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Master Thesis

The Issue of Effective Control over Foreign Territories in International Investment Arbitration

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Abstract

This work analyses the issue of effective control over foreign territories in international investment arbitration cases under the Ukraine-Russia BIT. Recent trends of the issue in question are examined to understand how arbitral tribunals define their jurisdiction in cases involving changes of control over Ukrainian territory. The research also encompasses analysis of the temporal scope of the Ukraine-Russia BIT and territorial jurisdiction of arbitral tribunals in cases when investments were made in the occupied Ukrainian territories, as well as comparison analysis of differences in arbitral tribunals' jurisdiction in so-called "Crimean and non-Crimean cases".

Keywords: effective control, arbitral tribunal, foreign territories, jurisdiction, investments

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Introduction

Relevance of the topic. The issue of effective control over foreign territories or territory accession considered by numerous international tribunals and courts within cases spanning different areas of international law. Such international forums derived their jurisdiction from various international treaties. Along with that, the issue of effective control over occupied foreign territories had not been considered by arbitral tribunals in investment cases under a bilateral investment treaty (further – BIT or treaty) before the annexation of Crimean territories in 2014 and subsequent occupation of other Ukrainian territories in 2022 by Russian Federation (further – Russia).

Occupation of Ukrainian territories by Russia led to a bunch of legal consequences under international law. In particular, Russia started exercising effective control over occupied parts of Kharkiv, Luhansk, Donetsk, Zaporizhzhia and Kherson regions, as well as the whole territory of Crimea. As a result, Ukrainian investors, whose lost assets located on occupied Ukrainian territories, received a right to claim damages from Russia under the Agreement between Ukraine and Russian Federation on encouragement and mutual protection of investments (further – Ukraine-Russia BIT).

These changes in control over territories and lost of Ukrainian investors' assets resulted to some investment arbitration commenced against Russia under the Ukraine-Russia BIT. As of now, there are eight cases where arbitral tribunals found occupied Ukrainian territories under effect control of Russia; among them are such so-called "Crimean cases" as *Aeroport Belbek and Mr. Kolomoisky, Privatbank and Finilov, Lugzor and others, Stabil and others, Ukrnafta, Everest and others, Oschadbank, Naftogaz and others and DTEK v. Russia*. Also, there is a pending case, *Ukrenergo v. Russia*, and a first so-called "non-Crimean case" where arbitration proceedings has recently been initiated, *Akhmetov v. Russia*.

We can see that Ukrainian investors have already started bringing claims against Russia in connection with lost assets in other territories than Crimea. This marked the beginning of new era of investment arbitrations against Russia under the Ukraine-Russia BIT. Thus, considering the factual background of potentially new disputes, new jurisdictional issues in effective control over foreign territories may arise. Therefore, it is important to analyse whether arbitral tribunals have jurisdiction over Crimean and potential and current non-Crimean investment arbitration cases and examine possible differences in arbitral tribunals' jurisdiction over these two types of cases, as well as the outcome of set aside or

enforcement proceedings under New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (futher – New York Convention).

Originality of the topic. Despite the issue of effective control over foreign territories/territory accession has already been raised in some studies so far, the current situation happening in Ukraine raises a needed to conduct further research. Particularly, previous studies do not touch upon the temporal scope of the Ukraine-Russia BIT and territorial jurisdiction of arbitral tribunals in cases when investments were made in the occupied Ukrainian non-Crimean territories, as well as comparison analysis of differences in arbitral tribunals' jurisdiction in cases where investments were made in occupied Crimean and non-Crimean territories.

The aim and delimitations of the Thesis. The aim of the Thesis is to define whether the establishment of the effect control over occupied Ukrainian territories by Russia may affect arbitral tribunals' jurisdiction under investment protection instruments.

It is crucial to set boundaries to achieve the aim of the Thesis. Within the present Thesis, the scope of the analysis is as follows: 1) investments made before the change in effective control over occupied Ukrainian territories 2) by Ukrainian investors 3) under the Ukraine-Russia BIT.

For the purposes of the Thesis, the legal fact of Russian occupation of Ukrainian territories will be deemed undisputed and defined based on the United Nations General Assembly Resolution ES-11/1 of 2 March 2022 on Aggression against Ukraine and the current position of the global community.

Tasks of the Thesis. The main tasks of the present research are the following:

1. To analyse recent investment arbitral tribunals' decisions and scientific literature on effective control of foreign territories.
2. To examine territorial jurisdiction of investment arbitral tribunals over Crimean and non-Crimean cases.
3. To study temporal scope of the Ukraine-Russia BIT and its implications.
4. To establish whether arbitral tribunals have power to consider investment Crimean and non-Crimean cases.
5. If yes, to compare differences in arbitral tribunals jurisdiction over Crimean and non-Crimean cases.

Methods and sources. For fulfilling the above listed tasks, the following research methods are used in this work:

- Case study (to analyse recent investment arbitral tribunals' decisions and scientific literature on effective control of foreign territories).
- Systematic analysis (to examine territorial jurisdiction of investment arbitral tribunals over Crimean and non-Crimean cases).
- Legal analysis (to study temporal scope of the Ukraine-Russia BIT and its implications).
- Logical analysis (to establish whether arbitral tribunals have power to consider investment Crimean and non-Crimean cases).
- Comparative (to juxtapose differences in arbitral tribunals jurisdiction over investment Crimean and non-Crimean cases).

Most important sources. Agreement between Ukraine and Russian Federation on encouragement and mutual protection of investments, Vienna Convention on the Law of the Treaties, New York Convention on Recognition and Enforcement of Arbitral Awards, Charter of the United Nations as well as relevant case law of investment arbitral tribunals and state courts are the sources most extensively examined in the present Research.

Part 1. Recent Trends in Effective Control over Foreign Territories in Investment Arbitration: Cases Law Analysis

To start with, it is beneficial to note that because of Russian first invasion in 2014 and beginning of a full-scale war in 2022 against Ukraine, which was condemn by United Nations General Assembly (further – UNGA) (UNGA Resolution on Territorial integrity of Ukraine, 2014; UNGA Resolution on Aggression against Ukraine, 2022), Ukrainian investors lost control over their assets. First, this led to commencement of Crimean investment arbitration cases against Russia. Having won all Crimean cases so far, Ukrainian investors started enforcing awards under New York Convention (New York Convention on Recognition and Enforcement…, 1958) in different jurisdiction including Ukraine, Switzerland, France, and the United Kingdom while Russia tried to set aside awards and filed an appeal. Second, in light of the Rinat Akhmetov's investment arbitration claim against Russia in April 2023 regarding his lost assets in Luhansk and Donbass regions, it can be stated that era of non-Crimean cases has begun.

In this Part of the Thesis, it is going to be thoroughly examined current publicly available decisions in investment arbitration cases brought by Ukrainian investors against Russia under the UNCITRAL Arbitration Rules (UNCITRAL Arbitration Rules, 1976). Notably, the decisions in Crimean cases including arbitral awards, state courts' decisions on enforcement and set aside proceedings, as well as current and potential non-Crimean cases.

Within Crimean cases, Ukrainian investors claim compensation for damages to their assets, located in Crimea peninsula, caused by Russia in connection of its invasion in 2014. Annexation of Crimea peninsula resulted in exercise of jurisdiction and effective control over this territory by Russia. Thus, the status of Ukrainian investors switched from domestic to foreign and activated investment protection mechanisms under the Ukraine-Russia BIT for them. Based on this BIT, ten cases were brought[1] so far (Soldatenko, 2019; Uvarov, 2019), namely:

1) *Aeroport Belbek and Mr. Kolomoisky v. Russia* in January 2015;
2) *Privatbank and Finilon v. Russia* in April 2015;
3) *Lugzor and others v. Russia* in May 2015;
4) *Stabil and others v. Russia* in June 2015;

[1] See also Annex 1.

5) *Ukrnafta v. Russia* in June 2015;
6) *Everest and others v. Russia* in June 2015;
7) *Oschadbank v. Russia* in January 2016;
8) *Naftogaz and others v. Russia* in October 2016;
9) *DTEK v. Russia* in February 2018;
10) *Ukrenergo v. Russia* in August 2019.

Aeroport Belbek and Mr. Kolomoisky v. Russia. On 9 January 2015, Mr. Kolomoisky as a natural person and Belbek Airport LLC initiated arbitral proceedings against Russia before PCA arbitral tribunal seated in The Hague. The claimants alleged that Russia violated its obligations under the Ukraine-Russia BIT by taking measures that deprived claimants of their ownership, contractual and other rights to operate the commercial passenger terminal of the Belbek Airport in Crimea. In particular, Mr. Kolomoisky stated that he had an agreement to manage the passenger terminal of the Belbek Airport until 2020. However, after annexation of Crimea, Russia "nationalised" this airport, and therefore the businessman is demanding compensation from Russia in the amount of approximately USD 15 million.

Notably, that this case is connected with *Privatbank and Finilon v. Russia* as Mr. Kolomoisky is an ultimate beneficial owner of Belbek Airport LLC, PJSC CB PrivatBank and Finance Company Finilon LLC at the time of expropriation of these businesses. Also, in both these arbitrations there are the same arbitral tribunal members, namely Sir Daniel Bethlehem, Dr. Václav Mikulka and Professor Pierre Marie-Dupuy (PCA Press Release on Arbitration…, 2017). These cases were considered simultaneously, and they have a similar procedural history. It is important to note that even though these arbitrations were the first Crimean case, they will be among the last ones to be finished since the arbitral tribunals decided to bifurcate the proceedings.

Hearing on jurisdiction and admissibility was conducted simultaneously in both cases in Geneva. On 24 February 2017 and 4 February 2019, the arbitral tribunal issued two partial awards on jurisdiction and liability respectively while proceedings on quantum took place on 27 November 2019. As it follows from the judgement of the Hague Court of Appeal of 19 July 2022, above mentioned issued were decided in favour of claimants.

