From Aggression to Arbitration

Investment Protection in Eastern Ukraine in Light of Russia’s Annexation and the Crimea Jurisprudence

Author: Davit Khachatryan
Supervisor: Kaj Hobér
Table of Contents

Acknowledgments .................................................................................................................. iii
List of Abbreviations ........................................................................................................... iv
Introduction ........................................................................................................................... 1
Research inquiry .................................................................................................................... 3
Methodology and sources ...................................................................................................... 3
Purpose and delimitation ....................................................................................................... 4
Disposition ............................................................................................................................ 4
1. Applicable law .................................................................................................................. 5
   1.1. Sources of International Investment Law ................................................................. 5
   1.2. The Law of Occupation ............................................................................................ 7
   1.2.1. Occupation v. Annexation .................................................................................. 8
2. Russia’s obligations toward foreign investors ................................................................. 9
   2.1. Effect of IHL on investment treaties ...................................................................... 9
   2.2. Investment treaties as part of “Laws in Force” ..................................................... 10
      2.2.1. Legal consequences ....................................................................................... 11
            2.2.1.1. Respect for laws in force ..................................................................... 11
3. ISDS under Russia’s IIAs ............................................................................................... 12
   3.1. Jurisdiction ratione loci ......................................................................................... 12
      3.1.1. Moving Treaty-Frontiers Rule ....................................................................... 12
      3.1.2. “Territory” in the BIT .................................................................................. 13
            3.1.2.1. Ordinary meaning ............................................................................... 13
            3.1.2.2. Object and Purpose ............................................................................. 16
            3.1.2.3. Good faith ............................................................................................ 18
4. The Crimea jurisdiction .................................................................................................... 19
   a. Everest Estate v. Russia ......................................................................................... 20
   b. Stabil LLC and Others v. Russia .......................................................................... 20
   c. Belbek v. Russia, PrivatBank v. Russia ................................................................. 22
   d. Oschadbank v. Russia ......................................................................................... 23
   e. The Swiss Federal Tribunal ............................................................................... 24
   f. The Hague Court of Appeal ............................................................................. 24
5. Certain jurisdictional hurdles under international law .................................................. 25
   5.1. Non-recognition ................................................................................................... 25
5.2. The Monetary Gold Principle ................................................................. 27
6. Potential arbitral proceedings in eastern Ukraine ........................................ 27
6.1. Status of the affected territories ............................................................. 28
6.1.1. Attribution .......................................................................................... 29
6.2 Jurisprudence related to eastern Ukraine .................................................. 30
6.3 Interim conclusion .................................................................................... 31
Conclusion ...................................................................................................... 32
Appendix I: Key Events .................................................................................. 35
Table of cases ................................................................................................ 36
List of authorities ............................................................................................ 39
Acknowledgments

I would like to express my sincere gratitude to Swedish Defence University for providing me with an excellent academic environment and resources to pursue my studies. I am particularly grateful to Nobuo Hayashi, the Coordinator of the LLM Program in International Operational Law, for his guidance, encouragement, and support throughout my academic journey.

I would also like to extend my heartfelt thanks to my supervisor Kaj Hobér, whom I deeply admire, for his valuable insights, feedback, and willingness to supervise my thesis. His expertise and mentorship have been invaluable in shaping the outcome of this research.

I am grateful to all the teachers who have contributed to my education and development during my time at Swedish Defence University. Finally, my studies became possible due to the generous opportunity of being a Swedish Institute Scholar.
List of Abbreviations

**A**

Agreement on the Encouragement and Mutual Protection of Investments between Russia and Ukraine (Russia-Ukraine BIT) ............................................... 1

**B**

Bilateral investment treaties (BITs) ............................................................ 6

**C**

Charter of the United Nations (UN Charter) ............................................. 26

**D**

Donetsk People’s Republic DPR ................................................................. 1

**E**

Energy Charter Treaty (ECT) ................................................................. 6

European Convention on Human Rights (ECHR) .................................... 32

European Court of Human Rights (ECtHR) ........................................... 31

exclusive economic zone (EEZ) ................................................................. 15

