 1 of the BIT.

The Swiss court also considered that the object and purpose of the BIT was to promote and protect investments, and rejected Russia's argument that a "good faith" interpretation of the BIT should lead to the denial of treaty protection to investments made by Ukrainian nationals in Crimea before the annexation. To the contrary, according to the Swiss court, Russia's interpretation of the BIT would lead to a territorial and temporal restriction of the scope of the treaty brought about by the respondent State, which would contradict the principle of good faith as well as the object and purpose of the BIT.

The Federal Tribunal concluded that the claimants' assets were 'investments' in the sense of the BIT despite the fact that Crimea was a Ukrainian territory at the time of the investment.

Finally, Russia also contested the jurisdiction of the arbitral tribunal on the basis that the claimants were not 'investors' in the sense of the BIT.

The Swiss court noted that Russia did not challenge the claimants' link with Ukraine, but based its argument only on the allegation that the claimants never made a protected investment in Russia. Considering that it had already found that the claimants had made a protected investment, the Federal Tribunal rejected Russia's third argument.

Noting that Russia's request had been rejected in its entirety, the Federal Tribunal ordered Russia to pay the costs of the court proceedings in the amount of 110,000 Swiss Francs in the case of Stabil LLC and Others, and in the amount of 115,000 Swiss Francs in the case of PJSC Ukrnafta.

The court also ordered Russia to pay compensation for the proceedings in the amount of 160,000 Swiss Francs to Stabil LLC and Others, and compensation in the amount of 165,000 Swiss Francs to PJSC Ukrnafta.

#### ***Outcome of the arbitration cases.***

As to the merits of the case, while neither final award has been released, Ukrnafta has confirmed certain details in a public statement<sup>70</sup>. (The Stabil case had broadly the same outcome.) In both cases, the unanimous tribunal held Russia liable for an expropriation under Article 5 of the BIT. In so doing, the tribunal saw no need to rule on other claims for treaty breach made by the respective claimants.

In the Ukranafta case, the claimant was awarded some \$44.4 million (US), as well as \$5.5 million in accrued interest to date, and a further \$3.5 million in costs.

In the Stabil case, the claimants were awarded \$34.5 million in base compensation, and then a similar total sum for interest and costs.

Thus, Russia's liability arising out of the two cases approaches \$100 million (US).

#### ***Attempts to set aside the awards on the merits.***

On 16 December 2019, in two recent decisions, the Swiss Federal Tribunal found that Russia could not raise corruption allegations to set aside the final awards in both cases – Stabil & Others and Ukrnafta – since those allegations had not previously been submitted to the arbitral tribunal. The Federal Tribu-

nal also rejected Russia's argument that the dispute concerned the status of the Crimea peninsula, which was not arbitrable.

This time, the Federal Tribunal was composed of judges Christina Kiss, Fabienne Hohl, and Martha Niquille, who also sat on the tribunal which rendered the October 2018 decisions. However, the two other judges who sat on the October 2018 tribunal, Kathrin Klett and Marie-Chantal May Canellas, were not involved. (Ms. Klett dissented from the tribunal's October 2018 decisions.)

In the Swiss proceedings, the Ukrainian companies were represented by Lalive. Russia relied on counsel by Schellenberg Wittmer.

Russia argued that the 2019 merits awards must be set aside for two reasons:

- Igor Kolomoisky, a beneficial owner of the Ukrainian claimant companies, had allegedly acquired his wealth through fraudulent schemes and corruption, and that this warranted the annulment of the award; and
- the awards must be annulled since the dispute related to the status of the Crimean Peninsula and was therefore not arbitrable before an investor-state tribunal, as Article 13 of the BIT reserved such matters for the contracting states.

Regarding the respondent's first argument, the Federal Tribunal first set out a number of principles under the Swiss arbitration law. In particular, the court stressed that the set-aside procedure must be distinguished from an appeal, that the Federal Tribunal did not have the power to review any factual determinations made by the arbitral tribunal, that the applicant was not allowed to substantially supplement its challenge in its reply, and that the applicant must rely on grounds for annulment which were explicitly mentioned in Article 190(2) of PILA.

