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IN JURISDICTION RULING, ARBITRATORS RULE THAT RUSSIA IS OBLIGED UNDER BIT TO PROTECT UKRAINIAN INVESTORS IN CRIMEA FOLLOWING ANNEXATION

Mar 09, 2017 | By [Luke Eric Peterson](#)



Case(s) discussed in this article: [Kolomoisky and Aeroport Belbek v. Russia](#), [Privatbank and Finilon v. Russia](#), [Everest Estate and others v. Russia](#)

In a pair of rulings rendered on February 24, 2017 by identically-constituted tribunals hearing parallel claims against the Russian Federation, certain key jurisdictional objections have been dismissed.

In particular, arbitrators have accepted the principle that Russia could be liable under the Ukraine-Russia BIT for the mistreatment of investors in the Crimean Peninsula following the date when Russia signed decrees incorporating the contested territory into the Russian Federation.

This appears to be the first instance where a tribunal has ruled to extend BIT protection to circumstances such as these.

Claims arise out of banking and airport investments, with Russia denying jurisdiction but not appearing in the arbitrations

The legal developments come in the cases of Igor Kolomoisky and Aeroport Belbek LLC v. Russia and Privatbank and Finilon v. Russia, a pair of arbitrations initiated in 2015 under the Ukraine-Russia bilateral investment treaty.

As [previously reported](#), a tribunal of Pierre-Marie Dupuy (chair), Daniel Bethlehem (claimant's nominee), and Vaclav Mikulka (arbitrator chosen by an appointing authority), were hearing each of these cases.

Although the Russian Federation has not appeared to defend itself in the cases, in letters sent to the Permanent Court of Arbitration, 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.

Tribunal sidesteps ruling on lawfulness of occupation and annexation, but sees it as effective – with legal consequences under BIT

In the recently-rendered interim awards, the tribunals have dismissed certain of the key objections, while apparently leaving certain other jurisdictional questions (such as the presence of protected investments) to a later phase of the case.

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

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

Until *IAREporter* can see copies of the interim awards – which remain for now confidential – the detailed reasoning of the arbitrators in reaching the above conclusions remains unclear.

However, it appears that 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.

(The state of 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).)

The claimants in the Privatbank and Belbek airport cases are represented by the law firm Hughes Hubbard and Swedish lawyer and arbitrator Kaj Hober. Ukraine was represented in its intervention by Covington & Burling.

Notably, the struggling [Privatbank was nationalized by Ukraine in late 2016](#), thus seemingly bringing the state of Ukraine into a different relationship to that particular BIT case.

At least five other Ukraine-Russia BIT cases arising out of Crimean events are ongoing, with decisions looming

A number of other Crimea-related claims are also in arbitration under the same treaty before other tribunals, [including a pair of cases chaired by Gabrielle Kaufmann-Kohler \(sitting along side co-arbitrators Daniel Price and Brigitte Stern\)](#) where jurisdictional hearings were held in the same month, August 2016, as the hearings in the above-discussed Privatbank and Belbek airport cases.

Those two further cases, the Ukrnafta case and the Stabil and others case, are also brought by entities controlled by Ukrainian oligarch Igor Kolomoisky and pertain to the loss of petrol stations in Crimea.

Yet another case brought by Kolomoisky interests, the Everest Estates LLC and others case ([discussed here](#)), pertains to real estate investments in Crimea, and saw hearings held in December of 2016 by a tribunal comprised of Andres Rigo Sureda (chair), Michael Reisman (claimant's nominee) and Rolf Knieper (nominee selected by appointing authority).

As we've reported, two further Crimea-related cases are also on foot, including [an ongoing claim by state-owned bank, Oschadbank](#), being heard by a tribunal of David A.R. Williams (chair), Charles N. Brower and Hugo Perezcano Diaz, and another claim by Limited Liability Company Lugzor LLC and others, being heard by a tribunal of Donald McRae (chair), Bruno Simma, and Eduardo Zuleta.

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