

Annexation of Crimea and International Investment Law



Crimea-related cases

- Aeroport Belbek & Kolomoisky v Russia (commercial passenger terminal)
- Privatbank v Russia (Kolomoisky) (banking operations)
- Ukrnafta v Russia (Kolomoisky) (ownership of petrol stations)
- Stabil et al v Russia (Kolomoisky) (ownership of petrol stations)
- Everest Estate LLC et al. v Russia (Kolomoisky) (ownership of real property)
- Naftogaz et al v. Russia (energy assets)
- Oschadbank v Russia (bank branch)
- Lugzor et al v Russia (real estate)

The Crimea conflict



22 February 2014 – President Yanukovich fled Ukraine as a result of civil unrest

27 February 2014 – “Little green men” in masks occupy key strategic objects in Ukraine

16 March 2014 – referendum in Crimea

17 March 2014 – declaration of independence by the Supreme Council of Crimea and the Sevastopol City Council

18 March 2017 – Treaty on the Adoption of the Republic of Crimea to Russia

15 April 2017 – Ukrainian parliament declared Crimea as occupied territory

Crimea-related cases: general overview



- Tribunals composed of well-known western arbitrators
- Alleged jurisdiction basis: Russia-Ukraine BIT of 27 November 1998
- UNCITRAL Arbitration Rules (except for Naftogaz – under SCC Rules)
- Most claimants are members of Igor Kolomoisky's group of companies
- Claimants contend that protection of their investments falls to Russia under the BIT because Crimea is now part of Russia
- Russia does not participate in the proceedings

1998 Russia-Ukraine BIT

- "**Investments**" shall denote all kinds of property and intellectual values, which are put in by the investor of one Contracting Party on the territory of the other Contracting Party in conformity with the latter's legislation.
- "**Territory**" shall denote the territory of the Russian Federation or the territory of the Ukraine and also their respective exclusive economic zone and the continental shelf as defined **in conformity with the international law**.
- The claimants in the BIT cases: the substantive protections of the relevant treaty apply to the occupied territory.

Potential jurisdictional objections in Crimea cases

- The **treaty does not apply in the annexed territory**. That would be inconsistent with the Russia's claim for the territory. Non-appearance was chosen as the main strategy.
- A tribunal cannot hear a claim if deciding the claim would require the tribunal to make a legal determination in relation to **the underlying territorial dispute**.
- Violations took place when the territory was under **Ukraine's sovereign control**.

Relevant principles

- Supervening impossibility of performance (Articles 61 of the VCLT)
- Treaties to become inapplicable because of a fundamental change of circumstances (*rebus sic stantibus*) (Article 62 of the VCLT)
- An armed conflict may lead to the suspension or termination of an investment treaty, this is not an automatic process.
- If a unilateral suspension or termination were to take effect, this would not prejudice the application of an investment treaty's **survival clause**.

Vienna Convention on Succession of States in respect of Treaties – new States

- Continuity approach
- Clean slate approach
- Outside the colonial context, and outside the relatively narrow exception of Article 34(2)(b) of the Vienna Convention on Succession of States in respect of Treaties, new States are presumed to continue all treaty rights and obligations of their predecessors, irrespective of whether these derive from multilateral or bilateral agreements.
- Can Crimea be regarded as a new State under international law?
- More complications as it becomes a part of Russia.

Vienna Convention on Succession of States in respect of Treaties – transfer of territory

- “When part of the territory of a State ... becomes part of the territory of another State,’ **the treaties of the ‘predecessor State** cease to be in force’ and the **‘treaties of the successor State** are in force in respect of the territory to which the succession of States relates from the date of the succession of States’” (Article 29 of the Vienna Convention on Succession of States in respect of Treaties)
- This rule would not apply if either **‘incompatible with the object and purpose** of the treaty or would **radically change the conditions for its operation’** (Article 17(2) of the Vienna Convention on Succession of States in respect of Treaties)

Military occupation of territory

- State succession to treaties does not apply to situations of **military occupation** of territory (Article 40 the Vienna Convention on Succession of States in respect of Treaties) to preclude the validation in law of the situation created in fact.
- According to the Vienna Convention on Succession of States in respect of Treaties Article 6, the Convention ‘applies only to the effects of a succession of States occurring **in conformity with international law**’.
- Territory” refers to territories over which the treaty party has sovereignty in accordance with international law (Art 15 *ibid*; Art 29 of the VCLT)
- The conduct of the occupying State is governed by the regime of **belligerent occupation, human rights law and international humanitarian law**.

Illegal Occupation under International Law

- Annexations procured by force are illegal and must not be recognized as lawful by third States.
- ‘No territorial acquisition or special advantage resulting from aggression is or shall be recognized as lawful’ UNGA Res 3314, 14 December 1974, Definition of Aggression; also Arts 40, 41 of the ILC, Articles on Responsibility of States for Internationally Wrongful Act
- Ukraine would not accept State succession in relation to Crimea.

UN General Assembly resolution 68/262 on the territorial integrity of Ukraine (27 March 2014)

- The referendum held in Crimea has **no validity** and cannot form the basis for any alteration of the status of Crimea or of the city of Sevastopol.
- Calls on all States to “desist and refrain” from actions aimed at the partial or total disruption of Ukraine’s national unity and **territorial integrity**, “including any attempts to modify Ukraine’s borders through the threat or use of force or other unlawful means.”
- Explicit reference to the primacy of the **UN Charter**’s call for the preservation of the unity and territorial integrity of all UN Member States.

