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To BIT or not to BIT?

The effects of changes in effective control and temporal scope on investment tribunal jurisdiction under Ukraine - Russia BIT

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Uppsala, June 2019

List of Abbreviations

Ukraine-Russia BIT	Agreement between Ukraine and Russian Federation on encouragement and mutual protection of investments
BIT(s)	Bilateral Investment Treaty(ies)
Russia	Russian Federation
VCLT	Vienna Convention on the Law of the Treaties
Crimean cases or Crimea-related cases	Cases listed in Annex 1
UNCITRAL Rules	UNCITRAL Arbitration Rules 1976
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration
UNCTAD	United Nations Conference on Trade and Development
OECD	Organization for Economic Trade and Development
UN Charter	United Nations Charter
ICJ	International Court of Justice
ECHR	European Court of Human Rights
ICTY	International Criminal Tribunal for the former Yugoslavia
UNGA	United Nations General Assembly
NY Convention	New York Convention on Recognition and Enforcement of Arbitral Awards 1956

INTRODUCTION

1.1. To BIT or not to BIT

The change in effective control over the Crimea automatically switched status of Ukrainian investors from domestic to foreign and activated Ukrainian – Russia BIT protection mechanism for them.

The change of control in 2014 caused investors to lose control over assets that led to several investment arbitration claims against Russian Federation (hereinafter “Russia”) under the Agreement between Ukraine and Russian Federation on encouragement and mutual protection of investments (hereinafter “Ukraine-Russia BIT”) concluded in 1998.¹ Nowadays eight cases are known to have been raised.² In two more cases notice of arbitration was filed.

Tribunals in three cases rendered awards, i.e. PJSC *Ukrnafta*,³ *Stabil*,⁴ *Everest*⁵ v Russian Federation. Investors are enforcing the awards in different jurisdictions (Ukraine and Switzerland) facing jurisdictional challenges from the Russia’s side again. In late 2018, Russia failed in its attempt to challenge the two awards on jurisdiction rendered in the cases of *PJSC Ukrnafta v. Russia* and *Stabil LLC and others v. Russia*.⁶

In April 2019, Russia lost another arbitration relating to *Ukrnafta*⁷ and changed the strategy deciding to participate in the other case relating to the DTEK Krymenergo company.⁸ This research examines whether tribunals in past and future cases have

¹ Agreement between Ukraine and Russian Federation on encouragement and mutual protection of investments (Ukraine/Russian Federation) (adopted 15 December 1999, entered into force 27 January 2000) <https://zakon.rada.gov.ua/laws/show/643_101>

² For the List of cases refer to Appendix 1. M. Soldatenko, ‘From Kolomoikiy to Nafitogaz: New Wins and Challenges in Crimea-related Arbitrations against Russia’ [2019] EP <<https://www.eurointegration.com.ua/articles/2019/02/28/7093399/>> accessed 19 May 2019, S. Uvarov, ‘Investment Disputes related to Crimea: Overview’ [2019] Journal of the Russian Arbitration Association <<https://journal.arbitration.ru/reviews/investment-disputes-related-to-crimea-overview/>> accessed 19 May 2019

³ PCA Case No. 2015-34 *PJSC Ukrnafta v. the Russian Federation* <<https://pca-cpa.org/en/cases/121/>> accessed 18 May 2019

⁴ PCA Case No. 2015-35 *Stabil LLC et al. v. the Russian Federation* <<https://pca-cpa.org/en/cases/122/>> accessed 18 May 2019

⁵ PCA Case No. 2015-36 *Everest Estate LLC et al. v. the Russian Federation* <<https://pca-cpa.org/en/cases/133/>> accessed 18 May 2019

⁶ L. Bohmer, ‘In Now-Public Decisions, Swiss Federal Tribunal Clarifies Reasons For Dismissing Challenges To Two Crimea-Related Investment Treaty Awards Against Russia’ [2018] Investment Arbitration Reporter <<https://www.iareporter.com/articles/in-now-public-decisions-swiss-federal-tribunal-clarifies-reasons-for-dismissing-challenges-to-two-crimea-related-investment-treaty-awards-against-russia/>> accessed 19 May 2019

⁷ *Ukrnafta* won Investment Arbitration against Russia [2019] EP <<https://www.epravda.com.ua/news/2019/04/16/647072/>> accessed 19 May 2019; PCA Case No. 2015-34 *PJSC Ukrnafta v. the Russian Federation* <<https://pca-cpa.org/en/cases/121/>> accessed 18 May 2019

⁸ Russian Federation acknowledged jurisdiction of Hague-based court in case of former DTEK assets in Crimea [2019] Interfax-Ukraine <<https://ua.interfax.com.ua/news/general/582022.html>> accessed 19 May 2019

authority to hear the case and the award to stand during potential annulment/enforcement proceedings.

Some research has been made in relation to the implication of the territory accession in different areas of international law including BIT application.⁹ However, such researches does not extend to the implication of the temporal and territorial scope of the investment as the basic criteria to define whether the Tribunal has jurisdiction in the case or not in general, and in relation to the Crimean territory, in particular. This paper aimed to fill this gap.

1.2. Research question

The research question of the present thesis (“Thesis”) is: *“How does change in effective control affect investment protection mechanisms in the Ukraine-Russia BIT against the temporal scope of when the investment was made?”*

1.3. Methods and sources

The research is based on the basic legal method, i.e. analysis and interpretation of the law according to the hierarchy of law by:

(1) *identifying* how investor protection under BIT is influenced by:

- (a) change of effective control in the territory where investment was made and
- (b) time, when investment was made; and

(2) *evaluating* the effect of (a) and (b) on the Tribunal’s jurisdiction and *assert* that Tribunal has jurisdiction under the BIT if the effective control in the territory was changed.

I will *analyze* the Ukraine-Russia BIT under such sources as (1) Vienna Convention on the Law of the Treaties (hereinafter the “VCLT”), (2) other sources of public international law (for instance, other BITs) (3) available case law and (4) legal doctrine.

To be more precise, I will interpret the term “Territory of the Contracting State” contained in the BIT and the temporal limitations of the BIT by means of Articles 31

⁹ For example, analyses in respect to Hong Kong, Serbia/Montenegro, East/West Germany, Poland/German, West Sahara-Morocco dispute, The Occupied Palestinians Territories-Israeli dispute, disputes in the South China Sea, Cyprus-Turkey, Isle of Man and Gibraltar, DRC v Uganda is available.

and 32 of the VCLT.

The relevant case law and doctrine is used when it has additional value or leads to deeper conclusions than BIT analysis itself.

The awards in the so-called “Crimean cases” are not in the public domain. Thus, BIT is a primary subject to analysis and the main source of the Thesis along with other sources mentioned in this section. Where the reference to the awards is required, the analysis of the awards is based on secondary sources; such as court decisions on its enforcement, commentaries of the awards, IA Reporter sources, i.e. “*a news and analysis service ...focused on... investigation of unreported cases and rapid review...* ”.¹⁰

1.4.Purpose and delimitations of the topic

The purpose of the topic is to *define* how the change of the effective control over the territory might change (or not change) the Tribunal`s jurisdiction under the Ukraine – Russia BIT.

The delimitation of the topic is needed in order to reach the best results of the outlined purposes. The change of effective control over the territory raises number of questions, but this research is not aimed to analyze: (1) the protection of the investors under the other Treaties than Ukraine – Russia BIT; (2) other investors’ protection than Ukrainian nationals; (3) multiparty claims problem under UNCITRAL Rules¹¹; (4) investments that were made after change in effective control.

Also, this Thesis is not aimed to address the legality of the Russian annexation of

¹⁰ Investment Arbitration Reporter, About us <<https://www.iareporter.com/about-us/>> accessed on 30th May 2019; L. Bohmer, ‘In Now-Public Decisions, Swiss Federal Tribunal Clarifies Reasons For Dismissing Challenges To Two Crimea-Related Investment Treaty Awards Against Russia’ [2018] Investment Arbitration Reporter <<https://www.iareporter.com/articles/in-now-public-decisions-swiss-federal-tribunal-clarifies-reasons-for-dismissing-challenges-to-two-crimea-related-investment-treaty-awards-against-russia/>> accessed 19 May 2019; J. Hepburn, R. Kabra ‘Investigation: Further Russia investment treaty decisions uncovered, offering broader window into arbitrators’ approaches to Crimea controversy’ [2017] Investment Arbitration Reporter <<https://www.iareporter.com/articles/investigation-further-russia-investment-treaty-decisions-uncovered-offering-broader-window-into-arbitrators-approaches-to-crimea-controversy/>> accessed 19 May 2019; L. E. Petersson, ‘As Russia is held Liable in Two New Bit Cases and Ordered To Pay Upwards Of \$100 Million, We Round-Up Developments In Crimea-Related Arbitrations [16 Apr 2019] Investment Arbitration Reporter <<https://www.iareporter.com/articles/as-russia-is-held-liable-in-two-new-bit-cases-and-ordered-to-pay-upwards-of-100-million-we-round-up-developments-in-crimea-related-arbitrations/>> accessed 21 May 2019

¹¹ United Nations Commission on International Trade Law, *UNCITRAL Arbitration Rules*, adopted by The General Assembly on 15 December 1976 by Resolution 31/98 <<http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf>>

Crimea. For the purposes of this work, the annexation is presumed to be illegal based on UNGA Resolution No.GA/11493 and position of international community.

1.5. Definition and Terminology

The interpretation of terms under Ukraine-Russia BIT is the only way to find out whether the Ukrainian investors can enjoy the protection after change of effective control in the territory. Therefore, I will interpret and analyze following terms.

First, “*temporal*” and “*territorial*” scope of the BIT” -

Temporal scope of the BIT is a scope of *when* the investment must have been made to be covered by the BIT, i.e. before/after enter into force of the BIT; on which particular date the Ukrainian investor in Crimea can enjoy the BIT protection.

Territorial scope of the BIT is a scope of *where* the investment must have been made to be covered by the BIT.

Second, in respect to the Territory to find out the territorial scope of the BIT we define that:

- “*Territory of the Contracting State*” as “a part of surface including lands areas, subterranean areas, waters, rivers, lakes, the airspace above the land, etc., and the territorial sea” and does not contain mandatory characteristic of sovereignty;
- “*effective control*” - the possibility to exercise jurisdiction in the territory even when the legal ground is absent.
- “*effectively controlled*” and/or “*not legally acquired*” territory can be considered as a territory of the state for the purposes of investment protection under Ukraine – Russia BIT.

Third, in respect to the investment protection we define that “*Tribunal’s jurisdiction*” is a power of the Tribunal to decide the case.

The research will be made on the particular example of “*Crimean cases*” (or “*Crimea related cases*”) – Ukrainian investment cases that were made before Crimea fell under

the effective control of Russia.

Therefore, the *scope of the BIT* as the outer limits of the legal protection given by the Treaty to the *investments* will be used as one of *the arguments* for the *Tribunal's jurisdiction* in case the investor is situated on *the effectively controlled territory* of the Contracting state and suffered violation of the BIT's guaranties.

1.6. Disposition and Road map

Following legal concepts and legal exercises from the substance of the research: (1) Tribunal's jurisdiction and possible counterarguments for challenges against it in particular cases; (2) interpretation of the relevant BIT provisions under VCLT; (3) the concept of territory in public international law for the purposes of investment protection.

I analyze the BIT and relevant practices to show that the Tribunal has jurisdiction even if the investment was not initially made in the territory under the host state control. Investments that became foreign because of the change of the effective control in the territory between State are targets of this research.

Part I of the Thesis outlines the basis of the Tribunal's jurisdiction and the scope of the Ukraine – Russia BIT. It is aimed to *define* the territorial and temporal scope of the BIT, persons that are entitled to go to the arbitration under the BIT and the essence of the Tribunal's jurisdiction at all.

The purpose of Part II is to *analyze* and territorial scope of the BIT and to reach the conclusions on (1) whether the term “Territory” in the BIT covers the areas that are under effective control of the State but without 100 - percent lawful grounds for that.

The purpose of Part III is to *analyze* temporal scope of the BIT and *conclude* whether the BIT contains any temporal limitations, i.e. when the investment must have been made in order to be covered by the BIT.

PART I. INVESTMENT PROTECTION MECHANISM AVAILABLE UNDER THE UKRAINE - RUSSIA BIT

1.1. The Tribunal's jurisdiction and court review, or why "to BIT"

Starting points of arbitration is the arbitration agreement and tribunal's mandate. It defines whether the Tribunal has power to decide the dispute, i.e. has jurisdiction. According to Kaj Hober "*Arbitration agreement determines the procedural framework of the dispute between the parties*",¹² that is true for investment arbitration as well.

In investment cases arbitration agreement consists of: (1) consent to arbitrate by Contracting state in the Treaty;¹³ (2) offer by investor of the other Contracting state by means of filing request for arbitration. If the offer to arbitrate meets requirements of the consent, the Tribunal have jurisdiction to hear the case. Such form meets the requirement of arbitration agreement being in "writing"¹⁴ and this position is accepted by national courts. In *Occidental v Ecuador* English court stated:

*"the BIT Article providing for mixed arbitration must have been 'intended to give rise to a real consensual agreement to arbitrate, even though by a route prescribed in the Treaty'".*¹⁵

The consent to arbitrate is contained in the dispute resolution clause in Article 9 of the Ukraine-Russia BIT [**Annex 2**]. It requires the parties of the dispute to be "*Contracting Party*" and the "*investor of the other Contracting Party*".

Change in effective control over the territory means that this consent may be interpreted as consent to arbitrate with Ukrainian investors in Crimea. To accomplish arbitration agreement Ukrainian investor must submit the request for arbitration against Russia.

If the respondent state disagrees with the Tribunal's jurisdiction, it may follow several strategies to challenge it.

Firstly, Respondent may not participate in the hearing but (a) initiate the annulment

¹² Kaj Hober, *International Commercial Arbitration in Sweden* (Oxford University Press, New York, 2011) p. 183

¹³ K. Yannaca-Small (ed.), *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (2nd ed., Oxford, Oxford University Press, 2015) pp. 800-801, paras 29.10-29.12

¹⁴ New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) entered into force on 7 June 1959, Art. 5

¹⁵ Case No. UN3467 *Republic of Ecuador v. Occidental Exploration and Production Company*, England, Court of Appeal (Sept. 9, 2005) [2005] EWCA 1116, 12 ICSID Rep. 129 [hereinafter *Ecuador v. Occidental*]. Cited according to K. Yannaca-Small (ed.), *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (2nd ed., Oxford, Oxford University Press, 2015) pp. 800-801, paras 29.10-29.11

proceedings at the seat of arbitration or (b) challenge the award at enforcement stage¹⁶.