Having received the award, Russia initiated set aside proceeding before the Hague Court of Appeal. By its judgement, the court upheld the findings of the arbitral tribunal with regard to effective control of Russia over Crimea. In particular, the arbitral tribunal found

that the fact that Crimea had become a part of Russia under its law, which also had jurisdiction and effective control there and, by extension, had taken responsibility for international relations. In the arbitral tribunal's view, on the other hand, the principle of *pacta sunt servanda* enshrined in Article 26 of the Vienna Convention on the Law of the Treaties (further – VCLT) and the principle of Article 29 VCLT that treaties apply to the entire territory of states mean that Russia must offer treaty protection to Ukrainian investors in Crimea. The arbitral tribunal further ruled that this obligation came into effect on 21 March 2014, the date on which the Crimean Incorporation Law came into force. Accordingly, on this date the exercise of "jurisdiction and effective control" over Crimea by the Russian Federation commenced (partial award on jurisdiction of 24 February 2017 in *Aeroport Belbek and Mr. Kolomoisky v. Russia*).

The Hague Court of Appeal also conducted its own analysis on the issue of effective control over foreign territory. First, the court found that application of treaties to the entire sovereign territory of a state did not mean that they could not also have effect on territory over which a state had a long-term jurisdiction and effective control. Second, the court stated that considering Article 29 of the VCLT provided that a treaty applied to the "entire territory" of a contracting party, it could be inferred that a treaty also applies to an area over which a state exercises jurisdiction or effective control and, as a result, bears international responsibility. Third, it was held that treaties can also apply to annexed territories, especially when it comes to the protection of investors of a treaty state (judgment of the Hague Court of Appeal of 19 July 2022 in *Aeroport Belbek and Mr. Kolomoisky v. Russia*). Additionally, what applies to annexed territory also applies to incorporated territory, since the jurisdiction and effective control over the territory in question is in principle the same (Happ, Wuschka, 2016, p. 256; Costelloe, 2016).

In the present case, it's evident that both the arbitral tribunal and the court concurred that Russia's actions resulted not only in the enjoyment of exerting its power over the newly occupied territories but also in taking on international responsibilities towards Ukrainian investors who had conducted business there for a long period. Furthermore, both the arbitral tribunal and the court similarly interpreted Article 29 of the VCLT, concluding that it applies to the entire territory of the contracting state, including areas under its jurisdiction or effective control. Consequently, Russia is required to provide protection to Ukrainian investors.

Privatbank and Finilon v. Russia. On 13 April 2015, PJSC CB PrivatBank and Finance Company Finilon LLC commenced the arbitral proceedings against Russia in connection with alleged violation of claimants' rights in respect of their banking investment in the Crimean territory. Claimants asserted that after annexation of Crimea, Russia expropriated their assets in different forms located on the annexed territory. As a result, claimants were deprived from not only their property rights, but also an opportunity to operate in this territory. Consequently, the claim amounted in USD 1 billion as compensation for the loss was brought before the arbitral tribunal seated in the Hague.

Also, as was discussed above, this case is being considered simultaneously with *Aeroport Belbek and Mr. Kolomoisky v. Russia*. Therefore, the defence strategy of Russia is the same in both cases. After the interim award had been issued, Russia initiated the set aside proceedings before the Hague Court of Appeal arguing it has no jurisdiction and effect control over Crimea according to the Ukraine-Russia BIT interpreted under the VCLT. However, the court did not accept any of Russian arguments, including those concerning effective control over foreign territory, and finally refused set aside again based on the similar grounds.

As for the findings of the arbitral tribunal, it did not find that reciprocity arguments were raised by Russia in the arbitral proceedings and was not treated as such by it. Yet, the arbitral tribunal did pay attention to the non-disputing party submission of Ukraine in the Interim Award. The arbitral tribunal deduced from that submission that Ukraine contested the sovereignty claim of Russia in Crimea, but at the same time accepted in a practical sense that Russia had jurisdiction and exercises effective control over Crimea since its incorporation. Ukraine considered this to be a stable situation and accepted that Russia took responsibility for Crimea's foreign relations. The arbitral tribunal took Ukraine's position into account in its judgment that Russia was the one that exercised *de facto* sovereignty in Crimea and had therefore come to bear responsibility for Crimea's foreign relations. Further, the arbitral tribunal found that Ukrainian investors should have been offered investment protection pursuant to the Russia-Ukraine BIT in light of its interpretation under the VCLT (interim award (corrected) of 27 March 2017 in *Privatbank and Finilon v. Russia*).

The court fully upheld the arbitral tribunal's arguments and provided its own examination if effective control over foreign territory issue. First, it was concluded that the fact that international investment treaties apply to the whole territory of a state does not lead to the conclusion that it is impossible to apply treaties to territory over which a state has

effective control. Consequently, the court's interpretation of the VCLT lead to a conclusion that a treaty is also applicable to territories over which a state have effective control and, thus bears international responsibility. Further, the present case concerns a transfer of the borders of the Contracting States, which places an initially domestic investment beyond the control of the investor in territory over which the other Contracting State has jurisdiction and effective control (judgement of the Hague Court of Appeal of 19 July 2022 in *Privatbank and Finilon v. Russia*).

In this case, the decisions of the arbitral tribunal and the court closely mirrored the decisions in *Aeroport Belbek and Mr. Kolomoisky v. Russia*. Both bodies concluded that Russia's exercise of *de facto* sovereignty in Crimea entailed a responsibility for Russia to extend investment protection to all investors, including those from Ukraine. The court expanded upon this analysis, determining that the provisions of the Ukraine-Russia BIT were applicable to regions under the effective control of a contracting state. This meant that, considering Russia's effective control over Crimea, it bore legal responsibility for any breaches of rights of Ukrainian investors in the region. This interpretation highlighted the broader implications of state control and international investment law, emphasizing Russia's duty to uphold investor rights under the prevailing circumstances.

Lugzor and others v. Russia. On 27 May 2015, claimants initiated arbitration in connection with their expropriated assets by Russia before the arbitral tribunal seated in the Hugue. Within this arbitration, Russia decided to choose another strategy by asking for a permission to request a bifurcation in order to have jurisdictional issues heard apart. The further Russian submission that it wanted to address merits and quantum issues jointly were satisfied by the arbitral tribunal which allowed Russia to make a submission on jurisdiction, admissibility, responsibility, and quantum simultaneously. After this decision, claimants applied for costs' security which required Russia to paid off the whole sum amounted EUR 200,000 on this stage. Further, by its procedural order of 30 August 2019, the arbitral tribunal decided to reject claimants' request until the end of the arbitration. Finally, on 2 December 2022, the award in favour of claimant was rendered.

Even though the full text of the award cannot be accessed, it may reasonably be assumed that the arbitral tribunal has taken a similar approach to the issue of effective control as other arbitral tribunals (award of 4 October 2022 in *Lugzor and others v. Russia*). This is because the investors were awarded compensation for their lost assets in Crimea.

Stabil and others v. Russia. On 3 June 2015, the arbitral proceedings were commenced by claimants against Russia. It was claimed that Russia had breached its obligations under the Ukraine-Russia BIT by fully expropriating claimants' investments in petrol stations situated in the Crimean territory. In this case, the amount of the claim is not publicly available. Noteworthy, in this case and *Ukrnafta v. Russia* there are the same members of arbitral tribunals, namely Mr. Daniel M. Price, Professor Brigitte Stern and Professor Gabrielle Kaufmann-Kohler. Moreover, taking into consideration similarities of factual and legal backgrounds, these both cases were decided simultaneously.

The proceedings in this case as well as in *Ukrnafta v. Russia* were divided into jurisdiction and merits stages. On 26 June 2017, the arbitral tribunal rendered the award on jurisdiction, by which it held that it had the power to decide upon claims brought. Further, Russia attempted to set aside the award on jurisdiction and to find that the arbitration tribunal has no jurisdiction to consider the arbitration claim. However, the court partially upheld findings of the arbitral tribunal with regard to the issue of effective control over foreign territories and dismissed Russian request. Notably, the court agreed with arbitral tribunal's interpretation of the term "territory" but disagreed with the statement regarding temporal scope of the treaty (decision of the Swiss Federal Court of 16 October 2018 in *Stabil and others v. Russia*). Finally, award on merits was granted in favour of claimants on 12 April 2019.

The arbitral tribunal completely recognised that Russia had jurisdiction and effective control over Crimea. First, the arbitral tribunal found that the term "territory" in light of the Ukraine-Russia BIT application included territory where a contracting state exercised effective control and had jurisdiction. In arbitral tribunal's view, upon Russian legal incorporation of Crimea by ratifying Incorporation Treaty and passing the Crimean Integration Law, Russia but not Ukraine became responsible for offering investment treaty protection to Ukrainian investors (award on jurisdiction of 26 June 2017 in *Stabil and others v. Russia*).

Second, the arbitral tribunal considered application of temporal scope of the Ukraine-Russia BIT to claimants' investments. It ruled that the language of Articles 1 or 12 of the Ukraine-Russia BIT did not offer any exclusions from the treaty protection on temporal basis. Furthermore, any exclusions would not be in line with object and purpose of the Ukraine-Russia BIT, namely Articles 2, 5 and the preamble relating to providence of "favourable conditions for mutual investments" and "expansion of economic cooperation"

amounting to output that narrow interpretation excluding protection would damage the object and purpose of the Ukraine-Russia BIT. To sum up, the arbitral tribunal determines that there is no justification to interpret the Ukraine-Russia BIT as excluding protection for investments existing prior to a territorial boundary change (award on jurisdiction of 26 June 2017 in *Stabil and others v. Russia*).

