

Home / News

INVESTIGATION: FURTHER RUSSIA INVESTMENT TREATY DECISIONS UNCOVERED, OFFERING BROADER WINDOW INTO ARBITRATORS' APPROACHES TO CRIMEA CONTROVERSY

Nov 17, 2017 | By Jarrod Hepburn And Ridhi Kabra

Case(s) discussed in this article: [Ukrnafta v. Russia](#), [Stabil and others v. Russia](#)

Following further investigation by *IAReporter*, we can now reveal the full reasoning of a pair of rulings rendered on June 26, 2017 by identically-constituted tribunals dismissing all jurisdictional objections in parallel [proceedings](#) brought under the Russia-Ukraine bilateral investment treaty.

Arbitrators in the cases brought by PJSC Ukrnafta and Stabil LLC held that protection under the treaty extends to Ukrainian investors in the Crimean Peninsula from the date when Russia signed a decree 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The new rulings (which currently remain unpublished) follow closely in the footsteps of earlier Crimea-related rulings, one of which we recently discussed in detail (the Everest Estate v. Russia case, [see here](#)).

Like the Everest Estate and other Crimea-related cases ([see here](#)), 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' law firm, Hughes Hubbard & Reed LLP, was 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.

Claims arise from investments in petrol stations and are being heard in coordination

As we previously [reported](#), these arbitrations were initiated in 2015, the first by PJSC Ukrnafta, and the second by a group consisting of Stabil LLC and ten other companies. The claims relate to the nationalisation of the claimants' network of petrol stations and other associated assets (including convenience stores and equipment at the stations, associated permits and licences, and the companies' offices). The claimants (like the Belbek, Privatbank and Everest Estate claimants) are associated with Ukrainian oligarch Igor Kolomoisky, and allege that the nationalisation was a result of this association.

Both cases are being heard by a Geneva-seated tribunal comprising [Daniel Price](#) (claimants' appointee), [Brigitte Stern](#) (appointed by [Michael Hwang](#), the appointing authority designated by the Permanent Court of Arbitration after Russia failed to appoint its arbitrator), and [Gabrielle Kaufmann-Kohler](#) (chair, appointed by the co-arbitrators).

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.

Tribunal supports *iura novit curia* and (by majority) duty to follow prior case-law

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](#)), 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".

Russia has effective control over Crimea

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.

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 a March 2014 decree and by adopting a constitution for Crimea, and also by repeatedly emphasising 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.

"Territory" covers the entire territory under Russia's control

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 Vienna Convention on the Law of Treaties (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 conclusion by noting that the phrase only appeared in investment treaties that Russia had concluded with states having maritime borders with Russia. (As we've reported [here](#), this issue was left undecided in the Everest Estate case.)

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.

Ability to legislate in an area is key

Focussing 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.

Extending protection to Ukrainian investments in Crimea is compatible with the BIT's object and purpose

Also approaching the issue teleologically (similar to the Everest Estate case), the tribunal next stated that the BITs two-fold object and purpose of enhancing economic operation and safeguarding foreign investments did not permit a restrictive interpretation of the BIT that "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* (on which Ms Stern also sat), in which an UNCITRAL tribunal similarly held that extending the China-Laos BIT to Macao was compatible with that BIT's object and purpose (see our report [here](#)).

Good faith prevents Russia from claiming control of Crimea but at the same time denying BIT protection to Ukrainian investments

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, as well as the Nuclear Tests case of the International Court of Justice, 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.

Tribunal can exercise temporal jurisdiction over pre-existing investments in newly-acquired territory

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 January 1, 1992 (the date of dissolution of the Soviet Union).

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

Claimants were competent to invest in Crimea both at the time of making the investment and when Crimea was occupied by Russia

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. (The Everest Estate tribunal similarly [noted](#) that Ukrainian law did not prohibit investment in Crimea even after the annexation.) 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.

Russian law relevant to determine legality of investments

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 March 21, 2014, when the decree incorporating Crimea into Russia was signed by the Russian president.

(The [Privatbank and Belbek](#) tribunals nominated the same date, but the [Everest Estate](#) tribunal did not designate a specific day from which Russia was bound to protect Ukrainian investments in Crimea under the BIT.)

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.

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.

Email Alerts

 I agree to IAREporter's [Privacy Policy](#) and to receive emails from IAREporter.[Sign up now](#)

What we do

Investment Arbitration Reporter is a news & analysis service tracking international arbitrations between foreign investors and sovereign governments.

IAReporter is used by the world's largest law firms, dozens of government agencies around the world, and numerous academic institutions. We offer proprietary insight into the breaking legal developments and policy trends in investment treaty arbitration.

Our service is renowned for its investigative focus: offering a window into otherwise confidential proceedings. We also offer timely and nuanced reports on the very latest legal pleadings, decisions and arbitral awards - typically before they've been discussed anywhere else.

[Click here for more info](#)

Browse News By Theme

Editor's Picks

- [▶ Analysis: Tribunal in *Curis v. Libya* award draws contrast with *Cengiz* award on FPS interpretation and sides with majority of prior *Libya* awards with respect to war losses clause](#)
- [▶ For the first time, an arbitrator declines jurisdiction under an intra-EU BIT – but majority disagrees](#)

We Recommend:



Comprehensive Public Database of Awards & Materials