In non-ICSID cases law of the seat of arbitration determines grounds for annulment.¹⁷

It is usually based on the UNCITRAL Model Law.¹⁸ In fact, grounds for the annulment

(Article 34 (2)(a))¹⁹ mirror the grounds for refusal in recognition and enforcement²⁰

(Article 36)²¹ and fall within the main categories “(i) *the jurisdiction of the arbitral*

tribunal, (ii) irregularities regarding the independence or impartiality of arbitrators,

(iii) procedural irregularities and violations of due process, and (iv) public policy and

arbitrability.”²² In other words, Russia may use the exact grounds in annulment and

enforcement proceedings subject to some exceptions. The legal seat of arbitration in

Crimean cases varies that may lead to peculiarities in setting aside proceedings.²³

Non-participation strategy was chosen by Russia²⁴ and was not successful. In

particular, the Federal court in Switzerland confirmed the Tribunals` jurisdiction in

annulment proceedings regarding awards on jurisdiction in *PJSC Ukrnafta v.*

*Russia and Stabil LLC and others v. Russia.*²⁵

Enforcement of foreign arbitral awards is conducted under NY Convention.²⁶ The law

of place of enforcement implements similar provisions and contains no impediments

to treat investment awards as foreign.²⁷ On 29 January 2019 Ukrainian Supreme Court

¹⁶ K. Yannaca-Small (ed.), *Arbitration Under International Investment Agreements: A Guide to the Key Issues* p.803, para 29.17

¹⁷ Ibid

¹⁸ United Nations Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration* adopted at 112th plenary meeting 11 December 1985, with amendments as adopted at the 64th plenary meeting on 4 December 2006 (United Nations documents A/40/17, annex I and A/61/17, annex I)

http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf

¹⁹ Ibid

²⁰ K. Yannaca-Small (ed.), *Arbitration Under International Investment Agreements: A Guide to the Key Issues* p.803, p. 29.17

²¹ United Nations Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration* adopted at 112th plenary meeting 11 December 1985, with amendments as adopted at the 64th plenary meeting on 4 December 2006 (United Nations documents A/40/17, annex I and A/61/17, annex I)

http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf

²² K. Yannaca-Small (ed.), *Arbitration Under International Investment Agreements: A Guide to the Key Issues* p. 762, para. 28.13

²³ S. Uvarov, `Investment Disputes related to Crimea: Overview` [2019] *Journal of the Russian Arbitration Association*

<https://journal.arbitration.ru/reviews/investment-disputes-related-to-crimea-overview/> accessed 19 May 2019

²⁴ M. Soldatenko, `From Kolomoiki to Naftogaz: New Wins and Challenges in Crimea-related Arbitrations against Russia` [2019] EP <<https://www.eurointegration.com.ua/articles/2019/02/28/7093399/>>

²⁵ Crimea awards upheld in Switzerland [2018] *Global Arbitration Review*

<https://globalarbitrationreview.com/article/1175695/crimea-awards-upheld-in-switzerland>; Swiss Federal Tribunal Case No. 4A_396/2017 *PJSC Ukrnafta v. Russia and Stabil LLC and others v. Russia*

https://www.bger.ch/ext/eurospider/live/fr/php/aza/http/index.php?highlight_docid=aza%3A%2F%2Faza://16-10-2018-4A_396-2017&lang=fr&zoom=&type=show_document

²⁶ New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) entered into force on 7 June 1959

²⁷ K. Yannaca-Small (ed.), *Arbitration Under International Investment Agreements: A Guide to the Key Issues* p. 798 para 29.04

let the enforcement of the arbitral award in case *Everest and others v Russia*²⁸.

Secondly, Respondent may participate in the case, but file the jurisdictional objection during arbitral proceedings.²⁹ The Tribunal has power to rule on the objections “*that it has no jurisdiction*” under Article 21 of the UNCITRAL Arbitration Rules 1976.³⁰

This power is based on one of the basic principles of investment arbitration - the Kompetenz-Kompetenz principle³¹, i.e. that tribunal may rule on its own jurisdiction “*without suspending the arbitral process on one party's jurisdictional challenge*”³². Russia’s announcement on participation in *PJSC DTEK Krymenergo v. the Russian Federation*³³ may mean change of the strategy in favor of participating but objecting the jurisdiction.

Aforementioned means that there are three opportunities for respondent state to challenge the Tribunal’s jurisdiction: (1) arbitral proceedings itself; (2) annulment proceedings at the seat of arbitration; (3) objection on enforcement in recognition and enforcement proceedings. Russia used different options in different cases, but tribunals and courts sustained the jurisdiction based on the scope of BIT argument mainly.

Thus, the Tribunal has jurisdiction in Crimea-related cases because there is (1) an arbitration agreement between Ukrainian investor and Russia, (2) investors and investments fall within territorial and temporal scope of the BIT.

²⁸Supreme Court of Ukraine Case No. 796/165/18 *Everest estate and others v. Russian Federation*, decision dated 29 January 2019 <www.revestr.court.gov.ua/Review/79573187>

²⁹ Russia decided to stop ignoring arbitration against expropriated from Akhmetov “Krymenergo” [2019] EP <<https://www.epravda.com.ua/news/2019/04/22/647267/>> accessed 19 May 2019

³⁰ United Nations Commission on International Trade Law, *UNCITRAL Arbitration Rules*, adopted by The General Assembly on 15 December 1976 by Resolution 31/98 <<http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf>>

³¹ Kaj Hober, *International Commercial Arbitration in Sweden* (Oxford University Press, New York, 2011), 186; V. Veeder, ‘The Lena Goldfields Arbitration: The Historical Roots Of Three Ideas’ [1998] *The International and Comparative Law Quarterly*, Vol. 47, No. 4, pp. 747-792;

<<https://www.jstor.org/stable/pdf/761544.pdf?refreqid=excelsior%3A629811021129359ec4bc80239fb52fcf>> accessed 18 May 2019>;

³² V. Veeder, ‘The Lena Goldfields Arbitration: The Historical Roots Of Three Ideas’ [1998] *The International and Comparative Law Quarterly*, Vol. 47, No. 4, pp. 747-792;

<<https://www.jstor.org/stable/pdf/761544.pdf?refreqid=excelsior%3A629811021129359ec4bc80239fb52fcf>> accessed 18 May 2019; A. Nussbaum, ‘Arbitration Between the Lena Goldfields Ltd. and the Soviet Government’ (1950) 36 *Cornell L. Rev.* 31; <<https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1582&context=clr>>

³³ DTEK Initiated Investment Dispute against Russia over the Company’s Assets in Crimea [2019] DTEK <<https://dtek.com/en/media-center/press/dtek-initsiuroval-rassmotrenie-investitsionnogo-spora-s-rossiyei-v-otnoshenii-aktivov-gruppy-v-krymu-/>>

1.2. A little bit of BIT, or Scope of the BIT and the Tribunal's jurisdiction.

The scope of the BIT has territorial, temporal and subject matter dimensions, that are³⁴ “established by the interaction between all its provisions”.³⁵

Subject matter is determined by the definition of the investment. Treaties usually contain a broad definition of the term “investment” and the Ukraine-Russia BIT is not an exception. In particular, under Article 1 (1) of the Ukraine-Russia BIT does not refer to any time restrictions, when the investment must be made in order to be protected:

“The term “investment” means all types of monetary and intellectual property values, that are being invested by the investor of one Contracting Party in the territory of the other Contracting Party in accordance with its legislation, ...”

However, the investment must fall under territorial and temporal dimensions of the treaty, that are usually determined by the specific provisions but not the definitions.³⁶ That leads to the conclusion that the factual investment must have the same territorial and temporal scope as prescribed by the BIT. There is a limited analysis of this approach in the case law and commentaries.

The territorial scope answers the question “where” and covers (1) the number and identity of States covered by it; (2) the States` territory³⁷. The temporal scope answers the question “when” and is based on temporary rule that “a State can only breach obligations that are in force at the time of the State action in question”.³⁸ It was introduced in *Island of Palmas case* and differentiates the state obligations depending on the date of entry into force of the BIT.³⁹

Nowadays content of the temporary scope is broader and may include: (1) date of entry into force of the agreement and its duration; (2) possibility to protect investments established prior entry into force of the BIT;⁴⁰ (3) possibility to protect the investment

³⁴ United Nations Conference on Trade and Development, UNCTAD Series on Issues in International Investment Agreements II ‘Scope and Definition’ [2011] <https://unctad.org/en/Docs/diaeia20102_en.pdf> accessed 19 May 2019, p. 11

³⁵ Ibid, p. 125

³⁶ United Nations Conference on Trade and Development, UNCTAD Series on Issues in International Investment Agreements II ‘Scope and Definition’ [2011] <https://unctad.org/en/Docs/diaeia20102_en.pdf> accessed 19 May 2019

³⁷ United Nations Conference on Trade and Development, UNCTAD Series on Issues in International Investment Agreements II ‘Scope and Definition’ [2011] <https://unctad.org/en/Docs/diaeia20102_en.pdf> accessed 19 May 2019

³⁸ N. Gallus, ‘The temporal scope of investment protection treaties’ [2008] 7 British institute on International and Comparative Law (BIICL) <https://www.academia.edu/34500152/The_Temporal_Scope_of_Investment_Protection_Treaties> accessed 19 May 2019, p.7

³⁹ Ibid, p. 22

⁴⁰ Ibid

after the termination of the treaty as part of temporal scope.⁴¹

The date of when the effective control over the territory was changed became important part of temporal scope of the BIT after Crimean events of 2014. It is claimed to answer the question whether the Ukraine – Russia BIT protects Ukrainian investments in Crimea made *before* the effective control was changed.

Therefore, to enjoy the protection BIT and investment must have the same territorial and temporal dimension. The scope of the BIT sets boundaries of the Tribunal's jurisdiction in potential dispute.⁴² If the investment was made in the territory and within time covered by the BIT, investor may enjoy all the BIT guarantees including consent to arbitration.

Thus, the task is to define whether Ukrainian investments in Crimea that were made before the change in effective control are covered by the BIT and Tribunals have jurisdiction in such cases.

1.3. The jurisdictional challenges in the Crimea-related investment cases and the scope of BIT

Tribunals in Belbek, Everest, PJSC CB PrivatBank, Ukrnafta, Stabil, Naftogaz and Lugzor arbitrations⁴³ have held that they have jurisdiction over the claims. Awards remain confidential.⁴⁴ There is limited information about Russian objections.

However, Russia tried challenge on the Tribunal's jurisdiction in the annulment proceedings in Naftogaz and Stabil cases. Two main challenges were based on the territorial and temporal scope of the BIT and investment through the interpretation of the consent to arbitration, meaning of the investment and territory.⁴⁵ Two more

⁴¹ OECD Investment Policy Reviews: Malaysia [2013] OECD <<https://www.oecd.org/daf/inv/investment-policy/IPRMalaysia2013Summary.pdf>> accessed 19 May 2019, p. 105-106.

⁴² ICSID Case No. ARB/06/18 *Joseph Charles Lemire & others v. Ukraine, Award dated 28 March 2011* <<http://www.kluwerarbitration.com.ezproxy.its.uu.se/document/kli-ka-1131013?q=%22scope%20of%20bit%22>> accessed 18 May 2019; Dietmar W. Prager, Samantha J. Rowe [2013] Kluwer Arbitration Blog, pp. 223, 401

⁴³ Annex 1

⁴⁴ P. Dumberry, 'Requiem for Crimea: Why Tribunals Should Have Declined Jurisdiction over the Claims of Ukrainian Investors against Russian under the Ukraine–Russia BIT' [2018] *Journal of International Dispute Settlement*, Volume 9, Issue 3, p. 526 <<https://academic.oup.com/jids/advance-article-abstract/doi/10.1093/jnlids/idy022/5032472>> accessed 19 May 2019

⁴⁵ L. Bohmer, 'In Now-Public Decisions, Swiss Federal Tribunal Clarifies Reasons For Dismissing Challenges To Two Crimea-Related Investment Treaty Awards Against Russia' [2018] *Investment Arbitration Reporter* <<https://www.iareporter.com/articles/in-now-public-decisions-swiss-federal-tribunal-clarifies-reasons-for-dismissing-challenges-to-two-crimea-related-investment-treaty-awards-against-russia/>> accessed 19 May 2019

submitted objections were considered as factual and not analyzed by the court.⁴⁶

The Responded State (Russia), challenged the Tribunal jurisdiction since the investment lacked necessary temporal and territorial scope. Russia tried to justify challenges based on the classical understanding of the protected investment: the investor of one Contracting State invests in the territory of the other Contracting State. But in the so-called Crimean cases, Ukrainian companies invested in the “Ukrainian Crimea”, while Russia obtained effective control over the territory later.

First challenge questions the territorial scope of the investment: is the fact that the Crimea is effectively controlled by Russia sufficient to define Crimea as the territory of Russia in terms of the BIT, i.e. under Russian effective control?

Second challenge questions temporal scope – (1) did the investments have to be initially made in the territory of Russia or (2) is it sufficient that on the moment of the expropriation by Russia, the territory was already under Russian effective control?

In recent awards tribunals found jurisdiction in cases where the (1) effective control over the territory was changed and (2) the investment was made prior to this change.

Third potential challenge may be based on the absence of the Tribunal’s power to decide the territorial dispute if necessary.⁴⁷ However, it is not true because the investment tribunal is called to decide investment dispute and no legal determinations of inter-state territorial disputes are required for this purpose.

Conclusions from Part I

The existence of arbitration agreement is a main argument against challenges of the tribunal’s jurisdiction in Crimean cases. Tribunal decides whether it has jurisdiction based on public international law as applicable law. Russia gave consent to protect investments that were not initially made in its territory in the BIT, while investors made their offers by request for arbitration.

⁴⁶ Ibid, “(i) *Russia’s argument that Russia and Ukraine agreed that the BIT was not applicable to Crimea or to the city of Sevastopol and (ii) Russia’s argument that Ukraine had no intention to offer protection under the BIT to Russian investors originating from Crimea.*”

⁴⁷ A. Niemoj ‘The Protection of Investments in Disputed Territories: A Panel Hosted by BIICL’s Investment Treaty Forum’ [2017] <<http://arbitrationblog.kluwerarbitration.com/2017/05/17/the-protection-of-investments-in-disputed-territories-a-panel-hosted-by-biicls-investment-treaty-forum/>> accessed 19 May 2019

While arbitration agreement sets framework of the dispute, scope of the Ukraine – Russia BIT fill it with particular arguments of why tribunals have jurisdiction in Crimean cases. The reason is that the territory under effective control is a part of state territory (territorial scope) and investors are covered by the BIT from the moment when the effective control started (temporal scope). These reasons are addressed below.

PART II. “WHERE”, OR THE TERRITORIAL SCOPE OF THE BIT AND ITS INFLUENCE ON THE TRIBUNAL`S JURISDICTION

2.1. The ordinary meaning of the term “territory” in the public international law

Change in effective control find its origins in the term “territory”. The territorial scope of the BIT is defined by the term “territory” and areas which are included in the “territory”, including areas under effective control.

The term “territory” is a concept of public international law. Given that the term is not unique for the arbitration field, the ordinary meaning of the term “territory” in public international law is provided before moving to the analysis of the term under Ukraine-Russia BIT.

Malcolm Shaw states that “*territory clearly includes its lands areas, subterranean areas, waters, rivers, lakes, the airspace above the land, etc., and the territorial sea*” and excludes the reference to the exclusive economic zones.⁴⁸ According to Black`s Law Dictionary, “*Territory is a part of a country separated from the rest, and subject to a particular jurisdiction...* ”.⁴⁹

Thus, nowadays term “territory” contained in dictionaries and scholars works is not based on sovereignty in terms of definition of the territory. The same approach was taken by the Tribunal in Crimean cases (*Ukrnafta and Stabil cases*).⁵⁰

Awards correctly exclude sovereignty as a mandatory feature of the territory as per

⁴⁸ M. N. Shaw, *Title to the Territory in Africa: International Legal Issues* (Clarendon Press, Oxford 1986) <<https://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780198253792.001.0001/acprof-9780198253792>> accessed 19 May 2019

⁴⁹ What is Territory? The Law Dictionary <<https://thelawdictionary.org/territory/>> accessed 19 May 2019

⁵⁰ J. Hepburn, R. Kabra ‘Investigation: Further Russia investment treaty decisions uncovered, offering broader window into arbitrators’ approaches to Crimea controversy’ [2017] Investment Arbitration Reporter <<https://www.iareporter.com/articles/investigation-further-russia-investment-treaty-decisions-uncovered-offering-broader-window-into-arbitrators-approaches-to-crimea-controversy/>> accessed 19 May 2019

Oppenheim`s definition “*That defined portion of the surface of the globe which is subject to the sovereignty of the state.*”⁵¹ This new approach eliminates unnecessary hurdles to protect investors in the illegally acquired territories and prevents the Russia from benefiting from the illegal act.

Therefore, it is necessary to define the correlation between “territory of State as defined part of surface” and “sovereignty”, “jurisdiction” given historical scholar discussion in that respect.

The term “Sovereignty” is not identified in UN Charter or any other treaty. The customary international law bases it on the term “territory”. In particular, in *Island of Palmas case* the *territorial sovereignty* is meant as a possibility to “*fulfill the functions of state*” in the part of globe delimited in space⁵².

I would like to emphasize on the word “*recognized*” in the context of territory, i.e. the recognized sovereignty only may allow the state to exercise its competence over the territory:

“....Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State.

....Territorial sovereignty is, in general, a situation recognized and delimited in space, either by so-called natural frontiers as recognized by international law or by outward signs of delimitation that are undisputed, or else by legal engagements entered into between interested neighbors, such as frontier conventions, or by acts of recognition of States within fixed boundaries”⁵³ [**our emphasize added**].