**F**

fair and equitable treatment (FET) ............................................................. 6

First Additional Protocol (AP I) ................................................................. 9

Fourth Geneva Convention of 1949 (GC IV) ........................................ 3

full protection and security (FPS) ............................................................ 6

**H**

Hague Regulations of 1907 (HR) .............................................................. 3

**I**

ILC Articles on State Responsibility (ASR) .............................................. 30

International Armed Conflict (IAC) ......................................................... 32

International Centre for Settlement of Investment Disputes (ICSID) ............ 7

International Chamber of Commerce (ICC) .......................................... 7

International Committee of the Red Cross (ICRC) .................................. 10

International Court of Justice (ICJ) .......................................................... 7

International Criminal Court (ICC) ......................................................... 32

International Criminal Tribunal of the formal Yugoslavia (ICTY) .............. 31

International Humanitarian Law (IHL) .................................................... 3

International Investment Agreements (IIA) ............................................ 5

International Investment Law (IIL) ........................................................... 3

International Law Commission (ILC) ...................................................... 10

International Law Commission (ILC) Draft Articles on the effects of armed conflicts on treaties (Draft Articles) .......................................... 10

International Humanitarian Law (IHL) .................................................... 3

Law of occupation (LO) ........................................................................... 5

London Court of International Arbitration (LCIA) .................................... 7

Luhansk People’s Republic LPR ............................................................... 1
<table>
<thead>
<tr>
<th>Letter</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>M</td>
<td>most-favored-nation treatment (MFN)</td>
</tr>
<tr>
<td></td>
<td>Multilateral investment treaties (MITs)</td>
</tr>
<tr>
<td>N</td>
<td>North Atlantic Free Trade Agreement (NAFTA)</td>
</tr>
<tr>
<td>O</td>
<td>Office of the Prosecutor (OTP)</td>
</tr>
<tr>
<td>P</td>
<td>Permanent Court of International Justice (PCIJ)</td>
</tr>
<tr>
<td>S</td>
<td>Stockholm Chamber of Commerce</td>
</tr>
</tbody>
</table>

**UN General Assembly (GA)**...

**United Nations Commission on International Trade Law (UNCITRAL)**...

**United Nations Conference on Trade and Development (UNCTAD)**...

**Vienna Convention on Succession of States (VCST)**...

**Vienna Convention on the Law of the Treaties (VCLT)**...
Introduction

Following the annexation of Crimea by Russia in 2014, Ukrainian domestic investors found themselves in the position of foreign investors. Many of them lost their investments due to the change of effective control over Crimea. This led to a number of investment arbitration proceedings against Russia. Investors filed their claims under the 1998 Agreement on the Encouragement and Mutual Protection of Investments between Russia and Ukraine (Russia-Ukraine BIT).

The outcomes of these proceedings (Crimea cases) have significant implications for the protection of foreign investments in eastern Ukraine, particularly in Donetsk, Kherson, Zaporizhzhia, and Luhansk Oblasts. Since 2014, Russia has exercised effective control over parts of Donetsk and Luhansk Oblasts through the so-called “Donetsk People’s Republic” (DPR) and “Luhansk People’s Republic” (LPR).

While Russia had been reluctant to recognize its control over these regions, the situation changed with the full-scale invasion of Ukraine on 24 February 2022, reaching its apex on 30 September 2022, when Russia formally annexed the four Ukrainian Oblasts. Russia has acknowledged its presence in various areas of de jure Ukrainian territories through several legislative acts:

- Decrees of the President of the Russian Federation on recognition of the independence of the DPR and LPR.

---

2 Ukraine and the Netherlands v. Russia App nos. 8019/16, 43800/14, and 28525/20 (ECtHR, 30 November 2022), para 695.
• The Friendship, Cooperation, and Mutual Assistance agreements between Russia, the “Donetsk People’s Republic” (DPR), and the “Lugansk [sic] People’s Republic” (LPR).
• The approval of the use of the Russian army abroad at the Federation Council of Russia on 24 February 2022.
• Treaties on accession of DPR, LPR, Zaporozhye [sic] and Kherson regions to Russia.