The court reasoned that Russia disregarded these principles when it sought to rely on a number of belatedly-submitted documents in order to support its contention that Mr. Kolomoisky had allegedly been involved in acts of corruption and fraud.

In addition, the Federal Tribunal stressed that Russia refused to participate in the arbitral proceedings, and that it therefore deliberately chose not to raise these allegations before the arbitral tribunal. As in other Crimea-related proceedings, Russia refused to participate in these two arbitration proceedings. However, more recently, Russia opted for a different strategy, as it belatedly decided to participate in an-

<sup>70</sup> See: Ukrnafta press release dated 16 April 2019. URL: <https://www.ukrnafta.com/en/ukrnafta-defeats-russian-federation-in-an-international-arbitration-tribunal> (accessed 01.12.2020).

other Crimea-related arbitration (e.g. *Lugzor & Others v. Russia*).

Thus, the Federal Tribunal concluded that Russia's allegations could not be heard for the first time in these set-aside proceedings. Russia's further argument that the award violated Swiss public policy because of Mr. Kolomoisky's alleged wrongdoing was therefore also unfounded, the judges held.

Turning to Russia's second argument, the Federal Tribunal reasoned that the dispute did not concern the status of Crimea under the BIT, but merely the Ukrainian companies' claims for damages. Thus, according to the Swiss court, the claims were "of financial interest" and therefore, according to PILA Article 177(1), could be submitted to arbitration.

The Federal Tribunal added that, in reality, Russia was once again contesting the findings of the 2017 jurisdictional awards, which had already been upheld by the Swiss court in its October 2018 decisions. Thus, the Federal Tribunal declined to examine this question anew, merely pointing out again that the arbitral tribunal could validly decide that, as of 2014, Crimea was part of Russia's territory for the purpose of the BIT's temporal application.

Noting that Russia had not prevailed in its set-aside applications, the Federal Tribunal reckoned that it must bear the costs of the two set-aside proceedings (amounting to CHF 190,000 total), and also compensate the Ukrainian companies for their legal costs (CHF 285,000 total).

### 8. *Ukrenergo v. Russia*.

As compared to the cases described in the previous section, little is publicly known about the case at hand.<sup>71</sup> On 27 August 2019, Ukrenergo, an Ukrainian state-owned energy company, commenced

an arbitration against Russia under the BIT [*Hepburn:2019*]. The company is seeking compensation for the alleged seizure by Russia of its trunk power grids in Crimea and Russia's alleged failure to grant "full-fledged and unconditional legal safeguards" in accordance with the BIT.

Ukrenergo has recently revealed that an arbitral tribunal is in place to hear its claims against the Russian Federation under UNCITRAL Arbitration Rules. In its press release dated 31 July 2020<sup>72</sup>, the claimant disclosed that the tribunal is composed of American arbitrator Brian King (claimant's nominee), Gabriel Bottini (respondent's nominee) and Lawrence Collins (chair).

The claimant also revealed that the tribunal rejected Russia's request for leave to apply for a bifurcation of the proceedings at this stage. The tribunal will decide on the procedural calendar (including on the bifurcation of the proceedings) once the claimant files its statement of claim.

Ukrenergo is relying on counsel from Lalive. Russia is represented by Ivanyan & Partners.

### Conclusion

Like in the *Arctic Sunrise* arbitration, Russia initially decided not to participate in the arbitration proceedings instituted by Ukrainian investors in connection with taking of property in Crimea. This is not the first time our home country did so: another notorious example is the *Lena Goldfields* arbitration in 1930s.<sup>73</sup> There was only one reason for Russia's non-participation in those international investment arbitration proceedings related to Crimea: Russia's fear that the arbitral tribunals will assess whether, under international law, the taking over of Crimea is

<sup>71</sup> See: IA Reporter: *Ukrenergo v. Russian Federation*. URL: <https://www.iareporter.com/arbitration-cases/ukrenergo-v-russia/> (accessed 01.12.2020).