Scholar sources support understanding of sovereignty as a concept that cannot exist without territory. Malcolm Show gives a clear answer, that “*the concept of territory itself is concerned with those geographical areas over which sovereignty or sovereign rights may be exercised*”.⁵⁴ In other words, “*sovereignty is a legal shorthand for legal personality of certain kind, that of statehood*”.⁵⁵ Based on that territorial sovereignty is

⁵¹ L. Oppenheim, H. Lauterpacht (ed.), *International Law*, Vol. 1 (8th edn, London, Longmans, Green & Co. 1955) pp. 451-452

⁵² *Island of Palmas case* (Netherlands, USA) 4 April 1928 ICJ Reports [1929] Vol. II pp. 829-871, 838
<http://legal.un.org/riaa/cases/vol_II/829-871.pdf> accessed 19 May 2019

⁵³ *Ibid*

⁵⁴ M. N. Shaw, *Title to the Territory in Africa: International Legal Issues* (Clarendon Press, Oxford 1986)
<<https://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780198253792.001.0001/acprof-9780198253792>> accessed 19 May 2019

⁵⁵ I. Brownlie, *Principles of Public International Law* (7th ed, Oxford University Press, New York 2008) p. 105

a state`s competence for answering the needs for “*security, stability, and identity felt by particular group within a certain area*”⁵⁶.

“Jurisdiction” refers to a particular aspects of a substance, especially rights or claims”⁵⁷ that derive from sovereignty. Malcolm Shaw goes further with explanation the influence of sovereignty on the jurisdiction “... *territorial sovereignty in fact marks a link between a particular people and a particular territory, so that within that area that people may exercise through the medium of the State its jurisdiction while being distinguished from other people exercising jurisdiction over other areas*”.⁵⁸ That means that jurisdiction over the territory fills the sovereignty with particular state actions.

Therefore, term “sovereignty” is based on the term “territory”, but not vice versa. Territory can exist without the sovereignty as per the referred definitions. Thus, there is no rule in international law or definition, that territory cannot be defined without sovereignty.

The situation is slightly different with “jurisdiction”. However, the term territory does not define whether such jurisdiction must be legal or not. It is hard to imagine the part of surface in modern World without any jurisdiction over it, i.e. some kind of control. That means, that the effective control can also create a jurisdiction over the territory.

Thus, the ordinary meaning of “Territory” under public international law is “a part of surface including lands areas, subterranean areas, waters, rivers, lakes, the airspace above the land, etc., and the territorial sea” and does not contain mandatory characteristic of sovereignty. This conclusion is a ground for considering areas under effective control as parts of state territory for the purposes of investment protection if the BIT does not contain any other conclusions. Below interpretation of the BIT is provided.

2.2. The interpretation of the term “territory” in the BIT in accordance with

⁵⁶ M. N. Shaw, *Title to the Territory in Africa: International Legal Issues* (Clarendon Press, Oxford 1986) <<https://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780198253792.001.0001/acprof-9780198253792>> accessed 19 May 2019; I. Brownlie, *Principles of Public International Law* (7th ed, Oxford University Press, New York 2008) p. 105

⁵⁷ I. Brownlie, *Principles of Public International Law* (7th ed, Oxford University Press, New York 2008) p. 105

⁵⁸ M. N. Shaw, *Title to the Territory in Africa: International Legal Issues* (Clarendon Press, Oxford 1986) p. 11-12

the VCLT

Territory is crucial for the territorial scope of the BIT.⁵⁹ BITs often contain the definition of the territory. However, it does not help much since they refer in general to the territory of particular Contracting State without providing the details of what that means. The definition of this kind is contained in the Article 1(4) Ukraine-Russia BIT:

*“Territory” means the territory of Ukraine or the territory of the Russian Federation, as well as their respective exclusive economic zone and continental shelf, defined in accordance with international law.*⁶⁰ **[our translation from Ukrainian]**

Obviously, it does not refer explicitly to Crimea.⁶¹ Thus, the present term must be interpreted according to the Article 31-32 VCLT given its unclarity⁶². The starting point is Article 31 (1):

“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. ...” **[our emphasize added].**

Evidently, the task of this exercise is to define whether the term “Territory” covers the area where effective control was unlawfully changed. The short answer is “yes”.

a) Ordinary meaning

Ukraine – Russia BIT contains common to the BIT world definition of the territory. It does not have any signs that it must be interpreted differently from its ordinary meaning accepted by the public international law.

The Tribunal must not go beyond the plain language of BIT in its interpretation. The plain language argument is supported by the case law. Hence, in the *Yukos case* the Tribunal stated, that it will interpret the treaty in accordance with its language only and will not add any new requirements:

“The Tribunal is bound to interpret the terms of [the ECT, including Article

⁵⁹ United Nations Conference on Trade and Development, UNCTAD Series on Issues in International Investment Agreements II ‘Scope and Definition’ [2011] p.20 <https://unctad.org/en/Docs/diaeia20102_en.pdf> accessed 19 May 2019

⁶⁰ Agreement between Ukraine and Russian Federation on encouragement and mutual protection of investments (Ukraine/Russian Federation) (adopted 15 December 1999, entered into force 27 January 2000) <https://zakon.rada.gov.ua/laws/show/643_101>

⁶¹ P. Dumberry, ‘Requiem for Crimea: Why Tribunals Should Have Declined Jurisdiction over the Claims of Ukrainian Investors against Russian under the Ukraine–Russia BIT’ (2018) *Journal of International Dispute Settlement*, Vol. 9, Issue 3, p. 524 <<https://academic.oup.com/jids/advance-article-abstract/doi/10.1093/jnlids/idy022/5032472>> accessed 19 May 2019

⁶² K. Yannaca-Small (ed.), *Arbitration Under International Investment Agreements: A Guide to the Key Issues* p. 829, para 30.13

1(7)], not as they might have been written but as they were actually written... The Tribunal is not entitled, [by the terms of the ECT], to find otherwise. ... The Tribunal knows of no general principles of international law that would require investigating how a company... operates when the applicable treaty simply requires it to be organized in accordance with the laws of a Contracting Party. The principles of international law, which have an unquestionable importance in treaty interpretation, do not allow an arbitral tribunal to write new, additional requirements— which the drafters did not include—into a treaty, no matter how auspicious or appropriate they may appear.⁶³

BIT does not have any restrictive features and it is silent about the territory under effective control. This silence evidences that it does not exclude such areas.

The opponent may argue that silence may be interpreted as exclusion. However, such argument will not stay, because (1) BITs in general do not explicitly refer to the effectively controlled areas; (2) the ordinary meaning of the word “territory” in this BIT does not contain any features that evidence exclusion of such areas; (3) public international law does not contain formal term “territory” and uses this term according to the common understanding. The conclusion will be the same, even if we provide separate exercises for definition of the term under the BIT and public international law. In other words, the term territory is based on the dictionary meaning in any event.

Thus, both ways – legal acquisition of the territory and illegal annexation – are extension of the territory which previously was not State`s land.⁶⁴ State must protect investments within the controlled territory regardless how the territory felt under its control from BIT perspective.

b) The context of the BIT

The parties did not exclude the territory under effective control of the state from its territory in the meaning of the Ukraine – Russia BIT given that (1) ordinary meaning of the “Territory” does not exclude such area from the territory of state and (2) the context of BIT is silent in that respect. However, there are two potential issues here.

First, whether the BIT referred to the meaning of the “Territory” “*as defined under international law*” or that phrase relates to the exclusive economic zone and continental

⁶³ PCA Case No. AA 227 *Yukos Universal Ltd v. Russian Federation*, INTERIM AWARD ON JURISDICTION AND ADMISSIBILITY, dated 30 November 2009, Para 413-415. – < <https://www.italaw.com/cases/1175>>

⁶⁴ H. Kelsen, A. Wedberg (trs.), *General theory of law and state* (The Lawbook Exchange, New Jersey, 2007) pp. 215-216.

shelf only⁶⁵.

The analysis of the other BITs concluded by Russia shows, that the reference “*as defined under international law*” is contained in BITs between Russia and states that have a sea border (for example, Singapore,⁶⁶ Romania).⁶⁷ However, BITs with states that do not have a sea border refer to the territory as “Territory of [name of the state]” only (for example, Austria⁶⁸, Slovakia⁶⁹) in respect to the territory of that states, but there is a reference to the exclusive economic zone and continental shelf “*as defined under international law*” in respect to Russia.

Thus, the most likely answer is that “*as defined under international law*” relates only to the exclusive economic zone and continental shelf in terms of the Ukraine-Russia BIT.

But it the term “Territory” must be interpreted under the ordinary meaning of the international law, because the Ukraine – Russia BIT (1) does not exclude the territory under the effective control of the state; (2) public international law also uses ordinary meaning of the term; (3) no special meaning is given to the term “territory” in the BIT or other provisions of the international law applicable to the treaty.⁷⁰

Second, the context of the Ukraine – Russia BIT link the territory with the ability to

⁶⁵ J. Hepburn, R. Kabra ‘Investigation: Further Russia investment treaty decisions uncovered, offering broader window into arbitrators’ approaches to Crimea controversy’ [2017] Investment Arbitration Reporter <<https://www.iareporter.com/articles/investigation-further-russia-investment-treaty-decisions-uncovered-offering-broader-window-into-arbitrators-approaches-to-crimea-controversy/>> accessed 19 May 2019

⁶⁶ Agreement on encouragement and mutual protection of investments between Russian Federation and Republic of Singapore (Russian Federation/Singapore) (adopted on 27 September 2010) <<http://www.consultant.ru/cons/cgi/online.cgi?rnd=1B24F1C9F9C552B25C4E60256070A1AE&req=doc&base=LAW&n=129210&REFFIELD=134&REFDST=1000000119&REFDOC=126895&REFBASE=LAW&stat=refcode%3D16876%3Bindex%3D179#2icnd4gh0m0>>

⁶⁷ Agreement on encouragement and mutual protection of investments between Russian Federation and Romania (Russian Federation/Romania) (adopted on 29 September 1993) <<http://www.consultant.ru/cons/cgi/online.cgi?rnd=1B24F1C9F9C552B25C4E60256070A1AE&req=doc&base=LAW&n=126439&REFFIELD=134&REFDST=1000000117&REFDOC=126895&REFBASE=LAW&stat=refcode%3D16876%3Bindex%3D176#2cemukxrt12>>

⁶⁸ Agreement on enhancing and mutual protection of investments between Russian Federation and Republic of Austria (Russian Federation/Austria) (adopted on 08 February 1990) <<http://www.consultant.ru/cons/cgi/online.cgi?rnd=1B24F1C9F9C552B25C4E60256070A1AE&req=doc&base=LAW&n=131323&REFFIELD=134&REFDST=1000000010&REFDOC=126895&REFBASE=LAW&stat=refcode%3D16876%3Bindex%3D14#85pels1rnw8>>

⁶⁹ Agreement on encouragement and mutual protection of investments between Russian Federation and Republic of Slovakia (Russian Federation/Slovakia) (adopted on 29 September 1993) <<http://www.consultant.ru/cons/cgi/online.cgi?rnd=1B24F1C9F9C552B25C4E60256070A1AE&req=doc&base=LAW&n=126439&REFFIELD=134&REFDST=1000000117&REFDOC=126895&REFBASE=LAW&stat=refcode%3D16876%3Bindex%3D176#2cemukxrt12>>

⁷⁰ Agreement on cooperation in the field of investment activity between Ukraine and Russian Federation (Ukraine/Russia Federation), adopted 24 December 1993, entered into force 21 November 1994 <https://zakon.rada.gov.ua/laws/show/997_144>

legislate within its territory.⁷¹ In particular, almost each article of the BIT refers to the actions that State takes within the territory to reach particular result, i.e. create favorable conditions, protect, create transparency of legislation etc. In particular, Articles 2, 3, 4, 5, 7 of the Ukraine-Russia BIT refer to the legislative and executive authority within its territory.⁷² Russia obtained de facto jurisdiction over the territory since 27 February 2014, including all opportunities prescribed by the BIT.

Therefore, the context of the BIT supports the ordinary meaning of the “territory” and does not exclude coverage by the BIT of the effectively controlled Crimea by Russia.

c) Object and purpose of the BIT

Commentaries state that two-fold object and purpose of the BIT is “*enhancing economic operation and safeguarding foreign investments*”⁷³ does not allow excluding of the Crimea from the territory of Russia for investment protection purposes.

The object and purpose of the Ukraine – Russia BIT is defined in the Preamble as “*having the intent to create and support the favorable conditions for mutual investments...*”.⁷⁴ Additionally, Preamble of the Ukraine-Russia BIT refers to the other treaty - Agreement on cooperation in the investment activity area between Ukraine and Russia as “*...developing the main terms of the Agreement on cooperation in the investment activity area between Ukraine and Russia dated 24 December 1993...*”.⁷⁵

Thus, BIT places investments and its protection on the first place in the parties’ relations. Any restrictions that are not contained in the BIT undermine such purpose. This object cannot be canceled just because the area where it is situated fell under

⁷¹ J. Hepburn, R. Kabra ‘Investigation: Further Russia investment treaty decisions uncovered, offering broader window into arbitrators’ approaches to Crimea controversy’ [2017] Investment Arbitration Reporter <<https://www.iareporter.com/articles/investigation-further-russia-investment-treaty-decisions-uncovered-offering-broader-window-into-arbitrators-approaches-to-crimea-controversy/>> accessed 19 May 2019

⁷² Agreement between Ukraine and Russian Federation on encouragement and mutual protection of investments (Ukraine/Russian Federation) (adopted 15 December 1999, entered into force 27 January 2000) <https://zakon.rada.gov.ua/laws/show/643_101>

⁷³ J. Hepburn, R. Kabra ‘Investigation: Further Russia investment treaty decisions uncovered, offering broader window into arbitrators’ approaches to Crimea controversy’ [2017] Investment Arbitration Reporter <<https://www.iareporter.com/articles/investigation-further-russia-investment-treaty-decisions-uncovered-offering-broader-window-into-arbitrators-approaches-to-crimea-controversy/>> accessed 19 May 2019

⁷⁴ Preamble of the Agreement between Ukraine and Russian Federation on encouragement and mutual protection of investments (Ukraine/Russian Federation) (adopted 15 December 1999, entered into force 27 January 2000) <https://zakon.rada.gov.ua/laws/show/643_101>

⁷⁵ Agreement on cooperation in the field of investment activity between Ukraine and Russian Federation (Ukraine/Russia Federation), adopted 24 December 1993, entered into force 21 November 1994 <https://zakon.rada.gov.ua/laws/show/997_144>

effective control of the other State.

Tribunals in *Ukrnafta and Stabil cases* took alike approach with *Sanum v Laos*⁷⁶ case and correctly agreed stating that non-application of the BIT:

“...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...”⁷⁷

In the light of the above any restrictive interpretation of the BIT that leads to excluding investment protection based on aggressor “State’s territorial expansion” would contradict Treaty object and purpose.

d) Good faith

The Contracting State must perform obligations under the Treaty according to *pacta sunt servanda principle*. Ukraine – Russia BIT does not contain restrictions excluding areas under effective control. Thus, good faith in this case means that Treaty does not contain (1) limitations of the “territory” that were not written and (2) ways of interpretation enhancing the performance of the State’s obligations. Additionally, Russia’s actions must be taken into account as evidence that Crimea is a Russian territory for the purposes of the BIT.

Russia treats Crimea as a part of its territory and cannot exclude previously admitted Crimea just because it triggers Russia’s investment protection obligations. Such interpretation would contradict good faith and mean interpretation of the international obligations depending on the desired outcome.