The thesis aims to examine how the Hague Regulations of 1907 (HR) and the Fourth Geneva Convention of 1949 (GC IV) may influence the jurisdictional rulings of arbitral tribunals in investment disputes arising in eastern Ukraine.

---

9 Regulations Respecting the Laws and Customs of War on Land, Annex to the Convention respecting the Laws and Customs of War on Land, 18 October 1907, 205 CTS 277 (HR).
10 Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287 (GC IV).
Research inquiry

“Does the Law of Occupation provide investors in eastern Ukraine with recourse to Investment Arbitration against Russia, considering the Crimea case law?” This is the research question guiding this thesis. For a comprehensive analysis, this thesis also addresses several sub-questions following the research question:

- Is the Russia-Ukraine BIT (the BIT) still in force?
- Does Russia assume any obligations vis-à-vis the investments in the territories under its “effective control”?
- Does the non-recognition principle affect tribunals’ jurisdiction in the context of Ukrainian territories under Russia’s effective control?
- Do the differences between specific situations in Crimea and in eastern Ukraine on the other hand affect potential tribunals’ jurisdiction?
- Is there a de facto cul-de-sac for investors seeking compensation for their infringed rights under the investment treaties?

Methodology and sources

Through the thesis I follow the basic legal method, i.e., analysis and interpretation of applicable law and relevant sources. The HR and GC IV as well as International Investment Law (IIL) inform the law applicable in this context.

I analyze the BIT under the Vienna Convention on the Law of the Treaties (VCLT)\(^\text{11}\). Article 29 VCLT contains the general rule of territorial acquisition under international law. I examine the rule in the context of jurisdiction ratione loci of arbitral tribunals. The thesis also takes into consideration the relevance of the Vienna Convention on Succession of States (VCST).\(^\text{12}\) By examining the Crimea cases, this thesis discusses how foreign investors in eastern Ukraine can seek recourse through investment arbitration against Russia, and what obstacles they may face in doing so. Since most of the awards are not publicly available, I use secondary sources, such as domestic enforcement and set-aside proceedings.


Purpose and delimitation

This thesis seeks to identify how the application of International Humanitarian Law (IHL) has affected investment protection under IIL. The analysis aims to examine the possible implications of the Crimea cases on Russia’s obligations under IIL in eastern Ukraine.

From a broader perspective, this study aims to explore the intersection of IHL and IIL in the context of Russia’s aggression against Ukraine. While the interaction between these bodies of law has received considerable attention, the topic generally remains understudied. This thesis seeks to make a valuable contribution to the ongoing discourse on the topic.

Additionally, the role of research delimitation is especially crucial in the context of a complex subject like foreign investments under occupation, where precision in defining the research scope is necessary to prevent ambiguity and facilitate a thorough examination of the pertinent legal aspects. This study focuses on the Investor-State Dispute Settlement (ISDS) mechanism under Russia-Ukraine BIT. At the same time, investment treaties that Russia has concluded with other contracting parties fall beyond the scope of this research.

The subject of this thesis is a procedural legal question. The study examines the implications of the IHL on the arbitral tribunal’s jurisdiction. Therefore, issues referring to the merits of the cases, and underlying standards of treatment under IHL and IIL are also beyond the scope of the thesis.

Disposition

Chapter 1 provides an overview of the applicable law for the thesis, first delving into IIL and its sources. Furthermore, it examines the Law of occupation (LO) as a specific aspect of IHL. The chapter aims to assess the relevance and viability of these legal frameworks in addressing the challenges posed by Russia’s aggression in Ukraine.

Chapter 2 explores the impact of IHL on investment treaties, highlighting that armed conflicts do not automatically terminate or suspend their operation. The chapter also emphasizes that Russia is still bound by its obligations under the BIT.

Chapter 3 delves into the jurisdiction ratio loci under the BIT. It explores the moving treaty-frontiers rule and the meaning of “territory” in International Investment Agreements (IIA). The
chapter provides an examination of the annexed territories, focusing on the object and purpose of IIAs.