Articles on the Effects of Armed Conflict on Treaties (AREAC)

- Investment treaties typically do not contain provisions that protect investors in situations of armed conflicts
- AREAC adopted by the UN General Assembly in 2011 and aimed to codify customary international law with respect to "the effects of armed conflict on the relations between States under a treaty
- Article 2 of the Articles: The existence of an armed conflict **does not ipso facto terminate or suspend the operation of treaties:** (a) as between States parties to the conflict; (b) as between a State party to the conflict and a State that is not.
- Russia-Ukraine BIT states that "[w]ith respect to the investments which were carried out before the termination of this Agreement ... the provisions of all other Articles...shall remain valid within the next ten years after that date of termination."

Is a treaty susceptible to termination, withdrawal or suspension in the event of armed conflict?

Article 6 of the AREAC a two-stage test requiring the examination of

(a) the nature of the treaty, in particular its subject matter, its object and purpose, its content and the number of parties to the treaty;

and

(b) the characteristics of the armed conflict, such as its territorial extent, its scale and intensity, its duration and, in the case of non-international armed conflict, also the degree of outside involvement."

Provisions on the armed conflict in the BIT

- Where a treaty itself contains provisions on its operation in situations of armed conflict, those provisions shall apply (Article 4 AREAC).
- The Russia-Ukraine BIT provides in Article 6:

The investors of one Contracting Party whose investments suffered damage on the territory of the other Contracting Party as a result of war, civil disturbances or other similar circumstances, shall be granted a regime no less favourable than the one which the latter Contracting Party is granting to investors of any third state with respect to any measures which it undertakes in connection with such damage.

Prohibition of benefit to an aggressor State

- A State committing aggression within the meaning of the Charter of the United Nations and resolution 3314 (XXIX) of the General Assembly of the United Nations shall not terminate or withdraw from a treaty or suspend its operation as a consequence of an armed conflict that **results from the act of aggression if the effect would be to the benefit of that State.** (Article 15 AREAC)
- The characterization of a State as an aggressor will depend, fundamentally, on the definition given to the word “aggression” and, in terms of procedure, on the **Security Council.** (Commentary to Article 15 AREAC)

Outside Involvement

- "The greater the involvement of third States in a **non-international** armed conflict, the greater the possibility that treaties will be affected, and vice versa." (Article 6 AREAC commentary)
- The "degree of outside involvement" serves as a factor intended "to limit the possibility for States to assert the termination or suspension of the operation of a treaty . . . **on the basis of their participation in such types of conflicts.**" (Article 6 AREAC commentary)
- Article 14 allows a state to suspend the operation of a treaty in exercising its inherent right of individual or collective self-defence;
- Article 15 establishes prohibition to benefit to an aggressor State.

Eritrea Ethiopia Claims Commission

18. The issue of the automatic termination of bilateral agreements with the outbreak of a conflict is currently debated in the literature. Nevertheless, **there is a broad consensus that bilateral treaties, especially those of a political or economic nature, are at the very least suspended by the outbreak of a war.** Taking into account the nature and objectives of the five agreements cited by Ethiopia to support its economic claims, the Commission cannot but consider that they fall within the category of treaties which become ineffective in time of war (either through termination, or suspension). Consequently because of the war, the treaties ceased to be operative. Ethiopia thus cannot claim compensation for economic losses because of violation of the treaties, and Ethiopia's claims in this regard are dismissed on the merits.

(Partial Award, Economic Loss Throughout Ethiopia, 19 December 2005)

Has there been there a war?

- Russia would dispute that that was a war in which it is a party
- Ukraine would argue it left Crimea under a threat of force
- Is it an armed conflict? AREAC definition: “a situation in which there is resort to armed force between States or protracted resort to armed force between governmental authorities and organized armed groups”
- Neither Russia nor Crimea dispute that the territory is under effective control of Russia; could be a way for the tribunal to assert jurisdiction

Igor Kolomoisky & Aeroport Belbek LLC; Privatbank and Finilon

- 24 February 2017 - key jurisdictional objections dismissed
- The Tribunal bifurcated proceedings on jurisdiction and admissibility issues.
- Accepted the principle that Russia could be liable under the Ukraine-Russia BIT for the mistreatment of investors in Crimea following the date when Russia signed decrees incorporating the contested territory into the Russian Federation.
- Russia failed to appear to defend itself in the cases, in letters sent to the Permanent Court of Arbitration Russia has contended that the BIT “cannot serve as a basis for composing an arbitral tribunal and that it “does not recognize the jurisdiction of an international arbitral tribunal at the [PCA].”
- Avoided ruling on lawfulness of occupation and annexation, but sees its as effective – with legal consequences under BIT

Igor Kolomoisky & Aeroport Belbek LLC; Privatbank and Finilon

- The BIT protections **can be invoked** in relation to alleged mistreatment of their respective investments in banking enterprises and a commercial airport in Crimea.
- Left several **other jurisdictional questions** to a later phase of the case (e.g. the existence of protected investments).
- The claimants had pushed for an earlier date linked to the start of the Russian occupation of the territory, but the tribunal decided to use the date when Putin signed decrees incorporating Crimea into the Russian Federation.
- Interim awards remain for now confidential – the detailed reasoning of the arbitrators in reaching the above conclusions remains unclear.
- Ukraine intervened as a non-disputing party: occupation unlawful, but ultimately effective => Russia should subsequently bear the responsibility of protecting Ukrainian investors under the BIT
- Privatbank and Belbek airport represented by Hughes Hubbard Kaj Hober. Ukraine represented by Covington & Burling.



British Institute of
International and
Comparative Law

Considerations

- Protect foreign investors
- Avoid ruling on the territorial dispute
- Not to benefit the aggressor
- Set the precedent
- Very difficult to enforce
- A political solution may be needed (a special compensation commission)