Russia acts in a manner that it has jurisdiction and even sovereignty over that territory even though international community did not recognize it. In particular, Russia enacted

⁷⁶ The Court of Appeals of the Republic of Singapore, Civil Appeals No I39 and 167 of 2015 in Case 2013-13 *Sanum Investments Limited v. the Government of the Lao people’s Democratic Republic* <<https://www.italaw.com/sites/default/files/case-documents/italaw7600.pdf>> accessed 18 May 2019, <<https://www.italaw.com/cases/2050>> and <<https://www.italaw.com/sites/default/files/case-documents/italaw3322.pdf>> (para241)

⁷⁷ J. Hepburn, R. Kabra ‘Investigation: Further Russia investment treaty decisions uncovered, offering broader window into arbitrators’ approaches to Crimea controversy’ [2017] Investment Arbitration Reporter <<https://www.iareporter.com/articles/investigation-further-russia-investment-treaty-decisions-uncovered-offering-broader-window-into-arbitrators-approaches-to-crimea-controversy/>> accessed 19 May 2019

the Law on Accession of the Crimea in Russian Federation on 21 March 2014⁷⁸ and claims that Crimea is its territory in other international relations.⁷⁹

Such conclusion is supported by international customary law and was accepted by *Ukrnafta and Stabil* Tribunals. In particular, under the paragraph 10 of International Law Commission`s 2006 Guiding Principles Applicable to Unilateral Declarations of States:

*“A unilateral declaration that has created legal obligations for the State making the declaration cannot be revoked arbitrarily”.*⁸⁰ Indeed, *“in its 1974 Judgments in the Nuclear Tests cases, the International Court of Justice states that “the unilateral undertaking resulting from [the French] statements cannot be interpreted as having been made in implicit reliance on an arbitrary power of reconsideration”.*⁸¹

Ukrnafta and Stabil Tribunals *“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”.*⁸²

Thus, the interpretation of the term “Territory” in the Ukraine – Russia BIT under the VCLT shows, that it does not have any special meaning and does not exclude the territories under the effective control of the state, legally acquired or not.

2.3. Illegally annexed territories as part of the State territory in terms of BIT

It is important to define, why illegally acquired territories are the part of the Contracting State territory under Ukraine – Russia BIT for the purposes of investment protection.

⁷⁸ The Law of Russian Federation “On acceptance of Crimean Republic to Russian Federation and creation in the Russian Federation of new subjects – Crimean Republic and city of federal importance Sevastopol” adopted on 21 March 2014 [О Принятии В Российскую Федерацию Республики Крым И Образовании В Составе Российской Федерации Новых Субъектов – Республики Крым И Города Федерального Значения Севастополя] <<http://www.consultant.ru/cons/cgi/online.cgi?req=doc&base=LAW&n=314390&fld=134&dst=1000000001.0&rnd=0.19362296286054415#09740625512518282>> accessed on 01 May 2019

⁷⁹ A. Niemoj ‘The Protection of Investments in Disputed Territories: A Panel Hosted by BIICL’s Investment Treaty Forum’ [2017] <<http://arbitrationblog.kluwerarbitration.com/2017/05/17/the-protection-of-investments-in-disputed-territories-a-panel-hosted-by-biicls-investment-treaty-forum/>> accessed 19 May 2019

⁸⁰ United Nations, International Law Commission, *Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations (with commentaries thereto)* [2006], Vol. II, Part II Yearbook of the International Law Commission <http://legal.un.org/ilc/texts/instruments/english/commentaries/9_9_2006.pdf> accessed 19 May 2019

⁸¹ Nuclear Tests case (Australia v. France; New Zealand v. France), ICJ Reports [1974], p. 270, para. 51, and p. 475, para. 53 cited according to the United Nations, International Law Commission, *Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations (with commentaries thereto)* [2006], Vol. II, Part II Yearbook of the International Law Commission <http://legal.un.org/ilc/texts/instruments/english/commentaries/9_9_2006.pdf> accessed 19 May 2019

⁸² J. Hepburn, R. Kabra ‘Investigation: Further Russia investment treaty decisions uncovered, offering broader window into arbitrators’ approaches to Crimea controversy’ [2017] Investment Arbitration Reporter <<https://www.iareporter.com/articles/investigation-further-russia-investment-treaty-decisions-uncovered-offering-broader-window-into-arbitrators-approaches-to-crimea-controversy/>> accessed 19 May 2019

Crimea was not recognized by international community as part of Russia. On 27 March 2014 the UN General Assembly Resolution No. GA/11493 “Territorial integrity of Ukraine”⁸³, “called on ... not to recognize any change in the status of Crimea or the Black Sea port city of Sevastopol...”.⁸⁴ Thus, Russia illegally acquired this territory.

From BIT perspective it is not important whether Russia acquired its control legally or illegally. On the other hand, the international law does not recognize sovereignty of Russia in Crimea. These two approaches do not contradict each other due to different aims and perspectives of the public international law and BIT.

2.3.1. Public international law perspective

There are legal and illegal ways of acquisition of the territory under international law. Given our fact pattern we will refer to the illegal way, i.e. annexation that covers territorial changes and changes of the effective control due to an armed conflict. Important, that the international law did not recognize the occupation and annexation as illegal ways to acquire territory until after the World War II. That shall be taken into account during the earlier case law analysis.⁸⁵

Nowadays, annexation is an unlawful way to acquire the territory under numerous sources of international law.

Firstly, Article 2 (4) UN Charter prescribes, that:

“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”

Secondly, the General Assembly in Friendly Relations Declaration stated:

*“[t]he territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognized as legal”.*⁸⁶

⁸³ UNGA (United Nations General Assembly) Resolution GA/11493 68th session (27 March 2014) ‘Territorial integrity of Ukraine’ <https://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/68/262>

⁸⁴ UNGA ‘Meeting Coverage UNGA’ Resolution GA/11493 68th session (27 March 2014) ‘Territorial integrity of Ukraine’ <<https://www.un.org/press/en/2014/ga11493.doc.htm>>

⁸⁵ R. Happ; S. Wuschka, ‘Horror Vacui: Or Why Investment Treaties Should Apply to Illegally Annexed Territories’ (2016) Vol. 33/3 Journal of International Arbitration, Kluwer Law International, 245 – 268 247 -250

⁸⁶ G.A. Res. 2625 (XXV), U.N. Doc. A/8082 (Oct. 24, 1970)/The Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in accordance with the Charter of the United Nations (“Friendly Relations Declaration”)

No additional actions including court decision are needed to refuse in recognition when the breach of the rule occurs.⁸⁷ Modern customary international law supports such approach that “*no additional determination is needed by an organ of the international legal system to implement the rule when a case of its breach arises*”.⁸⁸

Finally, ILC Articles of State Responsibility “*accurately reflect customary international law of state responsibility*”.⁸⁹ Under Articles 40 and 41 of ILC Articles on State Responsibility the situation that is created as a result of the serious breach of the peremptory norm of the international law cannot be recognized as lawful.

Under paragraph 2 of Article 41 “*No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation*”. While para 1 of Article 40 defines the serious breach as arising out of peremptory norm of general international law: “*This chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law*”.⁹⁰

Article 53 of the VCLT defines a peremptory norm of general international law as “*a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.*”

Since the prohibition of use of force prescribed under Article 2(4) of the UN Charter is a peremptory norm,⁹¹ or a principle of jus cogens⁹² the result reached by its violation cannot be recognized as lawful. This analysis was confirmed in real life: General Assembly of the UN, Council of Europe and most states rejected the inclusion of the

⁸⁷ Thomas D. Grant ‘International Dispute Settlement in response to an unlawful seizure of territory: Three Mechanisms’ 2015 Chicago Journal of International Law (Volume 16 Number 1) 4

⁸⁸ East Timor case (Portugal v. Australia), 1993 ICJ Rep [1993] 90, 129-30 (June 30) (Skubiszewski, J., dissenting)

⁸⁹ Kaj Hober *Selected Writings on Investment Treaty Arbitration* (2013) 57.

⁹⁰ United Nations, International Law Commission, *ILC Articles on State Responsibility* (Report on the work of its 53rd session, 2001), Official Records of the General Assembly, 55th session, Supplement No. 10 (A/56/10) <<http://www.un.org/law/ilc/>> accessed 19 May 2019

⁹¹ G. A. Christenson, ‘The World Court and Jus Cogens’ (1987) Vol 81/1 American Journal on International Law pp. 93-101 <<https://www.cambridge.org/core/journals/american-journal-of-international-law/article/world-court-and-jus-cogens/8011016D247BE3AB9510B77508CB3467>> accessed 19 May 2019

⁹² R. Beckman, D. Butte, ‘Introduction to International Law’ 6 <<https://www.ilsa.org/Jessup/Jessup%20Competitor%20Resources/intlawintro.pdf>> accessed 19 May 2019

Crimea in the territory of Russian Federation .⁹³

Unfortunately, there are still cases on illegal annexation. For example, Goan Episode, East Timor case;⁹⁴ Namibia and South Africa`s presence;⁹⁵ Northern Cyprus since that area's purported separation from the Republic of Cyprus in the 1980s;⁹⁶ Russia's presence since the early 1990s in the Transdnistria region of Moldova;⁹⁷ Donbass area and Crimea.⁹⁸

However, Crimean cases have a difference - Russia admitted its presence in Crimea. That directly confirm factual violation of the Article 2 (4) UN Charter by direct and indirect violation of territorial integrity of Ukrainian territory.⁹⁹

It was not contested and even confirmed by the President of Russian Federation: “Crimean self-defense forces were of course backed by Russian servicemen...”¹⁰⁰ and “Russian soldiers blocked Ukrainian armed forces situated in Crimea.”¹⁰¹

From the international law perspective that means that “Crimea enjoys (or – depending on the perspective – has to content itself with) territorial protection as part of

⁹³ Thomas D. Grant ‘International Dispute Settlement in response to an unlawful seizure of territory: Three Mechanisms’ (2015) Vol. 16/1 Chicago Journal of International Law 4-7 7

⁹⁴ M. N. Shaw, *Title to the Territory in Africa: International Legal Issues* (Clarendon Press, Oxford 1986)

<<https://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780198253792.001.0001/acprof-9780198253792>> accessed 19 May 2019; East Timor case (Portugal v. Australia), 1993 ICJ Rep [1993] 90, 129-30 (June 30) (Skubiszewski, J., dissenting).

⁹⁵ Legal Consequences for States of the Continued Presence of South Africa in Namibia Notwithstanding Security Council Resolution 276 (Advisory Opinion) [1970] I.C.J. 16 (June 21) [hereinafter Namibia Advisory Opinion] cited according to the Thomas D. Grant ‘International Dispute Settlement in response to an unlawful seizure of territory: Three Mechanisms’ 2015 Chicago Journal of International Law (Volume 16 Number 1)

⁹⁶ *Cyprus v Turkey* (App No. 25781/94) ECHR 2001-IV 13-16, *Loizidou v Turkey* (App No. 15318/89) ECHR 1996 cited according to the Thomas D. Grant ‘International Dispute Settlement in response to an unlawful seizure of territory: Three Mechanisms’ (2015) Vol. 16/1 Chicago Journal of International Law 4-7 7

⁹⁷ *Ilascu et al v. Moldova and Russia* (App No.18454/06) ECHR, judgement of July 12 2014, cited according to the Thomas D. Grant ‘International Dispute Settlement in response to an unlawful seizure of territory: Three Mechanisms’ 2015 Chicago Journal of International Law (Volume 16 Number 1)

⁹⁸ O. Marchenko, ‘Protection of investments in international armed conflicts:

a case for Donbas’ [2019] The European Arbitration Review <<https://marchenkopartners.com/wp-content/uploads/2018/12/Protection-of-investments-in-international-armed-conflicts-EN-O.-Marchenko.pdf>> accessed 19 May 2019

⁹⁹ Ch. Marxen, ‘Territorial Integrity in International Law – Concept and implications for Crimea’ [2015] Max Planck Institut für ausländisches öffentliches Recht und Völkerrecht <http://www.zaerv.de/75_2015/75_2015_1_a_7_26.pdf> accessed 19 May 2019

¹⁰⁰ Putin Acknowledges Russian Military Servicemen Were In Crimea [17.4.2014] Russia Today (published together with a video documentation of Putin’s statements with simultaneous translation into English at

<https://www.youtube.com/watch?v=G_zTMA1cQh4>; cited according to Ch. Marxen, ‘Territorial Integrity in International Law – Concept and implications for Crimea’ [2015] Max Planck Institut für ausländisches öffentliches Recht und Völkerrecht)

¹⁰¹ Five stages of acceptance. What Putin said about Russian troops in Crimea [5 стадий принятия. Как Путин рассказывал о российских военных в Крыму] [2018] Our Time <<https://www.currenttime.tv/a/five-states-of-vladimir/29273395.html>> accessed 19 May 2019

Ukraine”.¹⁰²

Thus, in terms of public international law Crimea remains a part of Ukrainian territory. It derives from the doctrine of non-recognition, i.e. the international community does not recognize illegally acquired areas as a territory of state.¹⁰³ But it does not exclude the effectively controlled Crimea from the territory of Russia for the investment protection purposes.

2.3.2. Crimea as part of Russia from BIT perspective

There are strong reasons and no impediments to consider Crimea as a part of Russian territory according to the Ukraine – Russia BIT. The main reasons are that (1) it serves the purposes of investment protection; (2) definition of the territory under Ukraine-Russia BIT is broad enough to include the *entire territory of the State*, legally acquired or not, including the territory under effective control of the State. Below there are arguments that must be considered by the Tribunal in this respect.

a) “Moving treaty frontier” rule

“Moving treaty frontier” rule is *a rule of customary international law that “presumptively provides that a state’s treaties will automatically extend to any new territory that becomes part of the state”*.¹⁰⁴

In particular, under Article 29 of the VCLT:

“Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of of its entire territory” [our emphasize added].

This rule was applied by Singapore Court of Appeal in para 49 of *Sanum Investments Ltd. v Government of the Lao People’s Democratic Republic* Judgement:

“... because a treaty is binding in respect of the entire territory of a State, the MTF Rule presumptively provides for the automatic extension of a treaty to a

¹⁰² Ch. Marxen, ‘Territorial Integrity in International Law – Concept and implications for Crimea’ [2015] Max Planck Institut für ausländisches öffentliches Recht und Völkerrecht 8 <http://www.zaoerv.de/75_2015/75_2015_1_a_7_26.pdf> accessed 19 May 2019

¹⁰³ I. Brownlie, *Principles of Public International Law* (7th ed, Oxford University Press, New York 2008) 95

¹⁰⁴ G. B. Born, J. W. Lim, Dh. Prasad `Sanum v. Laos (Part I): The Singapore Court of Appeal Affirms Tribunal’s Jurisdiction under the PRC-Laos BIT’ [2016] Kluwer Arbitration Blog <<http://arbitrationblog.kluwerarbitration.com/2016/11/10/sanum-v-laos-the-singapore-court-of-appeal-affirms-tribunals-jurisdiction-under-the-prc-laos-bit/>> accessed 19 May 2019

*new territory as and when it becomes a part of that State... ”.*¹⁰⁵

That means, that if the territory of the state was changed, Treaty is applicable for the entire [changed] territory, if “*the contracting states did nothing to expressly displace the effects of the MTF Rule*”.¹⁰⁶ This interpretation was correctly accepted by the *Ukrnafta and Stabil Tribunals* and the Swiss court in annulment proceedings.¹⁰⁷

b) Non-contradiction to non-recognition principle

Considering Crimea as a part of Russia for the purposes of investment protection in terms of Ukraine – Russia BIT does not contradict non-recognition principle under public international law. The Tribunals in *PJSC Ukrnafta and Stabil LLC cases* have already defined that “*the BIT’s protection extended to the entire territory under Russia’s effective control, whether lawfully occupied or not*”.¹⁰⁸ This conclusion is correct and may be backed with the following arguments.

Firstly, considering Crimea as Russian territory under the Ukraine – Russia BIT does not violate a non-recognition principle. The reason is the aim of the non-recognition rule, that has two implications: (1) non-recognition rule aimed to state the illegality of the acquisition of the territory¹⁰⁹; it is not aimed to define the territory of state for the purposes of investment protection; (2) non-recognition rule aimed not to let the aggressor state to benefit from the illegally acquired territory.¹¹⁰

If Russia avoid the responsibility for alleged violations of the investor rights, it would contradict aims of the non-recognition principle.