In the present case, the arbitral tribunal maintained the stance taken by all preceding arbitral tribunals concerning the interpretation of the term “territory” in light of the VCLT. This interpretation encompasses areas under the effective control of a contracting state. Additionally, the arbitral tribunal specified the precise timing for investments to qualify for coverage under the Ukraine-Russia BIT. It rejected Russia's argument, firmly concluding that changes in territorial boundaries do not impact the investment protection. This decision further elaborates on the scope of investment protection under international law, clarifying that changes in control or jurisdiction of a territory do not negate existing obligations towards investors as outlined in the Ukraine-Russia BIT.

Ukrnafta v. Russia. On 15 June 2015, PJSC Ukrnafta brought a claim against Russia before the arbitral tribunal seated in Geneva. It was alleged in this case that Russia expropriated claimant’s assets located in Crimea and disrupted its activity in the energy sector by violating its obligations under the Ukraine-Russia BIT. It is important to note that this case was simultaneously considered with *Stabil and others v. Russia* and consequently the same procedural history and composition of arbitral tribunals took place.

On 26 June 2017, the arbitral tribunal made the award on jurisdiction which further was attempted to be set aside by Russia. However, as it previously happened Swiss Federal Court dismissed Russian application since the complainant was unable to show any violation of the law and partially agreed with findings of the arbitral tribunal on effective control over foreign territory. Namely, the court ruled that interpretation of the term “territory” was correct, but arguments on the temporal scope of the treaty was analysed incorrectly (decision of the Swiss Federal Court of 18 October 2018 in *Ukrnafta v. Russia*).

The arbitral tribunal, applying these principles of interpretation of the VCLT, concluded that the term "territory" within the meaning of the VCLT also included an area over which a Contracting State exercises *de facto* control. Accordingly, as a result of the accession of Crimea into the Russian Federation, the Ukraine-Russia BIT had been applicable to Ukrainian investments in Crimea since 21 March 2014, at the time when Russia

ratified the integration agreement and adopted the Integration Act on Crimea. With relation to temporal scope of the Ukraine-Russia BIT, the arbitral tribunal stated under Article 12 of the treaty, it was temporally applicable (award on jurisdiction of 26 June 2017 in *Ukrnafta v. Russia*).

In *Ukrnafta v. Russia*, the central legal issues focused on the interpretation of the term "territory" under the VCLT and its implication for occupied Ukrainian territories. The court and the arbitral tribunal concurred that "territory" includes areas under a state's effective control, thereby extending treaty obligations to such regions, a significant interpretation impacting further application of investment treaties and state sovereignty.

Everest and others v. Russia. Claimants initiated proceedings before the PCA arbitral tribunal seated in the Hague. This was not the first commenced Crimean case, but it appeared to be the first where the award was rendered. Claimants argued the same: violation of the Ukraine-Russia BIT by Russia as the later caused loses to their investments. The proceedings were also bifurcated between the jurisdictional and admissibility stages, and the stage where merits of the case to be considered. By its award of 20 March 2017, arbitral tribunal upheld its jurisdiction over the case. Later, on 2 May 2018, the award on merits was issued recognising Russia liable for breaching the Ukraine-Russia BIT and awarding USD 159 millions as compensation. Further, the award was enforced by the judgement of Kyiv Court of Appeal of 25 September 2018 which was upheld by the ruling of the Supreme Court of Ukraine of 25 January 2019, clearing up that it was the Ukrainian bailiffs who should have determined whether assets owned by legal entities in Russia or Ukraine qualify as property belonging to Russia (judgement of Kyiv Court of Appeal of 25 September 2018 in *Everest and others v. Russia*; ruling of the Supreme Court of Ukraine of 25 January 2019 in *Everest and others v. Russia*). Also, Russia attempted to set aside the award before the Hague Court of Appeal, but it failed since the court fully agreed with findings of the arbitral tribunal, including those on effective control over foreign territory and temporal scope of the Ukraine-Russia BIT.

As for the effective control over foreign territory, first, the arbitral tribunal found that the investments of claimants can be regarded as investments in the territory of the Russian Federation after the annexation; the annexation of occupied territories had not led to changes in territorial jurisdiction; the concept of territory included the entire territory of a contracting party. Second, the arbitral tribunal deduced from the submission of Ukraine that even though the later contested the sovereignty claim of Russia in Crimea, but also accepted that in the

context of the Ukraine-Russia BIT the territory of Russia included Crimea since the Russian Federation had jurisdiction and effective control on Crimea; as a result, the arbitral tribunal took the Ukrainian submission as one of the arguments.

Analysing the temporal scope of the Ukraine-Russia BIT, the arbitral tribunal found that Article 14 of the Ukraine-Russia BIT required that the investment, at the time it took place, was made in the territory of the other contracting party. If a concurrency requirement were part of Article 1(1) and Article 12 of the Ukraine-Russia BIT, then protection under the Ukraine-Russia BIT would be denied to a category of investors solely because of the location of their investment, even though that investment was made after 1 January 1992. According to the arbitral tribunal, this was not the intention of the contracting parties. According to the arbitral tribunal, an explanation in which the existence of an investment is assumed if both elements of the definition were met before the infringement of denied occurred is in line with the intentions of the contracting parties. In this explanation, the reciprocal nature of the Ukraine-Russia BIT was maintained in this case since Russia benefited from investments by Everest et al. and Everest et al. which benefited from the protection of the BIT 1998. On the other hand, an explanation in which an investment took place in the territory of the other contracting party at the time of investment would lead to an unreasonable result (award on jurisdiction of 20 March 2017 in *Everest and others v. Russia*).

The Hague Court of Appeal upheld the findings of the arbitral tribunal. First, the arbitral tribunal relied on the correct definition of the concept of territory and therefore this did not provide grounds for sitting aside of the arbitral award. Moreover, the court did not accept the Russian argument regarding reciprocity meaning that Crimea could not be qualified as a territory within the meaning of the Ukraine-Russia BIT as long as Ukraine did not recognise the sovereign rights of the Russian Federation with regard to Crimea. Second, the court concluded that the arbitral tribunal rightly ruled that the investments of Everest et al. fell under the concept of investments as referred to in Article 1 of the Ukraine-Russia BIT and that to that extent there were no grounds for setting aside the arbitral award (the judgement of the Hague Court of Appeal of 19 July 2022 in *Everest and others v. Russia*).

In *Everest and others v. Russia*, the arbitral tribunal focused, *inter alia*, on a) the definition of “territory” under the Ukraine-Russia BIT and b) the treaty’s temporal scope. The arbitral tribunal concluded that annexed Crimea fell under Russia’s effective control and thus within the “territory” as provided for in by the BIT. Also, the arbitral tribunal found that investments made in Crimea were protected under the Ukraine-Russia BIT, regardless of the

annexation, emphasizing the treaty's broad temporal application. The court upheld all findings of the arbitral tribunal and rejected Russia's arguments against it. This case highlights the extend interpretation of the term "territory" in international investment law and reaffirms the enduring protection of investments while geopolitical changes occur.

Oschadbank v. Russia. On 18 January 2016, Oschadbank initiated arbitration before the arbitral tribunal seated in Paris, asking for the compensation in the amount of ISD 680 million for the expropriation its Crimean property which was destroyed by the actions of Russia. In comparison to many previous cases, the PCA arbitral tribunal did not divide the arbitral proceedings into several stages. On 26 November 2018, the arbitral tribunal decided in favour of investor and awarded full compensation. By its ruling, the Kyiv Court of Appeal granted enforcement of the award (ruling of the Kyiv Court of Appeal of 17 July 2019 in *Oschadbank v. Russia*), but after that Russian owned companies filed the application to challenge this decision. As of now, the is still pending before the Supreme Court of Ukraine. Also, Russia attempted to set aside the award and first it succeeded in the Paris Court of Appeal which stated that the Arbitration Tribunal lacks jurisdiction by reason of time (*ratione temporis*) (judgment of the Paris Court of Appeal of 30 March 2021 in *Oschadbank v. Russia*). However, the French Court of Cassation reinstated the award (judgment of the French Court of Cassation of 7 December 2022 in *Oschadbank v. Russia*).

Although temporal requirements for the definition of investments were not, in fact, analysed, the arbitral tribunal made a deep examination of the effective control over foreign territory issue. The arbitral tribunal accepted jurisdiction over this case since after annexation of Crimea, Russia took responsibilities under the Ukraine-Russia BIT before Ukrainian investors. This conclusion was reached in connection with interpretation of the treaty under the VCLT as well as previous arbitral tribunals did. Relying on the Article 31(1) of the VCLT, the arbitral tribunal found that Crimea should be deemed as part of Russia's "territory" for the purposes of the Ukraine-Russia BIT under Article 1(4). Thus, based on case's evidence, the arbitral tribunal identified a term "territory" that fully relied on a state's exertion of jurisdiction and effective control. It appears that exertion of jurisdiction over Crimea by Russia should be analysed its legislative and administrative authority. Finally, it was established that while the Russian right to have sovereign title to Crimea is contested by the internationally recognised sovereign – Ukraine – and by the international community, its maintenance, coupled with the effective control manifested by Russia, cannot be without

consequence within the context of the Ukraine-Russia BIT (award of 26 November 2018 in *Oschadbank v. Russia*).

As well as in previous cases, the arbitration tribunal ruled that Crimea is considered part of Russia's territory for the purposes of the Ukraine-Russia BIT. This decision is based on the VCLT interpretation, particularly considering Russia's legislative and administrative authority in Crimea. In spite of international disputes over Russia's sovereign claim to Crimea, the arbitral tribunal stated that effective control of Russia has legal consequences under the Ukraine-Russia BIT.