Chapter 4 extensively explores the jurisprudence surrounding Crimea, encompassing key Crimea cases and the significant findings of the Swiss Federal Tribunal and the Hague Court of Appeal in relation to these cases.

Chapter 5 emphasizes that investment tribunals’ decisions do not contradict the non-recognition rule. Hence, the relevant findings do not have any impact on Ukraine’s sovereignty over the affected territories.

Chapter 6 applies the analyses and findings from previous chapters to the situation in eastern Ukraine. It evaluates the applicability of LO and general international law in potential investment disputes before international tribunals in eastern Ukraine.

1. Applicable law

1.1. Sources of International Investment Law

IIL consists of general international law, specific standards within international economic law, and includes distinctive rules specifically focused on protecting investments. Additionally, the laws of the host state where the investments are located play an important role.13

Bilateral investment treaties (BITs) are the most important source of IIL. In 1959, the adoption of a bilateral agreement between Germany and Pakistan marked the beginning of the modern era of the BITs. There are now approximately 3,000 BITs globally.

Multilateral investment treaties (MITs) are another important source of IIL. The North Atlantic Free Trade Agreement (NAFTA)14 and the Energy Charter Treaty (ECT)15 are typical examples of such treaties. NAFTA is a regional investment and trade treaty, and the ECT is the largest sectoral treaty containing substantive rules on foreign investment.

---

BITs and MITs define terms such as “investor”, “investment” and “territory. These treaties normally offer substantive standards of protection to investments and investors. These standards include provisions on investment admission, fair and equitable treatment (FET), full protection and security (FPS), protection against arbitrary and discriminatory treatment, national treatment, most-favored-nation treatment (MFN), expropriation, and free transfer of payments.

BITs and MITs typically include two distinct dispute settlement provisions:

- arbitration between the host State and foreign investors in the event of disputes,\(^{16}\)
- arbitration between the State parties to the treaty\(^{17}\)

Investment treaties often include advance consent for international arbitration between investors and the state party. The Convention on the Settlement of Investment Disputes between States and Nationals of Other States\(^{18}\) created the International Centre for Settlement of Investment Disputes (ICSID), which is the leading institution for foreign investment arbitration.

Other institutions include the International Chamber of Commerce (ICC), the Stockholm Chamber of Commerce (SCC), the London Court of International Arbitration (LCIA), and the Permanent Court of Arbitration (PCA). These institutions use the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules\(^{19}\) or a set of their own rules.\(^{20}\)

Customary international law is another important source of IIL. Investment treaties must be interpreted in the context of the general rules of international law. According to Article 31(3)(c) VCLT, any applicable rules of international law in the relations between the parties should be considered, in addition to the treaty’s context.\(^{21}\) The International Court of Justice (ICJ) and the Permanent Court of International Justice (PCIJ) have acknowledged that unilateral declarations can be binding under certain circumstances, which is another relevant principle that tribunals can invoke vis-à-vis Russia’s declarations.\(^{22}\)

\(^{16}\) Chapter Eleven of NAFTA; Article 26 of the ECT.
\(^{17}\) Chapter Twenty of NAFTA; Article 27 of the ECT.
\(^{18}\) Convention on the Settlement of Investment Disputes between States and Nationals of Other States (adopted 18 March 1965, entered into force 14 October 1966) 575 UNTS 159.
\(^{19}\) UNCITRAL Arbitration Rules, (as revised in 2021) adopted by the GA Resolution 31/98 on 15 December 1976.
\(^{20}\) International Chamber of Commerce, ICC Arbitration Rules (as revised in 2021); Arbitration Institute of the Stockholm Chamber of Commerce, SCC Arbitration Rules (as revised in 2023).
\(^{21}\) Dolzer, Kriebaum, and Schreuer (n 13) 22.
Although arbitral tribunals frequently rely on previous awards, it is well-established that there is no doctrine of *stare decisis* in IIL. 23 Awards are final and binding upon the parties to the dispute and are not subject to any appeal procedures. Only under limited circumstances, a review of awards is possible. 24

1.2. The Law of Occupation

LO refers to the rules under IHL that outline the rights and obligations of an occupying power when it exercises control over the territory of another state.