¹⁰⁵ The Court of Appeals of the Republic of Singapore, Civil Appeals No I39 and 167 of 2015 in Case 2013-13 *Sanum Investments Limited v. the Government of the Lao people’s Democratic Republic* <<https://www.italaw.com/sites/default/files/case-documents/italaw7600.pdf>> accessed 18 May 2019

¹⁰⁶ K. Yannaca-Small (ed.), *Arbitration Under International Investment Agreements: A Guide to the Key Issues* p. 785, para. 28.113

¹⁰⁷ Swiss Federal Tribunal Case No. 4A_396/2017 *PJSC Ukrnafta v. Russia* <https://www.bger.ch/ext/eurospider/live/fr/php/aza/http/index.php?highlight_docid=aza%3A%2F%2Faza://16-10-2018-4A_396-2017&lang=fr&zoom=&type=show_document> accessed 18 May 2019; Swiss Federal Tribunal Case No. 4A_396/2017 and *Stabil LLC and others v. Russia*

<https://www.bger.ch/ext/eurospider/live/fr/php/aza/http/index.php?highlight_docid=aza%3A%2F%2Faza://16-10-2018-4A_396-2017&lang=fr&zoom=&type=show_document> accessed 18 May 2019

¹⁰⁸ J. Hepburn, R. Kabra ‘Investigation: Further Russia investment treaty decisions uncovered, offering broader window into arbitrators’ approaches to Crimea controversy’ [2017] *Investment Arbitration Reporter* <<https://www.iareporter.com/articles/investigation-further-russia-investment-treaty-decisions-uncovered-offering-broader-window-into-arbitrators-approaches-to-crimea-controversy/>> accessed 19 May 2019

¹⁰⁹ Ian Brownlie, *International Law and Use of Force by States* (Oxford University Press, New York 1963) <<https://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780198251583.001.0001/acprof-9780198251583-chapter-25>> accessed 19 May 2019, Chapter “The Principle of Non-Recognition”

¹¹⁰ R. Happ; S. Wuschka, ‘Horror Vacui: Or Why Investment Treaties Should Apply to Illegally Annexed Territories’ (2016) Vol. 33/3 *Journal of International Arbitration*, *Kluwer Law International* 245 – 268 262

Such conclusion is supported by customary international law and scholars. The ICJ in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* states:

“even though that the International Covenant on Economic, Social and Cultural Rights (ICESR) had no provision regarding the scope of application it applies both to the territories over which a State party has sovereignty and to those over which that State exercises territorial jurisdiction”.¹¹¹ [our emphasize added]

This approach clarifies the meaning of the host state for our case. Indeed, “*Host state*” meaning depends on the territory title to the extent the holder of such title controls it, i.e. can factually protect or violate investors` right in the territory. If the state - holder of title does not have a control, it cannot actually fulfill its obligations under the Treaty. Principle of non-recognition “*cannot be applicable strictly to illegally annexed territories*”.¹¹² It cannot be called for the definition of term “Territory” and is not applicable for the purposes of the BIT interpretation. Customary international law supports these conclusions by:

The ICJ in its *Namibia Advisory Opinion*: “*the non-recognition of South Africa`s administration of the Territory should not result in depriving the people of Namibia of any advantages derived from international cooperation*”.¹¹³

The ECHR in *Cyprus v Turkey* “*non-recognition of the acts of the de facto authorities that concern individuals would strip the inhabitants of their rights in international setting*”¹¹⁴

Secondly, bilateral recognition by Russia and Ukraine of the effective control in Crimea means that investors may demand Russia to execute the international obligations of the state. Russia produced dozens unilateral declarations that the Crimea is a part of Russia details of which are addressed in the present Thesis¹¹⁵. Ukraine informed the international community that Russia controls Crimea by initiating an inter-state application against the Russian Federation and interim measures

¹¹¹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion (2004) ICJ reports 136,180, para 112 cited according to Steven C. Young ‘*Foreign Direct Investment Disputes with Unrecognised States: FDI Arbitration in Kosovo*’, *Journal of International Arbitration*, 2016, Volume 33 Issue 5” pp 501 – 524 p 509

¹¹² Richard Happ; Sebastian Wuschka ‘*Horror Vacui: Or Why Investment Treaties Should Apply to Illegally Annexed Territories*’ (2016) Volume 33 Issue 3 *Journal of International Arbitration*, Kluwer Law International 245 – 268

¹¹³ *Legal Consequences for States of the Continued Presence of South Africa in Namibia Notwithstanding Security Council Resolution 276 (Advisory Opinion)* [1971] I.C.J Reports 16, 56, para 125, cited according to R. Happ; S. Wuschka ‘*Horror Vacui: Or Why Investment Treaties Should Apply to Illegally Annexed Territories*’ (2016) Volume 33 Issue 3 *Journal of International Arbitration*, Kluwer Law International, pp. 245-268; 261-263

¹¹⁴ *Cyprus v Turkey* (App No. 25781/94) ECHR 2001-IV, Para 96

¹¹⁵ *Ibid*, Para 2.4

proceedings under “Rule 39 of the Rules of Court and Article 33 of the European Convention”.¹¹⁶ That means both states have the same view that it is Russia that controls Crimea since March 2014.

Bilateral recognition and international recognition have different purposes and consequences. International recognition is connected with the non-recognition principle and refers to the ability to extend the sovereignty of state on the territory. To the contrary bilateral recognition, i.e. Ukrainian and Russian recognition of Russian presence in Crimea “*is important as regards evidence of effective control and should therefore be treated as an element within that principle*”.¹¹⁷ Thus, non-recognition principle does not exclude evidential value of the bilateral recognition.

Thirdly, international arbitration tribunals are not claimed to resolve the territorial dispute, but have a mandate for specific purpose - resolving of investment dispute. The other issues are beside their mandate and power and therefore cannot influence the non-recognition principle. That leads to the scope of Tribunal`s mandate on certain dispute.

c) Investment tribunal interprets the BIT to decide certain investment dispute

Investment protection purposes impose two limitations on the interpretation exercise – scope of dispute and parties that are relevant for understanding of the territory.

Firstly, investment tribunal has mandate to resolve the investment dispute between the investor and the host state. It does not extend to other issues of public international law. Based on that BIT is not claimed to define borders of the State, but to define who is responsible for the foreign investment protection within certain area.

In fact, Tribunal interprets the BIT “*for the limited purpose of protecting the rights of [inhabitants]*” investors.¹¹⁸ BIT is an international treaty that serves for the purposes of cooperation between the states in a particular field – to protect each other investors in the territory of the host state. Foreign investor in the territory of *host state* must enjoy

¹¹⁶ Letter from the Permanent Representative of Ukraine to the United Nations addressed to the President of the Security Council dated 17 March 2014 on UN/S/2014/196 <<https://undocs.org/S/2014/196>>

¹¹⁷ M. N. Shaw, *Title to the Territory in Africa: International Legal Issues* (Clarendon Press, Oxford 1986) 23 <<https://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780198253792.001.0001/acprof-9780198253792>> accessed 19 May 2019

¹¹⁸ *Cyprus v Turkey* (App No. 25781/94) ECHR 2001-IV, para 92; Steven C. Young, `Foreign Direct Investment Disputes with Unrecognised States: FDI Arbitration in Kosovo` (2016) Vol. 33/5 Journal of International Arbitration pp. 501-524 509

guarantees of the Treaty.

Secondly, investment tribunal has mandate for a particular dispute between certain investor and host state. Its award would be binding for the parties of the arbitral proceedings only. It is also binding to the court of enforcement to the extent it cannot revise award on the merits and may refuse enforcement on the basis of sufficient evidence from the other party only.

In other words, the Tribunal interprets the terms in the BIT only to the extent it serves task to resolve this dispute and is not aimed to create a general rule or resolve interstate dispute. The same position was taken in *Sanum v Laos case* where the Exchange of Letters between officials was interpreted not in abstract but in terms of the “*interpretation or modification of the China – Laos BIT*”.¹¹⁹

There are arbitral awards in modern practice that dealt with territorial dispute/issue to the extent necessary to resolve the dispute within their mandate, but not deciding the territorial dispute. For instance, in *Republic of Mauritius v UK in Chagos Island issue* the Tribunal decided on whether “*the UK’s declaration of the MPA was incompatible with substantive and procedural obligations under UNCLOS*” in 2015,¹²⁰ but the territorial issue itself was addressed in ICJ Advisory only on 25 February 2019.¹²¹

Thus, since 27 February 2014 Crimea is a part of Russian territory in terms of Ukraine – Russia BIT. But this conclusion is valid and the alleged arbitral award is binding only for the parties of the investment dispute due to two reasons: (1) it is not necessary to define whether the annexation of Crimea was lawful under public international law¹²²; (2) mechanism contained in the BIT is not claimed to be a basis for a territorial dispute settlement between the states, but serves a purpose resolving of certain dispute between defined parties. Thus, illegal annexation was made by means of imposing of effective

¹¹⁹ Odysseas G. Repousis, ‘On Territoriality and International Investment Law: Applying China’s Investment Treaties To Hong Kong And Macao’ (2015) Vol. 37/1 Michigan Journal of International Law

¹²⁰ PCA Case No. 2011-03 *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)* [18 Mar 2015] <https://pca-cpa.org/en/cases/11/> [<http://www.pcacases.com/pcadocs/MU-UK%2020150318%20Award.pdf>] accessed 25 May 2019

¹²¹ Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Advisory Opinion) ICJ 169 (25 Feb. 2019) <https://www.icj-cij.org/files/case-related/169/169-20190225-01-00-EN.pdf>

¹²² S. Bianchi, ‘The Applicability of the Ukraine-Russia BIT to Investment Claims in Crimea: A Swiss Perspective’ [2019] Kluwer Arbitration Blog <<http://arbitrationblog.kluwerarbitration.com/2019/03/16/the-applicability-of-the-ukraine-russia-bit-to-investment-claims-in-crimea-a-swiss-perspective/>> accessed 19 May 2019

control. Below meaning and criteria of effective control are described.

2.4. The meaning of “effective control” in the public international law and legal consequences for Crimea

2.4.1. Meaning of effective control

Change of effective control in Crimea activated the Ukraine-Russia protection mechanisms for Ukrainian investors in Crimea. Therefore, it is important to understand what is effective control to answer the question when it have started. According to Malcolm Shaw effectiveness has a spacial and temporal dimension.¹²³

Control means “to order, limit, or rule something, or someone`s action or behavior”.¹²⁴ It consists of (1) possibility to influence and (2) exercise of such possibility.

The term “effective control” is based on the ordinary meaning of “control” and used in many contexts, i.e. corporate and private law,¹²⁵ or public international law. In last case enforcement of control is connected with territoriality.¹²⁶ Sovereign, administrative, military¹²⁷ and other types of control are used to establish effective control over the territory.

Nowadays effective control may be established over the other state`s territory in the contrary to previous decades, when “effective control” was associated with terra nullius¹²⁸ and *Western Sahara case*.¹²⁹ It was defined as occupation of the area that did not belong to another state or was not under control of politically and socially organized

¹²³ M. N. Shaw, *Title to the Territory in Africa: International Legal Issues* 20 (Clarendon Press, Oxford 1986) <<https://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780198253792.001.0001/acprof-9780198253792>> accessed 19 May 2019

¹²⁴ Cambridge Dictionary (online) <<https://dictionary.cambridge.org/dictionary/english/control>> accessed 19 May 2019

¹²⁵ Mariam Al Shikarchy, ‘The Federal Court of Appeal clarifies the de facto control test’ [2016] *Gowling WLG* <<https://gowlingwlg.com/en/insights-resources/articles/2016/the-federal-court-of-appeal-clarifies-the-de-facto/>> accessed 19 May 2019

¹²⁶ Daud Hassan, ‘The rise of the Territorial State and The Treaty of Westphalia’ [2006] Vol. 9 *Yearbook of New Zealand Jurisprudence* pp. 63-70 64 <<https://opus.lib.uts.edu.au/bitstream/10453/3289/1/2006006060.pdf>> accessed 19 May 2019

¹²⁷ Kenneth A.Schultz, ‘What`s in a Claim? De Jure versus De Facto Borders in Interstate Territorial Disputes` [2014] *Journal of Conflict Resolution* Vol. 58 (6) pp. 1059-1066, 1084

<<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.1005.5290&rep=rep1&type=pdf>> accessed 19 May 2019

¹²⁸ L. Oppenheim, H. Lauterpacht (ed.), *International Law*, Vol. 1 (8th edn, London, Longmans, Green & Co. 1955) para 6.1 <<https://slideplayer.com/slide/9485256/>> accessed 21 May 2019

¹²⁹ *Western Sahara*, Advisory Opinion [1975] I.C.J. 12 (Oct. 16) cited according to Mark A. A. Smith Jr., ‘*Sovereignty Over Unoccupied Territories-The Western Sahara Decision Western Sahara case`* (1977) *Case Western Reserve Journal of International Law* Vol. 9 (1), pp. 135-159

<<https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=2180&context=jil>> accessed 19 May 2019

tribes. Effective control in that sense was a first step to obtain title on territory.¹³⁰

In public international law effective control over the territory means the exercise of the jurisdiction regardless presence of legal ground for that. Such position is supported by customary international law, in particular in *Schtraks case* the court stated:

“the territory ...included whatever is under the state`s effective jurisdiction... the instruments concerned were not concerned with sovereignty but with territory in which territorial jurisdiction is exercised”.¹³¹

In such a case, the sovereignty of the state as a legal ground does not matter because the state factually exercises powers that are followed by the people and companies within that territory. According to *Brownlie`s Principles of Public International law*:

*“courts are very ready to equate “territory” with the actual and effective exercise of jurisdiction even when it is clear that the state exercising jurisdiction has not been the beneficiary of any lawful and definitive act of disposition.”*¹³²

Indeed, if the state has an effective control over the territory it is responsible for any violations in that area. Tribunals in *Ukrnafta and Stabil cases* agreed:

“Russia had established effective control over Crimea through a combination of physical and legal acts, including by physically occupying Crimea in February 2014, by incorporating Crimea into Russia under a March 2014 decree and by adopting a constitution for Crimea, and also by repeatedly emphasizing in domestic Russian legislations that Crimeawas an integral part of its territory”.¹³³

Thus, meaning of effective control defines through which actions it is established in real life. I will analyze its forms one by one in the next paragraph.

2.4.2. Criteria of effective control and their implication on Crimea

Ukraine lost effective control in the moment when Russia gained it. To define whether Russia holds the effective control over Crimea, it is necessary to identify which Russian actions constitute the effective control over the territory and whether they took place

¹³⁰ Mark A. A. Smith Jr., `Sovereignty Over Unoccupied Territories-The Western Sahara Decision Western Sahara case` (1977) Case Western Reserve Journal of International Law Vol. 9 (1), pp. 135-159 138

<<https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=2180&context=jil>> accessed 19 May 2019

¹³¹ *Schtraks v. Government of Israel and Others* [1964] AC 556, [1962] 3 All ER 529, [1962] 3 WLR 1013, United Kingdom: House of Lords (Judicial Committee), 6 September 1962 cited according to I. Brownlie, *Principles of Public International Law* (7th ed, Oxford University Press, New York 2008) p. 113

¹³² I. Brownlie, *Principles of Public International Law* (7th ed, Oxford University Press, New York 2008) 112

¹³³ J. Hepburn, R. Kabra `Investigation: Further Russia investment treaty decisions uncovered, offering broader window into arbitrators` approaches to Crimea controversy` [2017] Investment Arbitration Reporter <<https://www.iareporter.com/articles/investigation-further-russia-investment-treaty-decisions-uncovered-offering-broader-window-into-arbitrators-approaches-to-crimea-controversy/>> accessed 19 May 2019

in Crimea in 2014.

a) Ability to legislate

Russia was the only state that has the effective, and resultative ability to legislate in the Crimea.¹³⁴ BIT contains guarantees to the investors. They are based on States regulative authority within the territory: legislative activity and enforcement of the legislation. Russia has become the only state that could exercise the resultative legislative authority in Crimea. In other words, physical presence of Russian authorities enabled enforcement of the Russian legislation in Crimea and substitution of state officials.

b) Substitution of the state authorities

“Effective government must have effective control over the territory and population”.¹³⁵ Russia deprived Ukraine from such control and become the holder of effective government in Crimea. In particular, in the paragraph 172 of ICJ case in matter of *DRC v Uganda case* effective government issue addressed as:

“... *The Court must examine whether there is sufficient evidence to demonstrate that the said authority was in fact established and exercised by the intervening State in the areas in question. In the present case the Court will need to satisfy itself that the Ugandan armed forces in the DRC were not only stationed in particular locations but also that they had substituted their own authority for that of the Congolese Government...*”. **[our emphasize added].**

Russia does not object that it establishes and exercises the authority in Crimea and has an effective government,¹³⁶ enjoys legislative and administrative competence.