Naftogaz and others v. Russia. On 17 October 2016, Claimants commenced the proceedings against Russia, arguing that later expropriated their investments in the oil and gas sector in Crimea by transferring their assets to the companies owned by Russia. Unlike some other cases, the arbitration proceedings were not bifurcated, and all issued were decided simultaneously. On 22 February 2019, the arbitral tribunal rendered its award, by which jurisdiction was accepted. However, Russian managed to partially set aside the award in the Hague Court of Appeal. In fact, this did not lead to major consequences as the court set aside the award to the extent that the arbitral tribunal has ruled that it has jurisdiction to assess all claims, as it is only competent to adjudicate on investments made on or after 1 January 1992 (judgment of the Hague Court of Appeal of 19 July 2022 in *Naftogaz and others v. Russia*). On 12 April 2023, the final award was issued and soon after recognised in the United Kingdom by the order of the High Court of Justice of England & Wales on 5 December 2023 (order of the High Court of Justice of England & Wales of 5 December 2023 in *Naftogaz and others v. Russia*).

The arbitral tribunal analysed issues of effective control over foreign territory and temporal scope of the Ukraine-Russia BIT. First, it concluded that within the geographic space, effective control and *de facto* authority over both domestic and international relations of Crimea and Sevastopol was seized by the occupying forces of Russia and adopted by the Russian Parliament and endorsed by the Russian Supreme Court. While Ukraine had not surrendered sovereignty, it acknowledged that it was incapable of exercising it. *De facto* power was exercised by Russia from and after 27 February 2014 ("Special Operations Forces Day") although the constitutionality of the annexation under Russian law and the legality of the seizure under Russian law were not regularised until 21 March 2014 backdated to 18 March 2014 (partial award of 22 February 2019 in *Naftogaz and others v. Russia*). Second, the arbitral tribunal upheld the position of Ukraine regarding exercising of effective control

by Russia as it exercises *de facto* sovereignty in Crimea. Third, in arbitral tribunal's view, the Ukraine-Russia BIT does not protect the pipelines and gas-related investments were made during the time that Ukraine and the Russian Federation were part of the Union of Soviet Socialist Republics (further – USSR). However, as Article 12 of the Ukraine-Russia BIT specify "'on or after January 1, 1992", the Ukraine-Russia BIT encompasses investments made after that date (partial award of 22 February 2019 in *Naftogaz and others v. Russia*).

The Hague Court of Appeal partially upheld findings of the arbitral tribunal. First, it confirmed that the arbitral tribunal relied on the correct definition of the term "territory" and that this therefore did not lead to setting aside of the arbitral (interim) award. Second, even though the court agreed that the Ukraine-Russia BIT did not apply to investments had made before 1 January 1992, which meant that Naftogaz et al. could not obtain protection under the Ukraine-Russia BIT if they had made their investments before that date, the partial award would be partially set aside as procedural order No. 8 was not clear. The court further explained that the arbitral tribunal did not specify whether it attached consequences to its statement in the procedural order for its ruling in the partial award that it was competent to rule on the (in principle all) claims. Thus, the award was set aside to the extent that the arbitral tribunal had ruled that it had jurisdiction to adjudicate all claims, as it had jurisdiction only to adjudicate on investments had made on or after January 1, 1992 (judgment of the Hague Court of Appeal of 19 July 2022 in *Naftogaz and others v. Russia*).

There is a non-typical position of the state court in this case. The court reaffirmed the arbitral tribunal's findings regarding Russia's effective control over Crimea and interpretation of the term "territory". However, the court limited the arbitral tribunal's jurisdiction to post-1992 investments clarifying ambiguities which were made in procedural order No. 8. Along with that, this diviation from the arbitral tribunal's findings did not result in the termination of the legal proceedings.

DTEK v. Russia. PJSC DTEK Krymenergo brough an action before PCA arbitral tribunal against Russia on 16 Feb 2018. It was claimed that respondent expropriated claimant's investments had made in the energy sector. Claimant asked for compensation in the amount of approximately USD 500 million. As it was one of the last Crimean cases, the award was rendered on 1 November 2023 and there was no enforcement or set aside proceedings commenced so far.

The arbitral tribunal considered both issues, namely whether Russia had effective control over Crimea and whether temporal requirements of the investments were fulfilled. With regard to the first issue, the arbitral tribunal stated that 1) interpretation of Article 1(4) of the Ukraine-Russia BIT suggested although parties had a dispute regarding who held sovereignty over Crimea, the later was under control of Russia and thus it should have construed as a Russian territory. Second, even though the term "territory" was to be construed with reference to "sovereign territory", in this case the reference should have been made to "controlled territory" (award of 1 November 2023 in *DTEK v. Russia*). As for the second issue, the arbitral tribunal found that Article 12 of the Ukraine-Russia BIT provided that only those investments could be protected by the treaty, which was made and after 1 January 1992. As a consequence, temporal requirements were fully met.

Ukrenergo v. Russia. This is the lasts Crimean case so far being on the very early stage. On 27 August 2019, NEK Ukrenergo initiated PCA arbitral proceedings against Russia in connections with expropriation the company's infrastructure facilities in the amount around USD 600 million (Press Release of NEK Ukrenergo on Ukrenergo is suing Russia…). Considering the known factual background of the case, namely the fact that NEK Ukrenergo had a bunch of power facilities in Crimea, the arbitral tribunal is going to deal with jurisdictional issues, including effective control over foreign territories.

Akhmetov v. Russia. In 2023, Ukrainian businessman Rinat Akhmetov brought an around USD 400 million claim before the PCA arbitral tribunal seated in Paris against Russia for expropriated assets located in the Donetsk and Luhansk regions. These assets, under the umbrella of the SCM Group, were involved in such diverse range of industries and activities as metals and mining, football, energy and real estate (Press Release of SCM Group…). Assets include, among many others, Azovstal Iron & Steel Works in Mariupol, the site of the final heroic defence of the Ukrainian forces against the Russian aggressor in May 2022; and Donbass Arena, which opened in 2009, with cost to build of around $400mln (Press Release of SCM Group…). This is the first non-Crimean case where the arbitral tribunal is going to decide whether occupied the Donetsk and Luhansk regions are territory under effective control of Russia.

To conclude, as it seen from above analysis in all Crimean awards so far arbitral tribunals found that Russia exercised effective control over Crimean territory. Moreover, national courts tend to enforce such awards and refuse to set aside. The only exception is the judgment of the Hague Court of Appeal in *Naftogaz and others v. Russia,* where the court

partially set aside arbitral award due to a lack of clarity in the procedural order. However, this is rather exception because this decision have not ruined the further arbitration process.

It worth mentioning that analysis and arguments of arbitral tribunals are quite similar and can be divided into two groups. First, Article 1(4) of the Ukraine-Russia BIT should be construed in a manner that term “territory” includes not only “sovereign territory” which is internationally recognised, but also territory under effective control of a contracting party. Thus, Crimea is under effective control of Russia and all Ukrainian investors should be now treated as foreign and be under protection of the Ukraine-Russia BIT. Second, Article 12 of the treaty covers only those investments which was made after 1 January 1992. Therefore, investments made when Ukraine was a part of the USSR are not protected by the Ukraine-Russia BIT.

Part 2. Territorial Jurisdiction of Investment Arbitral Tribunals under the Ukraine-Russia BIT

Territorial jurisdiction of investment arbitral tribunal depends on how the term “territory” is defined in an international investment treaty and which specific territories it includes. Even though the Ukraine-Russia BIT does not mention territory under effect control, the following analysis suggests that effective control over foreign territories is cover by the term “territory” enshrined in the Ukraine-Russia BIT. Also, whether occupied Ukrainian territories are under effective control of Russia and what legal consequences this has will be further analysed in this part.

Chapter 1. The Explanation of The Term “Territory” in Light of the VCLT.

Article 4 of the Ukraine-Russia BIT operated the term “territory” which is used to established territorial boundaries for investments. Article 1(4) provides that “territory shall denote the territory of the Russian Federation or the territory of the Ukraine and also their respective exclusive economic zone and the continental shelf as defined in conformity with the international law” (the Agreement between Ukraine and Russian Federation…, 1998). However, term “territory” pursuant to the Ukraine-Russia BIT relates to a territory of a contracting state and provides only a general overview without reference to occupied Ukrainian territories.

In scientific literature this term means “territory clearly includes its lands areas, subterranean areas, waters, rivers, lakes, the airspace above the land, etc., and the territorial sea” (Shaw, 1986). As we can see, this term is, in fact, not unique and is widely used in international law. However, neither this scientific source nor others do not cover any disputed territories. Therefore, the term should be construed pursuant to the VCLT.

Article 31(1) of the VCLT states that “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” (Vienna Convention on the Law of the Treaties, 1969). Thus, the following should be determined: 1) ordinary meaning; 2) the context of the Ukraine-Russia BIT; 3) object and purpose of the Ukraine-Russia BIT; 4) interpretation in good faith.

Ordinary meaning. Factually, the term "territory" enshrined in the Ukraine – Russia BIT is in most cases as in all other investment treaties. Thus, there is no grounds to construe it not in a meaning recognised by international law. In line with it, arbitral tribunals should refrain from exceeding the explicit language of the Ukraine-Russia BIT while interpreting it. The treaty says nothing about effective control, but also does not set any restrictions as to it. This absence of an explicit language indicates the non-exclusion of such areas. One might say that this absence of an explicit language might be construed as exclusion. Nevertheless, this argument is not tenable since a) bilateral investment treaties generally do not deal with territories under effective control, b) the term "territory" of the Ukraine-Russia BIT lacks any indications of excluding such areas, c) there is only general accepted term "territory" rather than one definition set in a legal act. Therefore, as the arbitral tribunal in *Yukos Universal v. Russia* found – legal acquisition of the territory and illegal annexation are both extension of the state's territory that used to belong to another state (interim award on jurisdiction and admissibility of 30 Nov 2009 in *Yukos Universal v. Russia*). It is a state obligation to protect investments of foreign investors in the territory under its control, even if the territory came under state's control in illegal way.