<sup>72</sup> See: Ukrenergo press release dated 31 July 2020. URL: <https://ua.energy/21688-78/international-arbitral-tribunal-starts-proceedings-on-the-loss-of-ukrenergo-s-assets-in-crimea/> (accessed 01.12.2020).

<sup>73</sup> Arthur Nussbaum, *Arbitration Between the Lena Goldfields Ltd. and the Soviet Government*, 36 *Cornell L. Rev.* 31 (1950) Available at: <http://scholarship.law.cornell.edu/clr/vol36/iss1/2> (accessed 01.12.2020). In the *Lena Goldfields* case, the Soviet Government, in its answer of 25 February 1930, agreed without qualification to the submission of the claims to arbitration, itself setting forth further issues by way of defense and counterclaim. Moreover, the Soviet Government appointed Dr. Chlenow as its arbitrator, agreed upon Professor Stutzer as the chairman, and requested him to fix the hearing for 9 May 1930. These measures of the Government amounted to a binding, that is, irrevocable, admission of the tribunal's competence over Lena's claims made known to the Government. However, later on, the Soviet Government not only failed to appear at the hearing, but also prevented an arbitrator it had initially appointed – Dr. Semyon Borisovich Chlenow (1890 – shot on 3 June 1937) – to participate in the arbitration proceedings. Dr. Chlenow was Chief Legal Adviser under the People's Commissariat for Foreign Trade and a Professor of International Law. He has been arrested in August 1936 on charges of counter-revolutionary terrorist activities. In March 1991 he was rehabilitated "for lack of corpus delicti". In 1919, Chlenow published a brochure (about 90 pages) called 'Московская охранка и её секретные сотрудники. По данным Комиссии по обеспечению нового строя'. The brochure contained lists of employees of the Guard Division (*okhranka*, kind of secret service) of the Tsarist Russia police.

lawful. Because the arbitral tribunals typically consist of the representatives of the Anglo-Saxon / European doctrines of international law which are 'hostile' to the Russian official doctrine (i.e. that the people of Crimea exercised its right to self-determination), such tribunals may well decide that the taking over of Crimea was contrary to Russia's obligations under international law.

Anyway, when deciding not to participate in the arbitration proceedings, Russia placed itself in a very fine society: China did not participate in the *South China Sea* case (Philippines v. China; final award rendered on 12 July 2016), US refused to participate in the merits phase of the *Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua v. United States*) case before ICJ; Israel has chosen not to participate in the proceedings before ICJ on the advisory opinion in the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* case. The problem with non-participating is that the respondent deprives himself of the opportunity to be heard by the tribunal. If the respondent raises objections at a later stage, this may be too late, as the arbitral tribunals rules in some of the 10 cases analysed above.

However, the arbitral tribunals elegantly bypassed the tricky question of whether or not the taking over of Crimea constitutes annexation and/or whether it was contrary to international law, by stating that this question is not arbitrable at all. Once Russia realized that this danger did not materialize, it started to not simply object, by submitting relatively concise letters to the arbitral tribunals, against the jurisdiction of those tribunals (as Russia did before), but also to use all possible endeavors to:

- challenge the jurisdiction of those tribunals;
- request the bifurcation of the proceedings;
- raise arguments on why the claim shall be dismissed on the merits;
- explain why the quantum shall be as low as possible;
- attack the awards in the course of set-aside proceedings;
- avoid enforcement of the awards, also using 'proxy wars' (e.g. enforcement of the arbitral award in the *Tatneft v. Ukraine* case).