Firstly, on the Russian official web-site with contact details of state authorities there is a separate page for “Crimean Republic”.¹³⁷ This page may serve as evidence of at least “elements of governmental authority” and “public powers” that were recognized as signs of other state`s jurisdiction in *Al-Siskeini and others v. United Kingdom*.¹³⁸

¹³⁴ J. Hepburn, R. Kabra ‘Investigation: Further Russia investment treaty decisions uncovered, offering broader window into arbitrators’ approaches to Crimea controversy’ [2017] Investment Arbitration Reporter <<https://www.iareporter.com/articles/investigation-further-russia-investment-treaty-decisions-uncovered-offering-broader-window-into-arbitrators-approaches-to-crimea-controversy/>> accessed 19 May 2019

¹³⁵ Permanent Court of International Justice, *Monastery of Saint-Naoum (Advisory Opinion)* [1924] Series B Vol. 9 Collection of Advisory Opinions (A.W. Sijthoff’s Publishing Company, Leyden 1924) pp. 1, 26 <http://www.worldcourts.com/pcij/eng/decisions/1924.09.04_saint_naoum.htm> accessed 21 May 2019

¹³⁶ A. Rudman ‘Re-defining National Sovereignty: Key to Avoid Constitutional Reform? Reflections on the 2011 Green Paper on Land Reform’ (2012) Stellenbosch Law Review Vol. 23 (3) pp. 417-437 419

¹³⁷ Governmental authorities of Crimea and Sevastopol (Information resource) <https://krim.ros-spravka.ru/catalog/law_government/> accessed 19 May 2019

¹³⁸ *Al-Siskeini and others v. United Kingdom* (App No.55721/07) ECHR, judgement of 07 July 2011 para 142

Secondly, state authorities in Crimea issue documents under the Russian letterhead only that I faced in my own legal practice. The part of the Archive of the Ministry of Justice of Ukraine with documents archived by Ukrainian notaries in the Autonomous Republic of Crimea remained in Crimea after annexation. In May 2015 I was approached by the citizen of Ukraine that requested the Certificate from the Archive regarding one particular copy of notarized document dated 2003. Even though the document was issued when the Crimea was under the Ukrainian control, the Certificate dated 2015 was issued under the Russian Letterhead and with Russian stamp, signed by the Russian state official.

Thus, Russia was the only state that held control over legal actions in Crimea against Ukrainian will.

c) Ukraine did not permit and objected against Russian presence

Ukraine have never permitted presence of Russian authorities in Crimea, but the control was effective enough that Ukraine acknowledged and objected¹³⁹ to it. To the contrary, in paragraph 46 of the *DRC v Uganda* ICJ case it was stated, that DRC agreed on the presence of the Ugandan troops that influenced the Tribunal`s decision:¹⁴⁰

“The Court held that both the absence of any objection to the presence of Ugandan troops in the DRC in the months before signing the Protocol, and subsequent practice, indicates that the continued presence, as before, of Ugandan troops was permitted by the DRC even under the Protocol”.

Thus, Russian troops has never had legitimate grounds for control of Crimea.

d) Russia exercised “overall effective control” and ‘in respect to each action” in Crimea directly and indirectly

Russia exercised both “*overall effective control*” and “*in respect to each operation in which alleged violations occurred*”. The overall control is enough to call it “effective” in Crimean cases, but in any event Russia overcame both thresholds. By direct and indirect actions, it exercised effective control over particular operations too.

¹³⁹ Decree of the President of Ukraine No. 296/2014 `On the suspension of the Resolution of the Verkhovna Rada of the Autonomous Republic of Crimea dated March 11, 2014, No. 1727-6/14 `On the Declaration on the Independence of the Autonomous Republic of Crimea and the City of Sevastopol` <<https://www.president.gov.ua/documents/2962014-16350>>

¹⁴⁰ Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2005, p. 168, para 46 <<https://www.icj-cij.org/files/case-related/116/116-20051219-JUD-01-00-EN.pdf>> accessed 19 May 2019

In *Bosnia and Herzegovina v. Serbia and Montenegro* ICJ stated that the control over the internal actors is effective when each operation is controlled:

*“must however be shown that this ‘effective control’ was exercised, or that the State’s instructions were given, in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations”*¹⁴¹ [our emphasize added].

In the *Tadic ICTY* case the claimed threshold was lower stating that *“financial and military support and general coordination of military activities are sufficient”*:

*“In order to attribute the acts of a military or paramilitary group to a State, it must be proved that the State wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity. Only then can the State be held internationally accountable for any misconduct of the group. However, it is not necessary that, in addition, the State should also issue, either to the head or to members of the group, instructions for the commission of specific acts contrary to international law.”*¹⁴² [our emphasize added].

That means ICTY applied less *“demanding control tests”* than ICJ not to let state avoid responsibility for internationally wrongful acts when they act through others.¹⁴³ ECHR also takes less demanding approach in *Loizidou v Turkey* case (northern Cyprus),¹⁴⁴ *Ilaşcu and Others v Moldova*:

“All of the above proves that the “MRT”, set up in 1991–1992 with the support of the Russian Federation, vested with organs of power and its own administration, remains under the effective authority, or at the very least under the decisive influence, of the Russian Federation, and in any event that it survives by virtue of the military, economic, financial and political support

¹⁴¹ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), Judgment, I.C.J. Reports 2007, p. 43 para. 400 <<https://www.icj-cij.org/files/case-related/91/091-20070226-JUD-01-00-EN.pdf>> accessed 19 May 2019 Ch. Marxen, ‘Territorial Integrity in International Law – Concept and implications for Crimea’ [2015] Max Planck Institut für ausländisches öffentliches Recht und Völkerrecht <http://www.zaoerv.de/75_2015/75_2015_1_a_7_26.pdf> accessed 19 May 2019

¹⁴² ICTY Case No IT-94-1-A *Prosecutor v Dusko Tadic*, Appeal Judgement dated 15 July 1999, p. 131; cited according to O. Marchenko, ‘Protection of investments in international armed conflicts: a case for Donbas’ [2019] The European Arbitration Review <<https://marchenkopartners.com/wp-content/uploads/2018/12/Protection-of-investments-in-international-armed-conflicts-EN-O.-Marchenko.pdf>> accessed 19 May 2019

¹⁴³ O. Marchenko, ‘Protection of investments in international armed conflicts: a case for Donbas’ [2019] The European Arbitration Review 116 <<https://marchenkopartners.com/wp-content/uploads/2018/12/Protection-of-investments-in-international-armed-conflicts-EN-O.-Marchenko.pdf>> accessed 19 May 2019

¹⁴⁴ *Loizidou v Turkey* (App No. 15318/89) ECHR 1996, p 56; cited according to O. Marchenko, ‘Protection of investments in international armed conflicts: a case for Donbas’ [2019] The European Arbitration Review <<https://marchenkopartners.com/wp-content/uploads/2018/12/Protection-of-investments-in-international-armed-conflicts-EN-O.-Marchenko.pdf>> accessed 19 May 2019

given to it by the Russian Federation”.¹⁴⁵ **[our emphasize added]**.

Russia overcame both thresholds: less and more demanding. Russia directly violated Ukrainian territorial integrity when established military control in Crimea and changed the authorities to Russia`s officials. It evidences every official action in Crimea was at least agreed by Russia and means effective control of Russia in Crimea.¹⁴⁶

Russian effective control in Crimea started on 27 February 2014 as a military and administrative control. On 27 February 2014 “green men” surrounded the Ukrainian military installations¹⁴⁷ in Crimea and Crimean Parliament, that is confirmed by the Russian media “Komsomolskaya Pravda”.¹⁴⁸ This day members of Crimean Parliament took decision to change the municipal government and set a referendum on 16th March 2014. Ukraine submitted a letter to the UN Security Council on 28 February 2019¹⁴⁹.

“Green men” were Russian speaking with non-Ukrainian accent¹⁵⁰, sometimes using Russian military weapons and equipment in the uniform that was similar to Russian.¹⁵¹ Presumably, some of them were representatives of the Russian Fleet and others got to Crimea earlier in February by helicopters and ships.¹⁵² Later on March 2, the Ukrainian Border Guard Service announced that it had noticed the crossing of the Russian-Ukrainian border by 24 helicopters of the Armed Forces of the Russian Federation.¹⁵³

President of Russia V. Putin on numerous occasions admitted that presence of “green man” led to the transfer of effective control directly from Ukraine to Russia:

¹⁴⁵ *Ilascu and Others v Moldova and Russia* (App No 48787/99) ECHR 2004, p 312 <http://www.rulac.org/assets/downloads/Ilascu_v_Moldova_and_Russia.pdf> accessed 19 May 2019 paragraph 392 cited according to O. Marchenko, ‘Protection of investments in international armed conflicts: a case for Donbas’ [2019] *The European Arbitration Review* <<https://marchenkopartners.com/wp-content/uploads/2018/12/Protection-of-investments-in-international-armed-conflicts-EN-O.-Marchenko.pdf>> accessed 19 May 2019

¹⁴⁶ Ch. Marxen, ‘Territorial Integrity in International Law – Concept and implications for Crimea’ [2015] *Max Planck Institut für ausländisches öffentliches Recht und Völkerrecht* <http://www.zaoerv.de/75_2015/75_2015_1_a_7_26.pdf> accessed 19 May 2019

¹⁴⁷ TSN News Coverage (27 Feb 2014, rep. by N. Safihanova) 1:26-1:58 <https://www.youtube.com/watch?v=bLkcvumqv_4> accessed 19 May 2019

¹⁴⁸ V. Baranets, “*Polite people*” *did not allow Maidan in Crimea*’ [2016] *KP* <<https://www.kompravda.eu/daily/26499.7/3367091/>> accessed 19 May 2019

¹⁴⁹ Letter from the Permanent Representative of Ukraine to the United Nations addressed to the President of the Security Council dated 28 February 2014 UN/S/2014/136 <<https://undocs.org/S/2014/136>>

¹⁵⁰ J. Biersack, Sh. O’Lear, ‘The geopolitics of Russia’s annexation of Crimea: narratives, identity, silences, and energy’ [2016] *Eurasian Geography and Economics* Vol. 55:3 pp. 247-269 <<https://www.tandfonline.com/loi/rege20>> accessed 19 May 2019

¹⁵¹ Ch. Marxen, ‘Territorial Integrity in International Law – Concept and implications for Crimea’ [2015] *Max Planck Institut für ausländisches öffentliches Recht und Völkerrecht* <http://www.zaoerv.de/75_2015/75_2015_1_a_7_26.pdf> accessed 19 May 2019

¹⁵² Y. Butusov, How Russian troops annexed Crimea on 27 February 2014: citations of Russian troops and locals [Як російські війська захопили Крим 27 лютого 2014 року. Цитати російських військових і місцевих зрадників] <<https://censor.net.ua/ua/r379570>> accessed 19 May 2019

¹⁵³ *Ibid*

“All my instructions were related to acting carefully and relying on those people whom we can already call patriots of Russia today, relying on them, on their assets. But helping them and being behind their back, much larger forces and means¹⁵⁴.” [our emphasize added].

“February 26, 2015, a year after the Crimean events, in which “polite people” played a significant role, Russian President Vladimir Putin signed Decree No. 103 on the establishment of a new professional holiday of the military forces - the Day of Special Operations Forces. It will be celebrated annually on February 27. It was on that day, February 27, 2014, that the events described here happened ...”¹⁵⁵

President of Russia admitted, that on the moment of referendum Russian troops were already able to “ensure the holding of independent free elections”.¹⁵⁶ Important, that even if President of Russia did not admit this, other present evidence should be sufficient to reach the same conclusion.

From the customary international law perspective this statement evidences at least the “overall control over military or paramilitary groups”, including “financial support, supply of weapons and military equipment, political support and coordination of military operations in the occupied territories”.¹⁵⁷ By all that means Russia “prevented [Ukraine] from exercising its authority in part of its territory [Crimea]:

*That may be as a result of military occupation by the armed forces of another State which effectively controls the territory concerned (see *Loizidou v. Turkey (Preliminary Objections)* judgment of 23 March 1995, Series A no. 310, and *Cyprus v. Turkey [GC]*, no. 25781/94, ECHR 2001-IV, §§ 76-80, as cited in the above-mentioned *Bankovic* decision, §§ 70-71), acts of war or rebellion, or the acts of a foreign State supporting the installation of a separatist State within the territory of the State concerned...” [our emphasize added]¹⁵⁸*

Moreover, Russia “concluded agreement”¹⁵⁹ with Crimea immediately after the

¹⁵⁴ Five stages of acceptance. What Putin said about Russian troops in Crimea [5 стадий принятия. Как Путин рассказывал о российских военных в Крыму] [2018] Our Time <<https://www.currenttime.tv/a/five-states-of-vladimir/29273395.html>> accessed 19 May 2019

¹⁵⁵ V. Baranets, “Polite people” did not allow Maidan in Crimea’ [2016] KP <<https://www.kompravda.eu/daily/26499.7/3367091/>> accessed 19 May 2019

¹⁵⁶ Five stages of acceptance. What Putin said about Russian troops in Crimea [5 стадий принятия. Как Путин рассказывал о российских военных в Крыму] [2018] Our Time <<https://www.currenttime.tv/a/five-states-of-vladimir/29273395.html>> accessed 19 May 2019

¹⁵⁷ O. Marchenko, ‘Protection of investments in international armed conflicts:

a case for Donbas’ [2019] The European Arbitration Review 117 <<https://marchenkopartners.com/wp-content/uploads/2018/12/Protection-of-investments-in-international-armed-conflicts-EN-O.-Marchenko.pdf>> accessed 19 May 2019

¹⁵⁸ *Ilascu and Others v Moldova and Russia* (App No 48787/99) ECHR 2004, p 312 <http://www.rulac.org/assets/downloads/Ilascu_v_Moldova_and_Russia.pdf> accessed 19 May 2019

¹⁵⁹ Agreement between Russian Federation and Crimean Republic “On adoption in the Russian Federation of the Republic of Crimea and creation in Russian Federation of the new subjects” adopted on 18 March 2014

unlawful elections. Even though such agreement cannot be recognized it has evidential value of the Russian control.

Thus, Russia's actions resulted in the direct transfer of effective control over Crimea from Ukraine to Russia without consent of Ukraine. Any other holders of control were absent. Russia obtained effective control in Crimea (February 2014) before it acknowledged that (March 2017) by military and administrative actions: physical presence, ability to legislate in the area and substitution of state authorities

2.4.3. Legal consequences

The main legal consequence of the change in effective control is activation of Ukraine – Russia BIT protection for Ukrainian investors in Crimea by mirroring the roles of all participants: investors and states.

Russia became host state in Crimea and acquired all protection obligations under the BIT and international law. In fact, Ukraine lost even theoretical possibility to violate the investors' rights because it has no presence and influence in Crimea since late February 2014. To put it in words of of *Sanum v Laos Tribunal* “one state replaced another in the responsibility for international relations of the territory”.¹⁶⁰

Ukrainian investors and investments in Crimea became foreign. Thus, change of effective control means that Ukrainian investors enjoy protection under BIT.

Ukraine – Russia BIT became applicable to the disputes between Ukrainian investors and Russia because the term “territory” covers the effectively controlled territories equally with legally acquired based on:

- (1) moving treaty frontier rule embodied in the Article 29 of the VCLT and
- (2) holders of effective control obligation to be responsible for violations of the BIT.

Thus, Russia consented to arbitration with Ukrainian investors set in the Article 9 of

<http://www.consultant.ru/cons/cgi/online.cgi?rnd=08EB491E7ED48066C91B31D902626784&req=doc&base=LAW&n=160398&dst=100037&fld=134&REFFIELD=134&REFDST=100137&REFDOC=314390&REFBASE=LAW&stat=refcode%3D16876%3Bdstident%3D100037%3Bindex%3D293#mito6bqc6f>

¹⁶⁰ The Court of Appeals of the Republic of Singapore, Civil Appeals No I39 and 167 of 2015 in Case 2013-13 *Sanum Investments Limited v. the Government of the Lao people's Democratic Republic* <<https://www.italaw.com/sites/default/files/case-documents/italaw7600.pdf>> accessed 18 May 2019

the BIT when obtained the effective control in Crimea. Ukrainian investors in ten cases¹⁶¹ accomplished the arbitration agreement by requesting arbitration. That leads us to the temporal scope of the BIT which helps to define particular moment when consent became valid for Ukrainian investors.