The context of the Ukraine-Russia BIT. Effective control over territory by a contracting state is not excluded from its territory under the Ukraine-Russia BIT. Nonetheless, the following must be taken into consideration. First, it is not defined in the treaty whether term "territory" should be interpreted under international law, or it only means exclusive economic zone and continental shelf. Russian analysis of the treaty suggests that phrase "as defined under international law" is used in BITs concluded between Russia and other states bordering with sea. Nonetheless, the situation is different in BITs concluded with states not bordering with sea because the exclusive economic zone and continental shelf "are defined under international law" in relation to Russia, but the term "territory" is defined as territory of contracting party in relation only to other contracting state, but not Russia. Therefore, the term "as defined under international law" in the Ukraine-Russia BIT is likely to be contributed only to the exclusive economic zone and continental shelf. On the other hand, the term "territory" must be construed pursuant to ordinary meaning under international law because effective control over foreign territory is not excluded and there is not any other exceptions to it in the Ukraine-Russia BIT. Second, within the context of the Ukraine-Russia BIT, there is a correlation between the territory and the power to enact legislation within it (Hepburn, Kabra, 2017). Particularly, articles of the Ukraine-Russia BIT have a reference to

actions which a contracting party take within its territory for achieve some results. Thus, the Ukraine-Russia BIT has the ordinary meaning of "territory" and territories under effect control are not excluded from the treaty.

Object and purpose of the Ukraine-Russia BIT. The object and purpose of the Ukraine-Russia BIT can be found in the Preamble, namely "having the intent to create and support the favorable conditions for mutual investments" (the Agreement between Ukraine and Russian Federation…, 1998). Also, there is reference in the Preamble to the Agreement on cooperation in the investment activity area between Ukraine and Russia, namely "developing the main terms of the Agreement on cooperation in the investment activity area between Ukraine and Russia of 24 December 1993" (Agreement between the Government of the Russian Federation and Cabinet of Ministers of Ukraine…). It appears that protection of investments are the main purpose of parties' mutual cooperation. Moreover, restrictions of any kind which are not presented in the treaty would jeopardize this goal.

Good faith. The *pacta sund servanta* principle must be complied with by contracting parties. As there are no restrictions on effective control over foreign territories in the Ukraine-Russia BIT, good faith in this case means that the treaty has no restrictions of "territory" and any other interpretational means that would change the performance of obligations of contracting parties. In addition, it must be born in mind that occupied Ukrainian territories are a part of Russia within the meaning of the Ukraine-Russia BIT. Russia considers occupied Ukrainian territories as part of its territory and cannot simply disregard its earlier admission of occupied Ukrainian territories since it now obliges to protect investments of Ukrainian investors. Interpreting the situation in a way that selectively benefits Russia would not be in line with the principles of good faith. This is supported by international customary rules, namely "a unilateral declaration that has created legal obligations for the State making the declaration cannot be revoked arbitrarily" (Guiding Principles applicable to unilateral declarations…, 2006) and findings of arbitral tribunals in *Stabil and others v. Russia*, namely "the Russian Federation has repeatedly claimed that Crimea forms an integral part of the territory of the Russian Federation" (award on jurisdiction of 26 June 2017 in *Stabil and others v. Russia*).

Therefore, the term "territory" enshrined in the Ukraine-Russi BIT when interpreted in light of the VCLT indicated that 1) there is only ordinary meaning of territory and 2) effective control over foreign territories is not excluded.

Chapter 2. Occupied Ukrainian Territories as a Part of Russia for the Purposes of the Ukraine-Russia BIT

Occupied Ukrainian territories are now under *de facto* control of Russia, but legally they still belong to Ukraine. Notably, neither Crimea, nor any other occupied Ukrainian territories are recognised as a part of Russia, namely United Nations General Assembly stated "reaffirms its commitment to the sovereignty, independence, unity and territorial integrity of Ukraine within its internationally recognized borders, extending to its territorial waters (the United Nations General Assembly Resolution on Aggression against Ukraine, 2022). As a consequence, it is undisputed that Russia occupied Ukrainian territory illegally. On the one hand, it is not significant whether Ukrainian territories became a part of Russia in a legal way or not for the purposes of the Ukraine-Russia BIT. On the other hand, such an acquisition is contradicted to international law. However, the distinct goals and viewpoints of international law and the Ukraine-Russia BIT mean that these two approaches are not in conflict with each other.

Annexation and occupation are two illegal ways in changes of territory. They cover a shift in effective control from one state to another due to a war conflict. First, Article 2(4) of the Charter of the United Nations (further – UN Chapter) provides that "all Members shall refrain in their international relations from the threat or use of force against the territorial integrity" (the Charter of the United Nations, 1945). Second, it is stated in the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States that "the 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" (Declaration on Principles of International Law Concerning…, 1970). Scientific literature supports this viewpoint, namely Thomas D. Grant stated that "no additional actions including court decision are needed to refuse in recognition when the breach of the rule occurs" (Grant, 2015).

Further, International Law Commission Articles on State Responsibility for Internationally Wrongful Acts (further – ILC Articles on State Responsibility) "accurately reflect customary international law of state responsibility" (Hober, 2013). Pursuant to Articles 40 and 41 of the ILC Articles on State Responsibility, scenarios resulting from a grave violation of an imperative norm of international law cannot be deemed legal. In particular, Article 41 of the ILC Articles on State Responsibility provides that "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" whereas Article 40 determines the violation situations arising out of imperative norm of international law, namely "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" (International Law Commission Articles on State Responsibility…, 2001). The definition of imperative norms of international law is provided in Article 53 of the VCLT, namely "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" (Vienna Convention on the Law of the Treaties, 1969). Provided that Article 2(4) of the UN Charter prohibits use of force and defines it as an imperative norm (Christenson, 1987), its violation will be deemed as unlawful. Although there is a list of cases with relation to occupation, Ukrainian cases are different since Russia officially declared its presence and even incorporated occupied territories. This constitutes a direct violation of the Article 2 (4) UN Charter and the inviolability of Ukraine's territorial boundaries (Marxen, 2015).

Hence, under international law, occupied Ukrainian territories keeps on being recognised as part of Ukrainian territory. This stems from the principle of non-recognition, meaning that global community does not acknowledge unlawfully territories acquired to be part of a state (Brownlie, 2008). However, this does not prevent occupied Ukrainian territory, which is under Russian effective control, from being considered as Russian within the meaning of the Ukraine-Russia BIT.

There are compelling justifications and no obstacles to deem occupied Ukrainian territory as a part of Russian territory within the meaning of the Ukraine-Russia BIT. First, it aligns with the objectives of investment protection. Second, the term "territory" in the Ukraine-Russia BIT is sufficiently expansive to encompass all areas under the State's jurisdiction, regardless of whether they were lawfully incorporated, including territories over which a state exercise effective control. The justifications are listed below.

Moving treaty-frontiers rule. This rule provides that "the treaties then in force for that State normally will be deemed to apply to the newly expanded territory" (Yearbook of the International Law Commission, 1974, p. 208). Pursuant to 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 its entire territory" (Vienna Convention on the Law of

the Treaties, 1969). Also, the rule was used by the Court of Appeal of Singapore in *Sanum Investments v. Laos (I)*, namely "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 new territory as and when it becomes a part of that State" (judgement of the Court of Appeal of Singapore of 20 January 2015 in *Sanum Investments v. Laos (I)*). This implies that if there is a change in the state's territory, the investment treaty remains applicable to the all territory, in case "the contracting states did nothing to expressly displace the effects of the MTF Rule" (Yannaca-Small, 2018, p. 785).

Non-recognition principle without any conflicts. Despite the fact that occupied Ukrainian territories are recognised as a part of Russia within the meaning of the Ukraine-Russia BIT, there are no contradictions in non-recognition principle under international law. This statement can be supported by the following. First, non-recognition is not violated by the fact that occupied Ukrainian territories are effectively controlled by Russia. This is because of the goal of the principle that has two consequences: a) the non-recognition principle is intended to affirm the unlawfulness of territorial acquisition (Brownlie, 1963) and b) the non-recognition principle is designed to prevent Russia from benefiting from territory acquired unlawfully (Happ, Wuschka, 2016, p. 262). It means that the non-recognition principle will be violated if Russia circumvent accountability for purported breaches of rights of investors. This is supported by legal doctrine. The principle in question "cannot be applicable strictly to illegally annexed territories" (Happ, Wuschka, 2016, p. 262). This reasoning is not relevant for defining the term "Territory" and does not apply to the interpretation of the Ukraine-Russia BIT. The findings of the International Court of Justice (further – ICJ) and the European Court of Human Rights (further – ECHR) support this statement, namely "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" (Security Council Resolution (advisory opinion) of 1971 in *Namibia (South West Africa)*) and "non-recognition of the acts of the de facto authorities that concern individuals would strip the inhabitants of their rights in international setting" (judgement of the European Court of Human Rights of 10 May 2001 in *Cyprus v. Turkey*).

Secondly, the mutual acknowledgment by Russia and Ukraine of Russian effective control over occupied Ukrainian territories implies that investors can require Russia to fulfil its international state obligations. Along with this, there are various goals and implications for bilateral recognition and international recognition. International recognition relates to the

principle of non-recognition and pertains to a state's capacity to extend its sovereignty on a territory. Whereas bilateral one, namely acknowledgement by Ukraine and Russia that the later has *de facto* control over occupied Ukrainian territories, "is important as regards evidence of effective control and should therefore be treated as an element within that principle" (Show, 1986). Therefore, the principle of non-recognition does not negate the evidentiary importance of bilateral recognition. Third, investment arbitral tribunals are not tasked with resolving disputes over territories, but rather must resolve investment disputes. Issues outside arbitral tribunals' power and power do not impact the principle of non-recognition. Consequently, this defines the scope of the arbitral tribunal's power concerning specific disputes.