Primary sources of LO are the 1907 HR and the 1949 GC IV. Under Article 42 HR “[t]erritory is considered occupied when it is actually placed under the authority of the hostile army.” Importantly, under Common Article 2(2) Geneva Conventions 25 IHL applies to an occupant even in the absence of hostilities or resistance. IHL continues to apply after the cessation of the initial conflict situation. LO applies where forces of one or more states exercise effective control over another State’s territory without its consent. LO applies regardless of the legality of the occupation or the underlying use of force. Thus, only the control over the alien territory is decisive for the application of LO.

Upon the occupation of a territory, Article 43 HR starts applying with the obligation to take over the functions of the *de jure* authorities. 26 The provision reads as follows:

The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore and ensure, as far as possible, public order and [civil life], while respecting, unless absolutely prevented, the laws in force in the country.

Article 43 HR, which has customary status, 27 functions as a ‘mini-constitution’ for the occupation administration, and its general guidelines inform all prescriptive measures and acts taken by the occupant. 28 The purpose of the provision is to fill the temporary void resulting from the removal

---

24 Dolzer, Kriebaum, and Schreuer (n 13) 433-46.
28 Benvenisti (n 26) 69.
of the local government and uphold its power foundation until both the occupant and the occupied state reach a consensus regarding its reinstatement.\textsuperscript{29} Meanwhile, the ousted State’s \textit{de jure} sovereignty over the occupied territories remains fully in force.\textsuperscript{30} Therefore, IHL instructs Russia to respect all types of Ukrainian laws. However, this does not mean the occupant cannot modify the existing law or introduce new laws altogether.\textsuperscript{31} One of the prerequisite criteria for the regime of occupation is the occupant’s ability to legislate.

1.2.1. Occupation v. Annexation

In a nutshell, Article 43 HR prescribes the occupying power to temporarily fill the lacunae of the legitimate sovereign and preserve to the best of its abilities the \textit{status quo ante}, until states arrange the return of the \textit{de jure} sovereign.

Under international law, “annexation” refers to a domestic legal action taken by a state that aims to assert its sovereignty over a territory it has gained control of by non-consensual and forcible means.\textsuperscript{32} I use the terms “annexed” and “annexation” as already implying unlawfulness under international law. Russia since its occupation of Crimea and the eastern regions of Ukraine promulgated several laws to such an effect.\textsuperscript{33} While annexed Ukrainian territories form part of Russia’s territory under Russian law, Ukraine is the only lawful sovereign over these territories. Russian legislation underlying the annexation has no legal effect on the annexed territories’ status under international law. Under the 1977 First Additional Protocol (AP I), the application of the 1949 Geneva Conventions in no way changes the status of the respective territory.\textsuperscript{34}

\textsuperscript{29} Ibid.
\textsuperscript{30} Yoram Dinstein, \textit{The International Law of Belligerent Occupation} (Cambridge University Press 2009) 49.
\textsuperscript{34} Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (AP I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3.
However, international law does not have separate legal regimes for occupation and annexation. Under Article 42 HR, the state of occupation depends on the occupant’s actual authority. Therefore, LO continues to apply to the annexed territories from the perspective of international law. I argue that the fact of annexation plays a significant role in establishing jurisdiction over investment cases in the context of Crimea and eastern Ukraine.

2. Russia’s obligations toward foreign investors

2.1. Effect of IHL on investment treaties

A significant body of scholarly research has addressed the impact of armed conflict on international economic relations. In its Commentary to GC IV, the International Committee of the Red Cross (ICRC) has analyzed that “[t]he idea of the continuity of the legal system applies to the whole of the law (civil law and penal law) in the occupied territory”. 35