Conclusions from Part II

Ukraine – Russia BIT covers illegally acquired territories as part of the territory of state. This conclusion stems from the meaning of “territory” in public international law and its interpretation in the BIT under VCLT. Change in effective control from Ukraine to Russia opened opportunity to seek the BIT protection for Ukrainian investors in Crimea. The last question is “when the investors received that opportunity”.

PART III. “WHEN” OR TEMPORAL SCOPE OF THE BIT AND ITS INFLUENCE ON THE TRIBUNAL’S JURISDICTION

3.1. The interpretation of the temporal scope of the BIT according to the VCLT.

The Ukraine-Russia BIT does not contain specific provisions as to the time when the investment must be made in order to be protected by the BIT if the effective control changed. *Ukrnafta and Stabil* Tribunals accepted jurisdiction and concluded that BIT does not contain any temporal restrictions.¹⁶² The interpretation is based on the VCLT analysis of the BIT, mainly the term “investment”.

(a) Ordinary meaning

Ordinary meaning of the “investment” shows that the definition of the investment in Article 1(1) does not contain any time limits when the investment was made (or in other words “appeared”) at the territory legally or illegally controlled by the Respondent state as soon as it occurred on or after 1 January 1992 (Article 12).

In the Crimean cases one may pay attention to the usage of tenses¹⁶³ in the Article 1(1)

¹⁶¹ Appendix 1.

¹⁶² L. Bohmer, ‘In Now-Public Decisions, Swiss Federal Tribunal Clarifies Reasons For Dismissing Challenges To Two Crimea-Related Investment Treaty Awards Against Russia’ [2018] Investment Arbitration Reporter <<https://www.iareporter.com/articles/in-now-public-decisions-swiss-federal-tribunal-clarifies-reasons-for-dismissing-challenges-to-two-crimea-related-investment-treaty-awards-against-russia/>> accessed 19 May 2019

¹⁶³ J. Hepburn, R. Kabra ‘Investigation: Further Russia investment treaty decisions uncovered, offering broader window into arbitrators’ approaches to Crimea controversy’ [2017] Investment Arbitration Reporter <<https://www.iareporter.com/articles/investigation-further-russia-investment-treaty-decisions-uncovered-offering-broader-window-into-arbitrators-approaches-to-crimea-controversy/>> accessed 19 May 2019

and Article 12 of the Ukraine-Russia BIT. In particular, the definition of investment in Article 1 (1) contains the present tense (“are being invested”), while the Application of the Treaty in Article 12 refers to the past tense (“*the treaty shall apply to any investment “made [...] in the territory of the other Contracting state on or after January 1, 1992”*”).

Past tense in Article 12 raised argument that parties indirectly stated the investment must have been made initially in the territory of Russian Federation.¹⁶⁴ But this position have all chances to be refuted with the grammar rules and logic behind it.

Firstly, the usage of past tense in the Article 12 might be explained by the grammar rules. The Treaty was concluded on 27 November 1998, while Article 12 refers to the investments that were made after 1 January 1992, i.e. in the past tense in relation to the dates of signature, ratification and entry into force of the agreement. Thus, the past tense refers to the date and action in the past (after the date of the signature of the BIT) and reflects the outdated approach to the investment as to transaction.

Secondly, grammar rule in legal sense can mean that the past tense used to indicate the retrospective application of the BIT to the investments that were made before the Treaty was signed, ratified, entered into force.

Thirdly, the investment must have been made and situated in the Russian territory, but there are no rules on simultaneity of these two events under the BIT as was stated in *Everest Estate LLC and others v. Russia*.¹⁶⁵

Thus, the plain language of the BIT and relevant case law shows, that there is no language in the Ukraine-Russia BIT, that prevents investment from being protected by the BIT because of (1) restrictions on the time when the investment had to be made/occurred/reached the territory of the other Contracting State as soon as it occurred after 1 January 1992 and/or (2) that any transfers of the effective control change the result of interpretation.

¹⁶⁴ M. Soldatenko, ‘Ongoing Territorial Challenges in Crimea Cases: Putting Everest v. Russia in Context’ [2018] Kluwer Arbitration Blog <<http://arbitrationblog.kluwerarbitration.com/2018/11/05/territorial-challenges-expected-in-crimea-cases-putting-everest-v-russia-in-context/>> accessed 19 May 2019

¹⁶⁵ J. Hepburn, R. Kabra ‘Investigation: Further Russia investment treaty decisions uncovered, offering broader window into arbitrators’ approaches to Crimea controversy’ [2017] Investment Arbitration Reporter <<https://www.iareporter.com/articles/investigation-further-russia-investment-treaty-decisions-uncovered-offering-broader-window-into-arbitrators-approaches-to-crimea-controversy/>> accessed 19 May 2019

(b) Context

Context of the temporal scope of the BIT is embodied in the Article 12 that contains date marking the beginning of the protection: “*the treaty shall apply to any investment “made [...] in the territory of the other Contracting state on or after January 1, 1992”*”. It does not refer to any final date.

Thus, neither the term “investment”, nor the BIT itself contains provisions that the investment must have been made initially within the territory of the state-respondent in the arbitration.

(c) Object and purpose

Any restrictions that are not contained in the BIT contradict the object and purpose of the BIT “*having the intent to create and support the favorable conditions for mutual investments... ”*.¹⁶⁶ For object and purpose of the BIT it is not important, how the investment get to that territory and investor gained its foreign status – intentionally or as a result of moving treaty frontier rule. All criteria must be met on the moment of the breach: (1) BIT must be binding for the violator; (2) investment situated in its territory, (3) investor must be foreign.

Date of the change in effective control triggered all three criteria. Russia is responsible for the alleged violations that occurred in the territory during the period under its effective control.

The object and purpose of the BIT are met if the BIT interpreted effectively and based on “pragmatic approach” to the object and purpose.¹⁶⁷

Firstly, Tribunal has to accept jurisdiction if otherwise the investor will not have other chance to arbitrate, i.e. resolve a dispute at neutral forum. Even if the Respondent’s alleged objections had been successful (but it is not the case) the Tribunal should have accepted the jurisdiction over the dispute not to deprive the investor from possibility to protect its investment. Basically, the investor shall not be left in “legal vacuum” if the

¹⁶⁶ Preamble of the Agreement between Ukraine and Russian Federation on encouragement and mutual protection of investments (Ukraine/Russian Federation) (adopted 15 December 1999, entered into force 27 January 2000) <https://zakon.rada.gov.ua/laws/show/643_101>

¹⁶⁷ R. Happ; S. Wuschka, ‘Horror Vacui: Or Why Investment Treaties Should Apply to Illegally Annexed Territories’ (2016) Vol. 33/3 Journal of International Arbitration, Kluwer Law International p. 259

BIT is not applied.¹⁶⁸

Secondly, Russia cannot benefit from its wrongful actions.¹⁶⁹ Russia took control over the territory, acknowledged it, but tries to leave the responsibility for all Russian violations on the previous host State – Ukraine.

Thus, it is not acceptable to use juridical equilibristic to let the new host state escape responsibility and leave the investor without arbitral forum.

(d) Good faith

Interpretation of the BIT in good faith means if parties did not impose any temporal restrictions in the BIT they do not exist. Ukrainian investors in Crimea pre-existing the change in effective control: (1) did not expect the control might change; (2) could not predict the extend of influence of change of effective control; (3) are not covered by other BITs and do not have other means of protection than set in the Ukraine–Russia BIT.

Finally, there were no signs of the other means of interpretation under Articles 31, 32 of the VCLT. There were no subsequent agreements/practices between the states in relation to these issues (Article 31) and the above interpretation did not lead to the ambiguous or obscure meaning or manifestly absurd/unreasonable result (Article 32).

Therefore, the Tribunals in mentioned cases were correct in their acceptance of the jurisdiction since the BIT does not contain any temporal bars to protect investments that were made on or after the 1 January 1992. This BIT guarantee is not canceled after changes in the effective control over the territory. But territorial control changes raise at least three temporal implications of the BIT to Ukrainian investors in Crimea:

- (1) Protection of investments made before or after entry into force of the BIT;
- (2) Protection of investments made before or after change of the effective control.

¹⁶⁸R. Happ; S. Wuschka, 'Horror Vacui: Or Why Investment Treaties Should Apply to Illegally Annexed Territories' (2016) Vol. 33/3 Journal of International Arbitration, Kluwer Law International

¹⁶⁹R. Happ; S. Wuschka, 'Horror Vacui: Or Why Investment Treaties Should Apply to Illegally Annexed Territories' (2016) Vol. 33/3 Journal of International Arbitration, Kluwer Law International

(3) Date from which Ukrainian investors in Crimea became covered by the BIT.

Time framework clarifies why only dates that matter is when (1) investment was made, (2) when change in effective control occurred, (2) when violation date took place.

3.2. Temporal scope of the Ukraine-Russia BIT in dates

Temporal scope of the Ukraine - Russia BIT based on Article 12 of the BIT and covers all the investments made on or after 01 January 1992. Neither of other dates that might be decisive under classical temporal rule do not change this conclusion. In particular, on 27 November 1998 the BIT was signed. On 15 December 1999 the BIT was ratified by Ukraine¹⁷⁰ and on 2 January 2000 BIT was ratified by Russia.¹⁷¹ On 27 January 2000 the BIT entered into force.¹⁷² But these dates may assist our analysis.

January 1992 is a date from when investment must reach Crimean territory to enjoy BIT protection.¹⁷³

27 January 2000 (entry into force) is a date from which all foreign investors in Crimea became entitled to refer to the arbitration under Ukraine – Russia BIT. This statement is based on non-retroactivity rule and supported by *Mondev v US* Tribunal position:

“The basic principle is that a State can only be internationally responsible for breach of a treaty obligation if the obligation is in force for that State at the time of the alleged breach”¹⁷⁴. [our emphasize added]

So the date of change in effective control was a borderline on who is responsible for violation of investment protection and must be a respondent – Ukraine or Russia.

27 February 2014 – the date of change in effective control. Ukraine – Russia BIT is activated for Ukrainian investors in Crimea because they become foreign to Russia.

¹⁷⁰ Agreement between Ukraine and Russian Federation on encouragement and mutual protection of investments (Ukraine/Russian Federation) (adopted 15 December 1999, entered into force 27 January 2000) < https://zakon.rada.gov.ua/laws/show/643_101>

¹⁷¹ The Law of Russian Federation ‘*On ratification of the Agreement between the Government of the Russian Federation and the Cabinet of Ministers of Ukraine on the promotion and mutual protection of investments*’ No. 21-Federal Law adopted at 23 December 1999, published on 10 January 2000 in “Collection of Legislation of Russian Federation” <<http://docs.cntd.ru/document/901751017>>

¹⁷² Agreement between Ukraine and Russian Federation on encouragement and mutual protection of investments (Ukraine/Russian Federation) (adopted 15 December 1999, entered into force 27 January 2000) < https://zakon.rada.gov.ua/laws/show/643_101>

¹⁷³ Article 12 Agreement between Ukraine and Russian Federation on encouragement and mutual protection of investments (Ukraine/Russian Federation) (adopted 15 December 1999, entered into force 27 January 2000) < https://zakon.rada.gov.ua/laws/show/643_101>

¹⁷⁴ ICSID Case No ARB(AF)/99/2 *Mondev International Ltd v United States of America*, Award dated 11 October 2002; para 68 cited according to N. Gallus, ‘The temporal scope of investment protection treaties’ [2008] 7 British institute on International and Comparative Law (BIICL)

<https://www.academia.edu/34500152/The_Temporal_Scope_of_Investment_Protection_Treaties> accessed 19 May 2019

This timeline justifies Swiss court's conclusions in *Ukrnafta and Stabil cases* that the investment must not be originally made in the territory of Russia¹⁷⁵ and the investor must not hold "correct nationality" when the investment is made.¹⁷⁶

Important, that earlier actions of Russia have evidential value and must be taken into account as "*factual basis for the later breaches and provide evidence of intent*".¹⁷⁷

The same approach was taken in *Cameroon v United Kingdom*:

".. *the earlier acts and events could, so far as relevant, have been cited by the Applicant State in support of, or to assist in establishing, that part of the claim which was admissible ratione temporis.*"¹⁷⁸

So, BIT extends its scope to the territory that felt under effective control of the other state not later the effective control changed due to (1) the object and purpose of the BIT and (2) the absence of the requirement that the investment must initially have been made in the territory of another state.

3.3. The date from which the investor is covered by the BIT protection: (a) time of the investment; (b) factual control or (c) official statement of Russia?

As BIT does not contain formal temporal restriction, it is crucial to determine from which date the BIT is applicable in mentioned cases – from the date when Russia accepted Crimea in Russian Federation (21 March 2014)¹⁷⁹ or from the date of actual annexation (earlier date).

The VCLT interpretation and good faith argument primarily leads to the logical

¹⁷⁵Swiss Federal Tribunal Case No. 4A_396/2017 *PJSC Ukrnafta v. Russia*

https://www.bger.ch/ext/eurospider/live/fr/php/aza/http/index.php?highlight_docid=aza%3A%2F%2Faza://16-10-2018-4A_396-2017&lang=fr&zoom=&type=show_document accessed 18 May 2019

¹⁷⁶ L. Bohmer, 'In Now-Public Decisions, Swiss Federal Tribunal Clarifies Reasons For Dismissing Challenges To Two Crimea-Related Investment Treaty Awards Against Russia' [2018] Investment Arbitration Reporter

<https://www.iareporter.com/articles/in-now-public-decisions-swiss-federal-tribunal-clarifies-reasons-for-dismissing-challenges-to-two-crimea-related-investment-treaty-awards-against-russia/> accessed 19 May 2019; Swiss Federal Tribunal Case No. 4A_396/2017 *PJSC Ukrnafta v. Russia*

https://www.bger.ch/ext/eurospider/live/fr/php/aza/http/index.php?highlight_docid=aza%3A%2F%2Faza://16-10-2018-4A_396-2017&lang=fr&zoom=&type=show_document accessed 18 May 2019

¹⁷⁷ N. Gallus, 'The temporal scope of investment protection treaties' [2008] 7 British institute on International and Comparative Law (BIICL) 22 <https://www.academia.edu/34500152/The_Temporal_Scope_of_Investment_Protection_Treaties> accessed 19 May 2019

¹⁷⁸ Judge Fitzmaurice's separate opinion in Northern Cameroons (Cameroon v United Kingdom) (Preliminary Objections) [1963] ICJ Rep 15, 130 cited according to N. Gallus, 'The temporal scope of investment protection treaties' [2008] 7 British institute on International and Comparative Law (BIICL) p. 22

<https://www.academia.edu/34500152/The_Temporal_Scope_of_Investment_Protection_Treaties> accessed 19 May 2019

¹⁷⁹ R. Happ; S. Wuschka, 'Horror Vacui: Or Why Investment Treaties Should Apply to Illegally Annexed Territories' (2016) Vol. 33/3 Journal of International Arbitration, Kluwer Law International

conclusion, that the BIT must be applied from the earlier date because:

- (1) the effective control was established from the date of actual annexation;
- (2) investors` rights were violated from the date of actual annexation;
- (3) Ukraine lost its actual control over the territory simultaneously with the opportunity to violate investor`s rights under the BIT. In fact, Ukraine did not have factual opportunity to fulfill powers that might breach the BIT;
- (4) Crimea was always covered by the BIT, but the change in the effective control just triggered its application for the Ukrainian investors.