Interpretation of bilateral investment treaties by arbitral tribunals aiming at*, inter alia,* resolution of investment cases. For investment protection purposes, there are two key limitations on the process of interpretation: the scope of the dispute and the parties that are relevant for defining the term "territory". First, investment tribunals are empowered to deal with investment cases. As this does not encompass broader issues of public international law, the bilateral investment treaties are not intended to delineate the borders of states, but rather to identify who is accountable for protecting foreign investments within a specified territory. Arbitral tribunals *de facto* construed bilateral investment treaties "for the limited purpose of protecting the rights of [inhabitants]" investors (judgement of the European Court of Human Rights of 10 May 2001 in *Cyprus v. Turkey*). Bilateral investment treaties are international treaty designed to facilitate cooperation between states in a specific area – the protection of each other's investors in the territory of one another. Foreign investors operating within the territory of the host state should benefit from the guarantees provided by bilateral investment treaties.

Second, investment arbitral tribunals are tasked with addressing of specific disputes between a particular investor and a host state. Their awards are obligatory for both the parties and the courts responsible for either enforcing or setting aside awards. It can also be said that investment arbitral tribunals' role is to construe the terms of bilateral investment treaties only as far as it is necessary to address the specific dispute at hand. It does not also aim to establish a common rule or resolve disputes between states. The arbitral tribunal in *Sanum v. Laos* took the same position. In this case the letters exchange was construed not in a abstract manner, but as "interpretation or modification of the China – Laos BIT" (Repousis, 2015).

Therefore, occupied territories of Ukraine are *de facto* a part of Russia within the meaning of the Ukraine-Russia BIT. However, the potential arbitral award will be obligatory for the parties of investment disputes because of the following: a) there is no need to determine whether occupation was a legal act under international law (Bianchi, 2019); b) protection mechanisms provided for in the Ukraine-Russia BIT are designed only for addressing specific disputes between the said parties. Additionally, unlawful occupation was in the form effective control which is discussed below.

Chapter 3. The Definition of "Effective Control over Foreign Territory" and Its Legal Implications for Occupied Ukrainian Territories

The shift of the effective control occurred in the occupied territories of Ukraine which resulted in activation of the Ukraine-Russia BIT protection mechanisms. Thus, it is crucial to determine the definition of effective control over foreign territories. This term is derived from the common understanding of the word "control" and is usually applied in different areas of international law. Enforcement itself is linked to territoriality (Hassan, 2006, p. 64). Besides that, various means of control are used to take specific territories under effect control, i.e. administrative and military (Schultz, 2014, p. 1084). At present, it is possible to take state's territories under effective control whereas in past it used to be connected with *terra nullius* (Oppenheim, Lauterpacht, 1955). Previously, effective control was attributed to the occupation of the territory were no state exercised its jurisdiction or the territory under no control of people. In this context, effective control was viewed as an initial step towards acquiring legal ownership over a territory (Smith, 1977, p. 138).

Within international legal doctrine, effective control over a territory refers to the exercise of jurisdiction, irrespective of whether there is a legal basis for such control. In this instance, the legal basis of state sovereignty becomes irrelevant, as the state in question factually exercises authority that is recognised and adhered to by the individuals and companies within that area. Pursuant to Principles of Public International law created by Brownie: "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." (Brownlie, 2008). Therefore, the term of effective control is determined by the specific actions through which it is taken.

In order to establish whether Russia exercises effective control over occupied Ukrainian territories, it's essential to determine the actions that constitute such control and ascertain whether these actions occurred in the occupied Ukrainian territories.

Legislative ability. Russia was the sole state exercising the effective and consequential capacity to enact legislation in territories in question, including Crimea (Hepburn, Kabra, 2017). Guarantees containing in the Ukraine-Russia BIT are founded on Russian authority within the area: ability to enact legislation and enforce it. Consequently, Russia emerged as the sole state capable to exercise effective legislative power in occupied Ukrainian territories. It can also be said that the *de facto* presence of Russia facilitated the enforcement of Russian legislation in Crimea and led to the replacement of most civil servants.

Ability to immediately replace existing state authorities. Russia usurped control from Ukraine and became the *de facto* the holder of effective government in occupied Ukrainian territories. Notably, Russia acknowledges that it has authority in occupied Ukrainian territories and the effective government (Rudman, 2012, p. 419), as well as has legislative and administrative authority. Current Russian authority in occupied Ukrainian territories issues official documents under their own letterhead which is common practice nowadays. There are many cases when people need to get official notarised documents to re-register their property located in that territories. As practice show, such people must visit a Russian notary to get their documents notarised and use Russian state registers in case of re-registration of their property. Otherwise, it will be impossible to sell or buy, for example, immovable property. Therefore, it is undisputed that Russia is the only state that control all legal actions over occupied territories.

Direct and indirect effective control is exerted by Russia in the occupied territories. Russia has full effective control and in relation to any action in which alleged breaches happened. The full or overall control is deemed sufficient in order to state is “effective”, despite this Russia ultimately exceeded the thresholds. It has effective control over all actions directly and indirectly. The ICJ found that if all actions are under the control, then there is the control over domestic stakeholders: “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” (judgement of the International Court of Justice of 11 July 1996 in *Bosnia and Herzegovina v. Serbia and Montenegro*). The ECHR adopted another stance in *Ilascu and Others v Moldova and Russia*, namely “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 given to it by the Russian Federation” (judgement of the European Court of Human Rights of 8 July 2004 in Ilascu and Others v. Moldova and Russia). Russia exceeded both less stringent and more rigorous thresholds as it directly infringed upon Ukraine's territorial inviolability by establishing military control in occupied regions and replacing Ukrainian state officials to Russian ones. This demonstrates that each official action in occupied territories was sanctioned by Russia, indicating Russia's effective control over the territories (Marxen, 2015). Russian effective control over the occupied territories characterised as military and administrative and is recognised by both Russia itself and the global community. Consequently, actions of Russia resulted to the shift of effective control over occupied Ukrainian territories from Ukraine to Russia. There were no one other exerting control during this time. Thus, effective control was gained by Russia as early as in 2014 over Crimea and in 2022 over other territories of Ukraine by military and administrative activities.

The first major legal implication of the shift in effective control is that Ukrainian investors have become foreign and have gaine legal rights to claim damages from Russia under the Ukraine-Russia BIT. It is a phenomen that the roles and obligations of all actors involved have been changed. Namely, Russia has assumed the role of the host state, inheriting all protective obligations under the Ukraine-Russia BIT and international law. Ukraine is not responsible any more for ensuring protection for Ukrainian investors and has become *de facto* third party which supports Ukrainian investors, but they and their investments assume a foreign status. The Ukraine-Russia BIT is applicable now to the cases involving Ukrainian investors and Russia since the term “territory” encompasses the Ukrainian occupied territory under Russian effective control. This is so because: a) moving treaty-frontiers enshrined in the Article 29 of the VCLT, and b) who exercise effective control is also responsible for infringements of the Ukraine-Russia BIT.

The second major legal implication is that arbitral tribunals, deciding on Ukrainian investors’ claims, touch upon the issue regarding resolution of interstate dispute over territory. This is the second paradox. On the one hand, arbitral tribunals (for example, in *Oschadbank v. Russia*) agree that occupied Ukrainian territories form a part of sovereign Russian territory because of a series of legal acts attributed to their incorporation into Russia.

On the other hand, considering the position of Ukraine and international community, arbitral tribunals conclude that occupied Ukrainian territories fall within the territory of Russia only for the purposes of the Ukraine-Russia BIT. Thus, even though arbitral tribunals determine that there is a legal link between occupied Ukrainian territories and Russia, they neither conclude, nor create any single arguments to be used in the future by Russia that the later has any legal right to these territories.

To sum up, the Ukraine-Russia BIT encompasses territories which was incorporated unlawfully to another state's territory. This statement is drawn from the interpretation of the Ukraine-Russia BIT's term "territory" in light of the VCLT and under international law.

The shift in effective control from Ukraine to Russia created the possibility for Ukrainian investors to request protection under the treaty in the Ukrainian occupied territory. The remaining question pertains to the specific timing of when this opportunity became available to the investors.

Part 3. Temporal Scope of the Ukraine-Russia BIT Application

It worth mentioning that there is no explicit stipulations in the Ukraine-Russia BIT regarding the timing of investments for them to qualify for protection under the BIT in the event of a change in effective control. For example, arbitral tribunals in *Ukrnafta v. Russia* and *Stabil v. Russia*, having accepted jurisdiction, determined that the BIT does not impose any temporal limitations for making investments. This position is grounded in the VCLT's analysis of the Ukraine-Russia BIT, particularly focusing on the definition of "investment".

Ordinary meaning. Literal interpretation of the term "investment" suggest that the definition of the investment enshrined in Article 1(1) does not specify any time constraints regarding when the investment was made within the territory which is lawfully or unlawfully controlled by the other contracting party, as long as it took place on or after 1 January 1992, as stipulated in Article 12 of the Ukraine-Russia BIT.

The attention may be given to the use of tenses (Hepburn, Kabra, 2017) in both Article 1(1) and Article 12 of the Ukraine-Russia BIT. Particularly, Article 1(1) provides for a present tense – are put in by the investor – whereas Article 12 stipulates that "this Agreement shall apply to all investments carried out by the investors of one Contracting Party on the territory of the other Contracting Party, as of January 1, 1992" (the Agreement between Ukraine and Russian Federation…, 1998). The use of the past tense in Article 12 might mean the parties indirectly indicated that the investment must have initially been made in the territory of Russia (Soldatenko, 2018). However, this interpretation is likely to be challenged based on grammatical rules and the underlying logic.

First, the application of past tense in Article 12 can be understood through grammatical rules. The Ukraine-Russia BIT was signed on 27 November 1998, whereas Article 12 pertains to investments made after 1 January 1992, for example, the usage of past tense relates to the dates of signing, ratification, and enactment. It can rightly be concluded that the past tense in this context relates to an action and date that occurred in the past (subsequent to the treaty's signing) and mirrors an antiquated perspective of investment as a transaction. Second, in a legal context, the grammar rule concerning the use of past tense can imply that it is intended to signify the retrospective application of the Ukraine-Russia BIT. This would encompass investments made prior to the signing, ratification, and coming into force of the treaty. Third, the investment must have been made and situated in the territory of Russian in the meaning of the Ukraine-Russia BIT, however there are no specific provisions

requiring the these two events happen concurrently as was found by the arbitral tribunal in *Everest and others v. Russia* (Hepburn, Kabra, 2017). Therefore, the straightforward wording of the Ukraine-Russia BIT, along with relevant case law, indicates that the Ukraine-Russia BIT contains no language that would preclude an investment from being protected by the BIT due to a) limitations on the timing of when the investment was reached or occurred, or made within the territory of a contracting party, considering it happened after 1 January 1992, and/or b) any changes in effective control alter the outcome of its interpretation.

