INVESTIGATION: FULL JURISDICTIONAL REASONING COMES TO LIGHT IN CRIMEA-RELATED BIT ARBITRATION VS. RUSSIA

Nov 09, 2017 | *By Jarrod Hepburn*
Case(s) discussed in this article: Everest Estate and others v. Russia

IAReporter can now reveal the full reasoning of a March 20, 2017* jurisdictional decision holding that the Russia-Ukraine bilateral investment treaty applied to investments made in Crimea by Ukrainian investors before Russia's 2014 annexation of the peninsula.

As we reported earlier this year (see here), the UNCITRAL-rules tribunal unanimously affirmed its jurisdiction in the case of Everest Estate LLC and others v. Russia. Following a detailed review of the award, which remains unpublished for now, we discuss below the tribunal's reasoning for its decision.

Notably, the decision 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'.

Since the jurisdictional ruling, arbitrators have held merits hearings in the case. The Permanent Court of Arbitration recently announced that those hearings were held in early October 2017, without Russia's participation, and post-hearing submissions are due by December 11, 2017.

As we have chronicled, and also note at various junctures below, the Everest case is merely one of a number of similar Crimea-related claims pending against Russia under the Ukraine-Russia BIT.

Russia declines to participate in claims prompted by Crimea annexation

Everest Estate, along with seventeen other Ukrainian-registered companies and a Ukrainian individual, Alexander Dubilet, commenced their joint claim against Russia in June 2015, following the physical occupation of the Crimean peninsula by Russia in February 2014 and the subsequent annexation of the territory under Russian law in March 2014. 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.

As in other similar cases relating to Crimea (see here), Russia did not participate in the arbitration at all, except to submit a letter in August 2015 stating that '[i]t is manifest that such claims cannot be considered under the [BIT]'.

The claimants appointed Michael Reisman as their nominated arbitrator in the case. In default of Russia's appointment, Michael Hwang, the appointing authority selected by the PCA, named Rolf Knieper to the tribunal. The co-arbitrators then agreed on Andres Rigo Sureda as chair.

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) then determined on its own motion that it would bifurcate the case to address this jurisdictional objection in a preliminary phase.

In November 2016, the tribunal ruled that it would accept a written submission from Ukraine in the case, although the investors' home state was denied the possibility to present oral submissions. Jurisdictional hearings were held in December 2016, again in Russia's absence.

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

Claimants say *de facto* control of Crimea is enough for BIT jurisdiction

In their filings, the claimants espoused the general principle that treaties are binding on a state in respect of its entire territory. Since Russia claimed Crimea now as an integral part of its territory, 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 for *de facto* exercises of jurisdiction over territory, meaning that 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 and the International Court of Justice 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' for BIT purposes was movable over time, and their investments in Crimea (ie, 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 Certain German Interests case of the Permanent Court of International Justice, where the court 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, which held Ethiopia responsible 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.

Tribunal confirms its jurisdiction despite Russian non-participation

The tribunal firstly 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, thus construing Russia's letter not as a rejection of a dispute 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 submission) 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'.

All parties agree that BIT applies to Crimea; question is *timing* of investment

Turning to more central issues, the tribunal then considered whether the investments were investments in Russian territory, as required for protection under the BIT.

Applying the general principle in the Vienna Convention on the Law of Treaties, cited by the claimants, 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, noting that Russia and Ukraine both agreed that the BIT applied to Crimea. (Ukraine's submission 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.

BIT purposes better achieved by extending protection to pre-annexation Ukrainian investments

Assessing this, the tribunal first gave an example from the law of armed conflict, noting that states could assume obligations towards the inhabitants of a territory by occupying that territory. The occupation thus created obligations for the occupying state that did not previously exist, the tribunal said.

The tribunal then noted that the claimants clearly must make an investment, ie a transaction 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 respondent's territory by the time of the alleged breach.

The tribunal also cited the PacRim v El Salvador case (see here), noting that 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'.

(Whether any nationalisation or expropriation actually occurred still presumably remains for determination on the merits of the case.)

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, as we discussed, the tribunal did not nominate a specific day from which Russia was bound by BIT obligations in respect of Crimea.)

Investments are lawful under Russian law

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.

Tribunal follows Abaclat and Ambiente Ufficio on multi-party arbitrations

In a final issue addressed, 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, 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 (hypothetical) objection from Russia was also rejected.

Other Crimea claims continue

Numerous other claims remain on foot against Russia in relation to Ukrainian investments in Crimea.

The Privatbank and Belbek cases mentioned above (similarly connected to Mr Kolomoisky, as alleged in the Everest Estate case) are still pending in their merits phases, following jurisdictional decisions in February 2017. Meanwhile, we reported on a June 2017 decision upholding jurisdiction in the Ukrnafta and Stabil cases, where the claimants are also controlled by Mr Kolomoisky.

Cases brought by Oschadbank (see here) and Lugzor LLC are also pending at earlier procedural stages, and a preliminary notice of dispute was filed by DTEK Krymenergo earlier this year (see here).

* [Update June 12, 2019: An earlier version of this article said that the tribunal's ruling on jurisdiction was dated from April 2017. It has since surfaced that the decision's date is March 20, 2017.]