The rationale behind is that earlier date is crucial for expropriated investments before 21 March 2014. In particular, assets of Naftogaz Ukraine – one of the biggest Ukrainian investors in Crimea - was expropriated before the date when Russia admitted its control in Crimea. The later date might have excluded Naftogas from the BIT application or decrease amount of compensation that will be determined in the separate award.¹⁸⁰

On 27 February 2019, the Naftogas Tribunal¹⁸¹ ordered that the investors are covered by the BIT from the actual start of the effective control, even though Russia admitted its control later than expropriation took place. In this case Claimants proved that earlier dates of the control and investment protection are applicable. But some other Tribunals took different position and established that Ukrainian investors are covered by the Ukraine-Russia BIT from the later date – when Russia admitted control.¹⁸²

Thus, choosing a later date as start of the effective control contradicts the wording of the BIT and places suffered investors in different situation. The chart below depicts the situation of 2014 in Crimea. The change in effective control occurred several weeks before Russia recognized it. All expropriations occurred after change in the effective control. Russia`s recognition of the occupation took place between the expropriations of different investments. For example, Naftogas assets were expropriated before and Belbek assets – after the change.¹⁸³ All investments expropriated after change in the

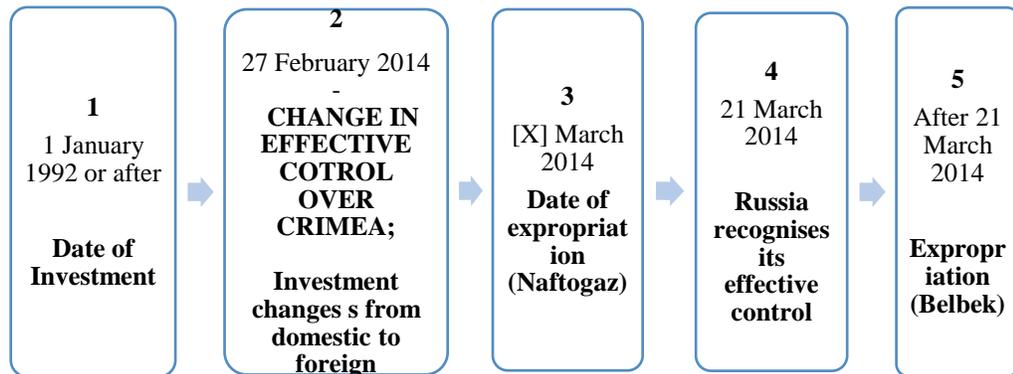
¹⁸⁰ Official briefing of Andrii Kobolev, Director of Naftogaz Ukraine (01 March 2019) available at official FB page of Naftogaz at <<https://www.facebook.com/NaftogazUA>>

¹⁸¹ PCA Case No. 2017-16 NJSC *Naftogaz of Ukraine et al. v. the Russian Federation* < <https://pca-cpa.org/en/cases/151/>>

¹⁸² The award is unavailable on the date. The information is provided according to Official briefing of Andrii Kobolev, Director of Naftogaz Ukraine (01 March 2019) available at official FB page of Naftogaz at <<https://www.facebook.com/NaftogazUA>>

¹⁸³ Annex 1

effective control must be treated equally and covered by the BIT.



Thus, the approach of Naftogaz Tribunal on the date when protection started is correct because:

- (1) the investor must be protected from the earliest date when the violation of his rights under the BIT occurred;
- (2) it is illogical to postpone the date of the protection to the date when Russia admitted control since Russia has already controlled the territory and expropriated the investment on earlier date;
- (3) moreover, the connection of the date when Ukrainian investors in Crimea are protected by the BIT with the date when Russia admitted control would have led to the wrongful conclusion. If Russia did not admit the effective control at all, the investors would have never benefited from the BIT protection. Such conclusion would be not in compliance with the VCLT interpretation of the BIT, primarily with good faith.

For these reasons it is reasonable that investor must be protected by the BIT from the date when effective control changed.

Conclusions from Part III

Ukraine – Russia BIT does not contain temporal restrictions of when investment had to be made to be protected by the BIT, if it is made after January 1992. Change in effective control is a date activating BIT protection for Ukrainian investors in Crimea, because there is no requirement that investment must have been initially made in the territory of the host state (Russia).

CONCLUSIONS

Effective control influences investment protection mechanisms in such a manner that investors previously deemed as domestic investors will be considered as foreign investors under the BIT.

Influence of change in effective control has several implications on the jurisdiction:

- (i) the change in effective control over territory triggered the guarantees under Ukraine – Russia BIT for Ukrainian investors in Crimea since for the purposes of investment protection (1) Crimea has become a part of Russian territory, (2) Russia should be considered as a host state in Crimea, and (3) Ukrainian investors – as foreign investors;
- (ii) Russia assumed the consent to arbitrate in the Ukraine-Russia BIT when it took the effective control over Crimea. From this moment onwards, the investors became entitled to submit the request for arbitration and “enter into” the arbitration agreement with Russia;
- (iii) the Tribunal’s awards would be in line with the non-recognition principle since the Tribunal does not resolve a territorial dispute. The Tribunal’s mandate covers only resolution of the particular investment dispute.

It means that arbitral tribunals may exercise jurisdiction in investment cases over the claims of Ukrainian investors in Crimea after the effective control has changed. This conclusion is based on public international law (including BIT) as applicable law. Domestic Ukrainian and Russian legislation is taken into account as a matter of fact.

The territorial and temporal scope of the Ukraine-Russia BIT can be used as an argument in favor of the Tribunal’s jurisdiction. It shows where and when investment must have been made to be covered by the BIT and enjoy protection.

The territorial scope is based on the meaning of the “territory”. The analysis confirmed that the areas under the effective control fall under the term “territory”. For the purposes of the BIT protection it does not matter whether the effective control was acquired in a legal way.

The effective control means exercising the jurisdiction over a territory. The effective control comprises of physical, military and administrative control, i.e. the ability to enact and enforce the legislation, substitute the state authorities etc., not necessarily based on the principles of international law.

The effective control defines who can commit and who is responsible for the alleged violations of the investors` rights under the BIT within the territory in question. Only a holder of the effective control can ensure or violate the investment protection guarantees under the BIT.

The temporal scope of the Ukraine-Russia BIT determines when the Ukrainian investors (1) had to make their investments to be covered by the BIT and (2) the date from which investors are covered by the BIT protection.

The investments made after 1 January 1992 are covered by the Ukraine-Russia BIT. Ukrainian investments made after this date are within the scope of the BIT, regardless of other criteria such as the dates of entry of the BIT into force or change in effective control. There is no requirement for the investments to be made initially within the territory of Russia to qualify for the BIT protection.

Russia`s consent to arbitrate with Ukrainian investors in Crimea is made from the date of actual change in effective control. The date of Russia`s recognition is not decisive. The earlier date linked to change in effective control is relevant as it is the only chance to protect expropriated investments before Russia`s recognition.

Appendix I. List of Crimea-related cases ¹⁸⁴								
No.	Case Name	Rules	Status	Commenced	Closed	Resolution/Action/ Reaction	Seat/Comments	Award on Jurisdiction
1.	Aeroport Belbek LLC and Mr. Igor Valerievich Kolomoisky v. the Russian Federation (Belbek arbitration) ¹⁸⁵ ; <i>PCA Case No. 2015-07 Aeroport Belbek LLC and Mr. Igor Valerievich Kolomoisky v. the Russian Federation</i>	UNCITRAL Rules	Waiting the Award on the remaining questions of jurisdiction and admissibility	9 January 2015		Hearing on 1-7 November 2017 on the second phase. The Tribunal has not yet issued its award on the second phase of the proceedings.	Netherlands /Identical tribunals were constituted with Privat case	+ I stage -II stage
2.	PJSC CB PrivatBank and Finance Company Finilon LLC v. the Russian Federation (Privatbank	UNCITRAL Rules	Waiting the Award on the remaining questions of jurisdiction and admissibility	1 April 2015		Hearing on 1-7 November 2017. The Tribunal has not yet issued its award on the second phase of the proceedings.	Netherlands /Identical tribunals were constituted with Belbek case	+ I stage -II stage

¹⁸⁴ S. Uvarov, 'Investment Disputes related to Crimea: Overview' [2019] Journal of the Russian Arbitration Association <<https://journal.arbitration.ru/reviews/investment-disputes-related-to-crimea-overview/>> accessed 19 May 2019

¹⁸⁵ PCA Case No. 2015-07 *Aeroport Belbek LLC and Mr. Igor Valerievich Kolomoisky v. the Russian Federation* <<https://pca-cpa.org/en/cases/133/>>

Appendix I. List of Crimea-related cases ¹⁸⁴								
No	Case Name	Rules	Status	Commenced	Closed	Resolution/Action/ Reaction	Seat/Comments	Award on Jurisdiction
	arbitration) ¹⁸⁶ ; <i>PCA Case No. 2015-21 PJSC CB PrivatBank and Finance Company Finilon LLC v. the Russian Federation</i>							
3.	<i>PJSC Ukrnafta v. the Russian Federation (Ukrnafta arbitration)¹⁸⁷; PCA Case No. 2015-34 PJSC Ukrnafta v. the Russian Federation and</i>	UNCITRAL Rules	Awaiting of the Award on merits	3 June 2015	On 26 June 2017 Award on Jurisdiction	5-6 February 2018 Hearing on Merits. Awaiting of the Award	Switzerland /26 June 2017, before the Swiss courts/Identical tribunals with Stabil	+
4.	<i>Stabil LLC et al. v. the Russian Federation (Stabil arbitration)¹⁸⁸;</i>	UNCITRAL Rules	Awaiting of the Award on merits	3 June 2015	On 26 June 2017 Award	5-6 February 2018 Hearing on Merits.	Switzerland /26 June 2017, before the Swiss	+

¹⁸⁶ PCA Case No. 2015-21 *PJSC CB PrivatBank and Finance Company Finilon LLC v. the Russian Federation* <<https://pca-cpa.org/en/cases/130/>>

¹⁸⁷ PCA Case No. 2015-34 *PJSC Ukrnafta v. the Russian Federation* <<https://pca-cpa.org/en/cases/121/>> accessed 18 May 2019

¹⁸⁸ 11 co-claimants in Stabil arbitration are Stabil LLC, Rubenor LLC, Rustel LLC, Novel-Estate LLC, PII Kirovograd-Nafta LLC, Crimea-Petrol LLC; Pirsan LLC, Trade-Trust LLC, Elefteria LLC, VKF Satek LLC and Stemv Group LLC. See also: <https://pca-cpa.org/en/cases/122/>
<https://journal.arbitration.ru/reviews/investment-disputes-related-to-crimea-overview/>

Appendix I. List of Crimea-related cases ¹⁸⁴								
No	Case Name	Rules	Status	Commenced	Closed	Resolution/Action/ Reaction	Seat/Comments	Award on Jurisdiction
	<i>PCA Case No. 2015-35 Stabil LLC et al. v. the Russian Federation</i>				rd on Jurisdiction		courts/Identical tribunals with Ukrnafta	
5.	Everest Estate LLC et al. v. the Russian Federation (Everest Arbitration) ¹⁸⁹ <i>PCA Case No. 2015-36 Everest Estate LLC et al. v. the Russian Federation</i>	UNCITRAL Rules	Enforcement of the Award on merits	19 June 2015	2 May 2018	Unanimous Award that Russian Federation liable of a breach of the BIT and awarding over USD 159 mln	Netherlands /Decision of the Supreme Court of Ukraine dated 25 January 2019 regarding enforcement of the award.	+
6.	Lugzor LLC et al. v. the Russian Federation (Lugzor arbitration) ¹⁹⁰ <i>PCA Case No. 2015-29</i>	UNCITRAL Rules	25-29 June 2018 Hearing on merits. No further information	27 May 2015		16-17 July 2017 in London the hearing on jurisdiction and admissibility took place	Netherlands	-

¹⁸⁹ 19 co-claimants in Everest arbitration are Everest Estate LLC, Edelveis-2000 PE, Fortuna CJSC, Ubk-Invest CJSC, Niva-Tour LLC, IMME LLC, Planeta PE, Krim Development LLC, Aerobud PJSC, Privatoffice LLC, Dayris LLC, Diline Ltd LLC, Broadcasting Company Zhisa LLC, Privatland LLC, Dan-Panorama LLC, Sanatorium Energetic LLC, AMC Finansovyy Kapital LLC, AMC Financial Vector LLC and Mr. Alexander Valerievich Dubilet. See also: <https://pca-cpa.org/en/cases/133/>

¹⁹⁰ 5 co-claimants in Lugzor arbitration are Limited Liability Company Lugzor, Limited Liability Company Libset, Limited Liability Company Ukrinterinvest, Public Joint Stock Company DniproAzot, Limited Liability Company Aberon Ltd. See also: <https://pca-cpa.org/en/cases/124/>.

Appendix I. List of Crimea-related cases ¹⁸⁴								
No	Case Name	Rules	Status	Commenced	Closed	Resolution/Action/ Reaction	Seat/Comments	Award on Jurisdiction
	<i>Lugzor LLC et al. v. the Russian Federation</i>							
7.	PJSC Oschadbank v. the Russian Federation (Oschadbank arbitration) ¹⁹¹ <i>PJSC Oschadbank v. the Russian Federation</i>	UNCITRAL Rules		18 January 2016		March 2017. Hearing. No further information	Paris ¹⁹² /The tribunal did not split the proceedings into jurisdiction and merits phases.	-
8.	NJSC Naftogaz of Ukraine et al. v. the Russian Federation (Naftogaz arbitration) ¹⁹³ <i>PCA Case No. 2017-16 NJSC Naftogaz of Ukraine et al.</i>	UNCITRAL Rules	Award on merits and jurisdiction	17 October 2016	01 March 2019	Hearing May 2018.	Hague, Netherlands	+ (together with merits)

¹⁹¹ UNCITRAL Case, *PJSC Oschadbank v. the Russian Federation*, <<http://investmentpolicyhub.unctad.org/ISDS/Details/724>> accessed 21 May 2019

¹⁹² L. E. Petersson, 'As Russia is held Liable in Two New Bit Cases and Ordered To Pay Upwards Of \$100 Million, We Round-Up Developments In Crimea-Related Arbitrations [16 Apr 2019] Investment Arbitration Reporter <<https://www.iareporter.com/articles/as-russia-is-held-liable-in-two-new-bit-cases-and-ordered-to-pay-upwards-of-100-million-we-round-up-developments-in-crimea-related-arbitrations/>> accessed 21 May 2019

¹⁹³ 7 co-claimants in Naftogaz arbitration are NJSC Naftogaz of Ukraine, PJSC State Joint Stock Company Chornomornaftogaz, PJSC Ukrtransgaz, Subsidiary Company Likvo, PJSC Ukrgasvydobuvannya, PJSC Ukrtransnafta, Subsidiary Company Gaz Ukrainy. See also: <https://pca-cpa.org/en/cases/151/>.

Appendix I. List of Crimea-related cases ¹⁸⁴								
No	Case Name	Rules	Status	Commenced	Closed	Resolution/Action/ Reaction	Seat/Comments	Award on Jurisdiction
	<i>v. the Russian Federation</i>							
9.	PJSC DTEK Krymenergo v. the Russian Federation (DTEK arbitration).	-	-	Late 2017	-	-	-	-
10.	Ukrenergo arbitration (SE NPC Ukrenergo v Russian Federation) ¹⁹⁴	-	-	10.04.2018 Notice of Arbitration was served ¹⁹⁵	-	-	-	-

Notes:

- **No information**

¹⁹⁴ *SE NPC Ukrenergo v Russian Federation* <<https://journal.arbitration.ru/reviews/investment-disputes-related-to-crimea-overview/>> accessed 21 May 2019

¹⁹⁵ Ukrenergo officially notified Russia about investment dispute related to Crimea assets [10 Apr 2018] <<https://interfax.com.ua/news/economic/497738.html>> accessed 21 May 2019

Appendix II Article 9 of the Ukraine – Russia BIT (dispute resolution clause)

Article 9 Resolution of Disputes Between Contracting Party and the Investor of the other Contracting Party

1. In case of any dispute between either Contracting Party and the investor of the other Contracting Party, which may arise in connection with the investments, including disputes, which concern the amount, terms of and procedure for payment of compensation provided for in Article 5 hereof or with the procedure for effecting a transfer of payments provided for in Article 7 hereof, a notification in writing shall be handed in, accompanied with detailed comments which the investor shall forward to the Contracting Party involved in the dispute. The parties to the dispute shall exert their best efforts to settle that dispute by way of negotiations.

2. In the event the dispute cannot be resolved through negotiations within six months as of the date of the written notification as mentioned in Item 1 hereof above, then the dispute shall be passed over for consideration to:

a) a competent court or an arbitration court of the Contracting Party, on whose territory the investments were carried out;

b) the Arbitration Institute of the Chamber of Commerce in Stockholm,

c) an "ad hoc" arbitration tribunal, in conformity with the Arbitration Regulations of the United Nations Commission for International Trade Law (UNCITRAL).

3. The award of arbitration shall be final and binding upon both parties to the dispute. Each Contracting Party shall undertake to execute such an award in conformity with its respective legislation."¹⁹⁶

¹⁹⁶ Translation of the Ukraine – Russia BIT <https://www.italaw.com/sites/default/files/laws/italaw7183.pdf>

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