Context. The temporal scope of the Ukraine-Russia BIT is enshrined in the Article 12 that include the first date when protection granted: "this Agreement shall apply to all investments carried out by the investors of one Contracting Party on the territory of the other Contracting Party, as of January 1, 1992" (the Agreement between Ukraine and Russian Federation…, 1998). However, there is no reference to any end date. Therefore, neither the Ukraine-Russia BIT, nor the term "investment" includes provisions stipulating that the investment must have been initially made within the area of a contracting party to the treaty.

Object and purpose. If either party comes up with any limitations which are not explicitly provided in the Ukraine-Russia BIT, then it will conflict with object and goal of treaty, namely "in pursuance of their intention to create and maintain favorable conditions for mutual investments" (the Agreement between Ukraine and Russian Federation…, 1998). Regarding the object and goal of the Ukraine-Russia BIT, the manner in which the investment reached the territory and how the investor acquired foreign status – whether intentional or as a consequence of the moving treaty-frontier rule – is irrelevant. The most important criteria that must be satisfied at the time of the breach are: a) the obligatory treaty for the violator, b) the investment located within its territory; c) the foreign investor. The date, when the effective control changed, activated all three of these criteria. Consequently, Russia bears responsibility for any alleged breaches that took place within the area during the period it was under Russian effective control. The object and purpose of the BIT are fulfilled if the latter is interpreted effectively, guided by a "pragmatic approach" that aligns with the treaty's object and aims (Happ, Wuschka, 2016, p. 259). First, the arbitral tribunal is obliged to accept jurisdiction in cases where the investor would otherwise lack any alternative means to arbitrate, for example, have its dispute resolved with a neutral forum. Even though the respondent's objections were found to be valid (which is not the case here), the arbitral tribunal should still accept jurisdiction over the case to prevent the investor from being deprived of the opportunity to protect their investment. Indeed, the investor should not be left

in a “legal vacuum” if the treaty is not applicable (Happ, Wuschka, 2016). Second, Russia should not be allowed to benefit from its illegitimate acts (Happ, Wuschka, 2016). By taking control over the territory and acknowledging the control, Russia cannot attempt to shift the responsibility for its own breaches onto the previous host state, Ukraine. Therefore, it is impermissible to engage in legal maneuvering that would enable the new host state – Russia – to evade responsibility and leave the investor without access to an opportunity to arbitrate.

Good faith. Interpreting the Ukraine-Russia BIT in good faith implies that if any temporal restrictions in the Ukraine-Russia BIT were not directly included by the parties, then such restrictions do not exist. Ukrainian investors in the occupied territories, prior to the change in effective control, a) did not anticipate a change in control, b) could not foresee the potential impact of the change in effective control, b) are not protected by any other bilateral investment treaties and thus have no other instruments of protection apart from those provided in the Ukraine–Russia BIT.

Further, there was no indication of alternative means of interpretation under Articles 31 and 32 of the VCLT. Also, there was no further agreements or practices between the states concerning these issues as per Article 31, and the aforementioned interpretation did not result in any obscure or ambiguous meaning, nor did it lead to a manifestly absurd or unreasonable outcome as per Article 32.

Hence, the arbitral tribunals in the referenced cases were right in accepting jurisdiction, as the treaty did not impose any temporal restrictions on protecting investments made on or after 1 January 1992. The guarantees provided by this treaty are not nullified by shifts in effective control over the territory. However, shifts in territorial control do introduce three temporal consequences of the Ukraine-Russia BIT for Ukrainian investors in the occupied territories: a) investments made either before or after the Ukraine-Russia BIT entered into force are protected, b) investments made either before or after the change in effective control are protected, c) the specific date from which Ukrainian investors in the occupied territories started to be covered by the Ukraine-Russia BIT.

Temporal scope of the Ukraine-Russia BIT is crucial since it highlights the significance of the dates when a) the investment was made, b) the change in effective control happened, c) the date of the alleged violation occurred. As per Article 12, the temporal scope of the Ukraine-Russia BIT encompasses all investments made on or after 1 January 1992. Other dates that might be significant under the classical temporal rule do not alter this

conclusion. Particularly, the Ukraine-Russia BIT was signed on 27 November 1998. Ukraine ratified it on 15 December 1999 (the Agreement between Ukraine and Russian Federation…, 1998), and Russia did it on 2 January 2000 (the Law of Russian Federation 'On ratification of the Agreement…, 1999). The BIT entered into force on 27 January 2000 (the Agreement between Ukraine and Russian Federation…, 1998). While these dates are not decisive in altering the overarching conclusion, they can nevertheless aid in further analysis.

The date from when investment must reach Crimean territory to enjoy Ukraine-Russia BIT protection is 1 January 1992 (the Agreement between Ukraine and Russian Federation…, 1998). The date of 27 January 2000, marking the entry into force of the Ukraine-Russia BIT, is the point from which all foreign investors in the occupied territories became eligible to invoke arbitration under the Ukraine-Russia BIT. This assertion is grounded in the principle of non-retroactivity and is supported by the findings taken by the arbitral tribunal in *Mondev v. US*: "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" (award of 11 October 2002 in *Mondev v. US*). Thus, the date of the shift in effective control is crucial in determining responsibility for infringements of investment protection and identifies the appropriate respondent – whether Ukraine or Russia. 27 February 2014 marks the date of the shift in effective control. From this point, the Ukraine-Russia BIT became applicable to Ukrainian investors in occupied territories, since they assumed the status of being foreign with relation to Russia.

This timeline supports the conclusions reached by the Swiss Federal Court in *Ukrnafta v. Russia*, which determined that the investment need not have been originally made in the territory of Russia (decision of the Swiss Federal Court of 16 October 2018 in *Ukrnafta v. Russia*), and that the investor is not required to possess the "correct nationality" at the time the investment was made (Bohmer, 2018; decision of the Swiss Federal Court of 16 October 2018 in *Ukrnafta v. Russia*). It also important to note that Russia's earlier actions hold evidential significance and should be considered as providing a "factual basis for the later breaches and provide evidence of intent" (Gallus, 2008). This perspective aligns with the approach adopted in *Cameroon v. United Kingdom*, where previous actions were taken into consideration to understand the context and implications of subsequent breaches: "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*" (Judge Fitzmaurice's separate opinion of 1963 in *Cameroon v. United Kingdom*

cited Gallus, 2008, p.22). Thus, the Ukraine-Russia BIT extends its applicability to territories which are under effective control of another state, effective from the moment such control is established. This extension is due to (1) the object and goal of the Ukraine-Russia BIT and (2) the absence of any stipulation requiring that investments to be initially made within the territory of the other state.

Since the Ukraine-Russia BIT does not impose formal temporal restrictions, it is essential to determine the specific date from which the Ukraine-Russia BIT becomes applicable in the mentioned cases. The key question is whether the applicability begins from the date when Russia officially incorporated occupied territory or from the date of the factual occupation, which happened earlier. The interpretation of the Ukraine-Russia BIT under the VCLT and the principle of good faith collectively led to a logical conclusion that the Ukraine-Russia BIT should be applied from the earlier date. This is due to: a) establishment of effective control from the date of the actual occupation; b) the rights of investors were breached from the date of the actual occupation; c) Ukraine's loss of actual control over some of its territory coincided with the loss of its ability to breach investors' rights under the Ukraine-Russia BIT. Practically, Ukraine did not have the real opportunity to exercise powers that could breach the Ukraine-Russia BIT; d) occupied territories were always within the scope of the Ukraine-Russia BIT, but the shift in effective control activated its applicability for Ukrainian investors.

The reasoning for prioritising the earlier date is significant, in particular for investments expropriated before 21 March 2014. A notable example is the assets of NJSC Naftogaz of Ukraine – one of the largest investors in Ukraine, including Crimea – which were expropriated before Russia officially acknowledged its control over the region. The later date could potentially exclude NJSC Naftogaz of Ukraine from the scope of the Ukraine-Russia BIT's application or cut down the amount of compensation, which would be determined in a separate award.

On 27 February 2019, the arbitral tribunal in *Naftogaz and others v. Russia* (partial award of 22 February 2019 in *Naftogaz and others v. Russia*) ordered that investors are protected by the Ukraine-Russia BIT from the actual commencement of effective control, despite Russia acknowledging its control at a later date than when the expropriation happened. In this case, the claimants successfully demonstrated that the earlier dates of control and investment protection are applicable. However, it worths mentioning that other arbitral tribunals adopted a different approach, determining that Ukrainian investors are

covered by the Ukraine-Russia BIT from the later date – the point at which Russia officially admitted control.

Therefore, picking a later date as the start of effective control is inconsistent with the language of the Ukraine-Russia BIT and results in unequal treatment of affected investors. The shift in effective control happened several weeks before Russia formally acknowledged it. All instances of expropriation happened after this change in effective control. The official Russian recognition of its occupation occurred among various expropriations. For instance, NJSC Naftogaz of Ukraine' assets were expropriated before this recognition, whereas Belbek's assets were expropriated after. All investments expropriated following the shift in effective control should be construed uniformly and fall under the protection of the Ukraine-Russia BIT.