Under Article 3 of the International Law Commission (ILC) Draft Articles on the effects of armed conflicts on treaties (Draft Articles) the existence of an armed conflict does not ipso facto terminate or suspend the operation of treaties. 36 This applies “as between the parties to the conflict and a State that is not”. Article 7 of the Draft Articles contains a list of treaties that remain in force during armed conflicts due to their nature and purpose. This list includes “Treaties of friendship commerce and navigation and analogous agreements concerning private rights” and “treaties relating to commercial arbitration”. 37 The ILC in its Commentary refers to IIAs, which indicates that these treaties continue to apply. 38

Under Article 9 of the Draft Articles termination or suspension of a treaty requires a notification to the other party or parties of the treaty. Neither Ukraine nor Russia has expressed such an intention. Moreover, Article 4 of the Draft Articles stipulates that should a treaty itself address its

---

37 UN ILC Draft Articles on the Effects of Armed Conflict on Treaties, A/65/10.
38 Schreuer (35) 2.
39 Draft Articles (n 37) Annex to Article 7, lit (e).
40 Ibid Commentary 48 to Annex to Article 7.
41 Schreuer (35) 7.
application in situations of armed conflict, those provisions shall apply. Article 6 of the BIT explicitly refers to such situations. Consequently, investment treaties continue to apply in the territory of Ukraine, including occupied and unlawfully annexed territories.

The Stabil Tribunal affirmed this understanding by stipulating that neither party terminated, suspended, or amended the BIT.42

2.2. Investment treaties as part of “Laws in Force”

This Section examines whether Ukraine’s investment treaties fall within the ambit of domestic laws in force. According to Articles 27 and 46 VCLT, domestic laws bear no relevance when it comes to states’ legal obligations. Nevertheless, one must refer to the national legal system to determine the status of law in a particular state. Article 9 of the Constitution of Ukraine grants international treaties the status of domestic law.43

The Ukrainian Parliament ratified the BIT by its Law N 1302-XIV on 15 December 1999.44 The BIT falls under the ambit of laws in force for the purposes of Article 43 HR.

Although the drafters of HR could not have foreseen the emergence of IIAs, the dynamic interpretation of treaties allows us to conclude that Article 43 HR covers these treaties as well.45 Since the provision obliges Russia to uphold the existing legal order, the object and purpose of Article 43 HR further supports the dynamic interpretation.46

While Article 43 refers to the maintenance of public order or civil life, it does not condition respect for status quo ante legal order for the sole purpose of public order or civil life maintenance. The obligation to respect the laws in force is independent of the objective of maintaining public order

---

42 Stabil LLC and Others v. Russian Federation, UNCITRAL, PCA Case no. 2015-35, Award on Jurisdiction, 26 June 2017, para 129.
and civil life.\textsuperscript{47} Thus, Russia must respect the investment protection standards under the BIT as laws in force in the occupied territories.\textsuperscript{48}

2.2.1. Legal consequences

What does Russia’s respect for the laws in force, including Ukraine’s IIAs entail? Does Russia assume Ukraine’s obligations under its IIAs? The tentative answer to the question is “no”. This section elaborates on the implications of Russia’s obligation to respect Ukraine’s IIAs.

Article 34 VCLT unambiguously stipulates that treaties normally do not create obligations or rights for a non-signatory state without its consent. Therefore, Ukraine’s IIAs with other state parties do not bind Russia. Instead, Russia must respond to its own obligations under the BIT.\textsuperscript{49} Under Article 43 HR, Russia must merely consider the standards of treatment that Ukraine has guaranteed under the IIAs to foreign investors.\textsuperscript{50} The obligation to respect the laws in force entails nothing more than a duty of due diligence.\textsuperscript{51} Corollary, Russia does not assume a ‘party-like position, but rather temporarily administers the obligations.\textsuperscript{52} Russia’s violations in this respect constitute breaches of obligations under IHL.\textsuperscript{53} Legal consequences in this case do not concern the investment regime since Russia is not a party to Ukraine’s IIAs.