At the first glance, these tactics is wise and efficient, but in a longer run they turn out not to be that wise and efficient at all. First, it would be fair to

compensate a nationalized / expropriated owner. So why shall the State spend so many efforts in trying to defend a non-defendable position? No information is available whether anyone conducted a cost/benefit analysis of engaging in lengthy arbitration proceedings which trigger high expenses for the State and the taxpayers. (The question is of course what is the adequate amount of compensation.) Second, such behaviour may threaten conservative foreign investors who may be willing to invest in our country, if no such investment arbitration cases were brought. In the light of overall negative publicity surrounding Russia's international relations, why should the State create, by its deliberate actions, an additional point of tension for years? Third, the findings of the arbitral tribunals in the Crimea-related cases may be dangerous also in the context of other disputes in which Russia is involved. For instance, based on the effective control doctrine, investors whose property was taken in so-called Donetsk and Luhansk People's Republics (on in other territories de facto controlled by Russia, such as – as ECHR found couple of times already – Abkhazia, South Ossetia, Transnistria) by the local authorities, may also sue Russia on the basis of BITs, although these territories are not part of Russia (yet).

As to Russia's position on confidentiality in international investment arbitration is expressed in its Statement on specific initiatives within the framework of UNCITRAL's Working Group III in relation to the reform of investment arbitration<sup>74</sup>. "10. Currently, participants in proceedings may select the procedural rules applicable to examination of the dispute, determine whether the proceedings will be **confidential** and whether they should include a disclosure phase, choose the language of the proceedings and determine the place and format of the arbitration".

However, we see contradiction in Russia's position in the Statement as compared to its behaviour in reality. In this Statement, the right to select arbitrators is protruded as a crucial advantage of the existing system of resolution of disputes between foreign investors and host states: "6. The direct involvement of the parties to a dispute in the selection of decision makers enables the parties to take into account many factors that are important to them. This ultimately determines the degree of confidence among parties to disputes, and among the wider public, in the arbi-

<sup>74</sup> See: Statement of the Russian Federation on specific initiatives within the framework of UNCITRAL in relation to the reform of investment arbitration dated 2019. URL: <https://documents-dds-ny.un.org/doc/UNDOC/LTD/V20/001/55/PDF/V2000155.pdf?OpenElement> (accessed 01.12.2020).

tration mechanism for dispute resolution”. However, as we can conclude from the analysis above, in the majority of Crimean cases, at least at the outset, Russia rarely used this opportunity and joined the proceedings after the tribunal had been formed.

Finally, as regards potential recognition and enforcement of anti-Russia arbitral awards in the Crimea-related (and other) cases, in July 2020, amendments to the Constitution were adopted. According to them, the Constitutional Court of the Russian Federation shall decide whether a decision of a foreign or international (interstate) court, a foreign or international arbitration court (arbitration) imposing obligations on the Russian Federation shall be executed, if such decision contradicts the foundations of public order of the Russian Federation (Article 125 para. 51). According to Article 79 (last sentence) of the new version of the Russian Constitution, decisions of interstate bodies adopted on the basis of the provisions of international trea-

ties to which Russia is a party, shall not be executed in Russia, if the interpretation of such provisions in such decisions is contrary to the Russian Constitution. Thus, the likelihood that Russia may voluntarily honour the arbitral awards rendered in the cases described above is very minor. Noteworthy, on 30 November 2020 the Russian Government asked the Constitutional Court to clarify the latter’s resolution No. 8-P dated 27 March 2012 which deals with the provisional application of international treaties.<sup>75</sup> Sergey Glandin, commenting on this news, believes that this is a disguised request from the Government on the possibility of non-enforcement of the arbitral awards in the YUKOS case.<sup>76</sup>

As a final remark, we see two strategies which Russia may potentially choose. The first one is to denounce all international treaties which allow PCA to arbitrate the disputes. The second one is to actively join the proceeding from the date when it receives the notice for arbitration and to defend till the end.

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<sup>75</sup> URL: <http://www.ksrf.ru/ru/Sessions/Plan/Pages/default.aspx>.

<sup>76</sup> URL: <https://openmedia.io/news/n3/gaage-otvetit-zorkin-pravitelstvo-mozhet-poluchit-v-ks-indulgenciyu-na-otkaz-platit-yukosu-50-mlrd/> (accessed 04.12.2020).

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