The stance which was adopted by the arbitral tribunal in *Naftogaz and others v. Russia* concerning the commencement date of protection is justified for several reasons: a) investors should be safeguarded from the earliest date at which their rights under the Ukraine-Russia BIT were infringed upon; b) it is unreasonable to delay the start of protection to the date when Russia officially acknowledged effective control, provided that Russia had already exercised control over the occupied territories and expropriated investments at an earlier date; b) furthermore, linking the date when Ukrainian investors in occupied territories receive the Ukraine-Russia BIT protection to the date when Russia acknowledged effective control could lead to an erroneous conclusion. In case Russia never officially acknowledged effective control, the investors would be deprived of the Ukraine-Russia BIT protection entirely. Such a statement would not align with the VCLT's interpretation of the Ukraine-Russia BIT, especially the principle of good faith. Bearing this argumentation in mind, it is logical to conclude that investors should be protected by the Ukraine-Russia BIT from the date when effective control was established.

The Ukraine-Russia BIT does not impose restrictions on the timing of when an investment needs to have been made for it to be protected by the Ukraine-Russia BIT since the investment was made after 1 January 1992. The shift in effective control acts as a trigger for activating the Ukraine-Russia BIT protection for Ukrainian investors in the occupied territories. This is because the Ukraine-Russia BIT does not stipulate that the investment must have initially been made within the territory of the host state – Russia in our case.

Conclusions

1. Based on the analysis of various Crimean awards, it is evident that arbitral tribunals have consecutively found that Russia exercises effective control over the territory of Crimea. Furthermore, domestic courts generally tend to enforce such awards and decline requests to set them aside. The remarkable exception is the decision of the Hague Court of Appeal in *Naftogaz and others v. Russia*, where the court partially set aside the arbitral award due to unclear procedural orders. However, this decision stands as an outlier and has not significantly infringed the subsequent arbitration process.

2. It is also important to note that the reasoning and arguments presented by arbitral tribunals are quite uniform and can be categorized into two main groups. First, under Article 1(4) of the Ukraine-Russia BIT, the term "territory" is interpreted to encompass not only internationally recognised "sovereign territory" but also territories under the effective control of a contracting party. Therefore, the fact that occupied Ukrainian territories are under effective control of Russia should lead to the treatment of Ukranian investors as foreign ones, thereby bringing them under the protection of the Ukraine-Russia BIT. Second, pursuant to Article 12 of the treaty, only those investments made after 1 January 1992 are protected. Consequently, investments made during the time when Ukraine was part of the USSR do not fall under the protection of the Ukraine-Russia BIT.

3. The change in effective control over a territory has a list of implications for jurisdiction. First, the shift in effective control over occupied territories activated the guarantees under the Ukraine-Russia BIT for Ukrainian investors in the region. For investment protection objectives, a) occupied territories are deemed as a part of Russian territory, b) Russia is regarded as the host state within occupied territories, and c) Ukrainian investors are no longer domestic investors. Second, Russia implicitly agreed to arbitration under the Ukraine-Russia BIT when it established effective control over the occupied territories. Since then, investors gained the right to initiate arbitration requests and automatically have an arbitration agreement with Russia. Third, arbitral awards complied with the principle of non-recognition, as the arbitral tribunals are not involved in resolving cases over the area. Arbitral tribunals have jurisdiction to consider only specific investment cases. This implies that arbitral tribunals are empowered to consider investment cases involving claims by Ukrainian investors in the occupied territories following the shift in effective control. These findings are rooted in international law, including the provisions of bilateral investment treaties.

4. The territorial jurisdiction of arbitral tribunals within the context of the Ukraine-Russia BIT is defined by the interpretation of the term “territory”. The analysis has affirmed that territory under effective control is encompassed within this definition. The legality of how effective control was acquired is irrelevant under the Ukraine-Russia BIT. Effective control refers to setting jurisdiction over certain area. It encompasses, *inter alia*, administrative, and military control. This means the capability to enact and enforce law, replace state officials, etc., and it is not necessarily done with accordance with international law. The concept of effective control is pivotal in determining who can take and who bears responsibility for alleged breaches of rights of investors under the Ukraine-Russia BIT within the certain area. It is a subject who exercise effective control is capable to ensure investment protection, as well as breach provisions of the Ukraine-Russia BIT. It also follows that arbitral tribunals have jurisdiction over both Crimean and non-Crimean cases since the whole occupied territory is covered by abovementioned findings.

5. The temporal scope of the Ukraine-Russia BIT is crucial in determining a) the timeframe within which Ukrainian investors needed to make their investments for the Ukraine-Russia BIT coverage, and b) the commencement date from which investors are protected under the Ukraine-Russia BIT. Only those investments which were made after 1 January 1992 fall under the Ukraine-Russia BIT. This encompasses Ukrainian investments made after this date, irrespective of other factors like the date fall under the Ukraine-Russia BIT came into force or the shift in effective control. There are no stipulations within the Ukraine-Russia BIT that investments must originally be made within Russian territory to be eligible for protection. Regarding arbitration, Russia’s decision in the form of acceptance to arbitrate with Ukrainian investors becomes effective from the factual date of shift in effective control. The date when Russia officially acknowledged this control is not the determining factor. The significance of the earlier date, associated with the shift in effective control, lies in its role as the earliest point at which investments expropriated before Russia's formal acknowledgement can be safeguarded.

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Summary

The Issue of Effective Control over Foreign Territories in International Investment Arbitration

This master thesis analysis the issue of effective control over foreign territories as well as other related issues. The primary emphasis is on investment arbitration cases commenced in connection with expropriation of Ukrainian investors' assets by Russia in the occupied territories of Ukraine. The issues of territorial jurisdiction of arbitral tribunals and temporal scope of Ukraine-Russia BIT, as well as recent trends in so-called Crimean and non-Crimean cases are analysed to achieve the aim and complete the tasks of the research.

It follows from the case law analysis that arbitral tribunals in Crimean and non-Crimean cases tend to decide in favour of investors and find Russia liable for the breach of its obligation under the Ukraine-Russia BIT. The main arguments of arbitral tribunals are a) the term "territory" is interpreted to encompass not only internationally recognised "sovereign territory" but also territories under the effective control of a contracting party, and b) only those investments made after 1 January 1992 are protected under the Ukraine-Russia BIT.

The territorial jurisdiction of arbitral tribunals under the Ukraine-Russia BIT depends on the interpretation of the term "territory", encompassing areas under effective control, regardless of the legality of acquiring such control. Effective control means the exercise of jurisdiction over territory. This concept is crucial in identifying responsibility for any alleged investor rights violations under the BIT. The holder of effective control is responsible for ensuring investment protection and liable for any breaches of the Ukraine-Russia BIT. Additionally, arbitral tribunals have jurisdiction over both Crimean and non-Crimean since the whole occupied territory is covered by abovementioned findings.

The temporal scope of the Ukraine-Russia BIT is essential for determining a) the period within which Ukrainian investments must be made to be covered by the Ukraine-Russia BIT, and b) the start date for investor protection under the Ukraine-Russia BIT. Notably, investments made after 1 January 1992 are covered by the Ukraine-Russia BIT which does not require that investments be initially made within Russian territory for protection eligibility. In terms of arbitration, Russia's consent to arbitrate with Ukrainian investors is effective from the actual date of the change in effective control.

Annexes

Annex 1. List of Crimean cases.

No.	Case Name and No.	Rules	Seat	Commenced	Status of the Case	Decision on Jurisdiction
1.	Aeroport Belbek LLC and Mr. Igor Valerievich Kolomoisky v. The Russian Federation, PCA Case No. 2015-07	UNCITRAL Arbitration Rules 1976	The Hague	13 Jan 2015	Pending	Yes
2.	PJSC CB PrivatBank and Finance Company Finilon LLC v. The Russian Federation, PCA Case No. 2015-21	UNCITRAL Arbitration Rules 1976	The Hague	13 Apr 2015	Pending	Yes
3.	Limited Liability Company Lugzor and others v. The Russian Federation, PCA Case No. 2015-29	UNCITRAL Arbitration Rules 1976	The Hague	26 May 2015	Decided in favor of investor	Yes
4.	Stabil, Crimea-Petrol LLC, Elefteria LLC, Novel-Estate LLC and others v. The Russian Federation, PCA Case No. 2015-35	UNCITRAL Arbitration Rules 1976	Geneva	15 June 2015	Decided in favor of investor	Yes
5.	PJSC Ukrnafta v. The Russian Federation, PCA Case No. 2015-34	UNCITRAL Arbitration Rules 1976	Geneva	15 June 2015	Decided in favor of investor	Yes
6.	Everest Estate LLC, Edelveis-2000 PE, Fortuna CJSC and others v. The Russian Federation, PCA Case No. 2015-36	UNCITRAL Arbitration Rules 1976	The Hague	19 June 2015	Decided in favor of investor	Yes
7.	Oschadbank v. Russian Federation, PCA Case No. 2016-14	UNCITRAL Arbitration Rules 1976	Paris	18 January 2016	Decided in favor of investor	Yes
8.	NJSC Naftogaz of Ukraine, PJSC State Joint Stock Company Chornomornaftogaz, PJSC Ukrgasvydobuvannya and others v. The Russian Federation, PCA Case No. 2017-16	UNCITRAL Arbitration Rules 1976	The Hague	17 October 2016	Decided in favor of investor	Yes
9.	PJSC DTEK	UNCITRAL	The	16 February	Decided in favor	Yes

	Krymenergo v. Russian Federation, PCA Case No. 2018-41	Arbitration Rules 1976	Hague	2018	of investor	
10.	NEK Ukrenergo v. Russian Federation, PCA Case No. 2020-17	UNCITRAL Arbitration Rules 1976	Paris	27 August	Pending	No

Annex 2. List of Non-Crimean Cases.

No.	Case Name	Rules	Seat	Commenced	Status of the Case	Decision on Jurisdiction
1.	Rinat Akhmetov v. Russian Federation	Ukraine-Russia BIT	Ukraine-Russia BIT	Date of the Press Release (Claimant): 11 April 2023	Pending	No