2.2.1.1. Respect for laws in force

According to Mayorga, \textit{de jure} sovereign’s IIAs bind the occupant, because LO requires the latter to maintain the \textit{status quo} in occupied territories. However, consent to arbitration by the host state is an indispensable requirement for a tribunal’s jurisdiction.\textsuperscript{54}

Mayorga argues that Russia has given its consent “indirectly” or “derivatively” through the Hague Regulations. Nevertheless, such a reading of Article 43 HR is not convincing, to say the least. Mayorga’s concept is at odds with the notion of state sovereignty. Article 43 HR, which does not

\begin{flushright}
\footnotesize
\textsuperscript{47} Ibid 75; Naomi Burke, ‘A Change in Perspective: Looking at Occupation through the Lens of the Law of Treaties’ (2008) 41(1) NYUJILP 103 [contrary authority], 115-6.
\textsuperscript{48} Ackermann (46) 76; Ofilio J. Mayorga, ‘Occupants, Beware of BITs: Applicability of Investment Treaties to Occupied Territories’ (2016) 19 PYIL 136, 145.
\textsuperscript{49} Gilles Giacca, \textit{Economic, Social, and Cultural Rights in Armed Conflict} (Oxford University Press 2014) 216.
\textsuperscript{50} Ackermann (46) 77.
\textsuperscript{52} Burke (47) 117.
\textsuperscript{53} Ackermann (46) 77.
\textsuperscript{54} Dolzer, Kriebbaum, and Schreuer (n 13) 361-2.
\end{flushright}
address arbitral jurisdiction, cannot replace Russia’s consent. Russia should have explicitly consented to arbitral jurisdiction. Therefore, I argue that Mayorga’s understanding does not have a convincing legal basis.

To conclude, Russia must respect Ukraine’s IIAs as laws in force as a matter of due diligence. However, the ISDS mechanism under Ukraine’s IIAs is not binding upon Russia.

3. ISDS under Russia’s IIAs

3.1. Jurisdiction ratione loci

Article 1(1) of the BIT covers only ‘Investments’ made by ‘Investors’ of ‘one Contracting Party on the territory of the other Contracting Party…’. Article 1(4) of the BIT defines the term “territory” as follows:

the territory of the Russian Federation or the territory of Ukraine and also their respective exclusive economic zone and the continental shelf as defined in conformity with international law.

Therefore, the central question for arbitral tribunals to establish their jurisdiction is whether the annexed territories in eastern Ukraine constitute Russia’s territory for the purposes of the BIT.

3.1.1. Moving Treaty-Frontiers Rule

Article 29 VLCT and Article 15 VCST reflect the moving treaty-frontier rule under general international law. These provisions establish the general principle that governs a treaty’s territorial application unless there is an established exception. Article 29 VCLT reads as follows:

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.

The question is whether the customary moving treaty-frontiers rule covers annexed territories as well for the purposes of the applicable IIAs. Article 15 VCST, which regulates procedures of territory succession between states, consolidates this rule. However, Article 6 VCST stipulates that

---

the treaty applies only to successions occurring in conformity with international law, thus excluding annexation. This makes VCST inapplicable to the case at hand.

The VCLT does not contain a provision similar to Article 6 VCST. This arguably provides leeway for tribunals to establish that eastern Ukraine constitutes a part of Russia for the purposes of the BIT.\(^{56}\) Nonetheless, according to a *stricto sensu* reading of Article 29 VCLT, “territory” refers to states’ *de jure* territories only.\(^{57}\) One could argue that the ‘territory of each party’ in Article 29 VCLT, and ‘territory of another State’ in Article 15 VCST refer to a state’s *de jure* territory only.\(^{58}\)

On the other hand, neither the provisions nor customary international law provide an authoritative definition of the term. Article 29 VCLT and its commentary do not mention the territory over which a state exercises *de facto* authority. Since VCLT does not address treaty application over *de facto* territories, it does not exclude such an option. Therefore, IIAs could apply to territories that Russia unlawfully claims sovereignty over. As the Singapore High Court established in *Government of Laos v Sanum*, Article 29 VCLT and Article 15 VCST are not absolute.\(^{59}\)

Article 29 VCLT establishes a treaty’s application to a state’s entire territory. However, it does not expressly limit a treaty’s application to a state’s *de jure* territory only.\(^{60}\) The caveat in the Article – “unless a different intention appears…” – supports the presumption that treaties can cover unlawfully controlled territories too. Several grounds support the notion that IIAs can apply beyond a state’s *de jure* territory.

### 3.1.2. “Territory” in the BIT\(^ {61}\)

#### 3.1.2.1. Ordinary meaning

\(^{56}\) Costelloe (32) [contrary authority] 358.


\(^{58}\) Costelloe (32) 358.


\(^{60}\) Costelloe (32) 359.

Article 31 VCLT requires the interpretation of terms in treaties according to their ordinary meaning. Under international law, a state normally ‘has sovereignty’ over a territory, rather than ‘owns’ that territory. As arbitrator Max Huber opined in the Island of Palmas case:

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

At first glance, the ordinary definition of the term “territory” seems wide enough to include both de jure and de facto territories. However, Ackermann opines that ‘the notion of territory is legally charged, and the international legal context of such terminology must be considered when interpreting the treaty.

IIAs typically cover “Investments” made by “Investors” of one State Party in the territory of the other State Party. The BIT contains a similar requirement under Article 1(1). The prima facie problem is whether tribunals can view any such investments in eastern Ukraine as made in the territory of Russia for the purposes of the BIT. Tribunals in Crimea cases (Crimea tribunals) faced the same challenge.

Article 1(4) of the BIT reads as follows:

the territory of the Russian Federation or the territory of Ukraine, and also their respective exclusive economic zone and the continental shelf, as defined in conformity with international law.

This provision encompasses the continental shelf and functional economic zones, including the exclusive economic zone (EEZ). Costelloe argues that ‘where such territorial restrictions are present, support for arguing that the treaty extends protections beyond de jure territory is fairly thin’.

However, the purpose of such definitions in IIAs is to cover foreign investments in EEZs and continental shelves of the Contracting Parties. International law defines the extent of each

---

63 Island of Palmas (Netherlands v. United States of America) (1928) PCA Case No. 1925-10, 8.
64 Costelloe (32) 358.
65 Ackermann (46) 80.
66 Dolzer, Kriebaum, and Schreuer (n 13) 104-6.
67 Costelloe (32) 365.
Party’s EEZ.\(^{68}\) Such a reference *per se* does not indicate that the Contracting Parties intended to cover only *de jure* territory.\(^{69}\)

The point of gravity in this provision is its reference to international law. Does the reference entail that the BIT specifies a different intention under Article 29 VCLT? Does the reference to international law relate only to the EEZ and continental shelf, or a Contracting Party’s overall (land) territory?

In contrast to Russia’s IIAs with Norway, and Turkey, e.g., the BIT contains an extra comma after “shelf”, which supposes that the reference to international law relates to the EEZ and the continental shelf only, or both and territory, or only to the territory only.\(^{70}\)

The provision by reference to international law defines only the territorial scope of the EEZ and the continental shelf.\(^{71}\) As this thesis illustrates below, the Crimea tribunals have taken an identical position. According to the dissenting school of thought, the reference qualifies the broader expression ‘territory of the Russian Federation or territory of Ukraine.’ Hence, the “territory” of Russia would not include annexed regions of Ukraine for the purposes of the BIT.\(^{72}\) This in turn would leave the would-be tribunals without jurisdiction.

Nevertheless, both schools of thought seemingly overlook the very limited definition of the term “territory” under the BIT. One should consider the default references to “territory” in light of the treaty’s context as well as object and purpose, i.e., enhancement and protection of mutual investments. Waibel argues that IIAs are ‘designed to counterbalance the host state’s regulatory authority over investments in its territory.’\(^{73}\) Thus, IIAs relate territory to investments, which are

---


\(^{69}\) Patrick Dumberry, ‘Requiem for Crimea: Why Tribunals Should Have Declined Jurisdiction over the Claims of Ukrainian Investors against Russia under the Ukraine–Russia BIT’ (2018) 9 JIDS 506, 524.


\(^{71}\) Dumberry (69).


‘under the control of the host state’s legislative, executive, and judicial power.’\textsuperscript{74} As Douglas notes, the rationale behind this relationship is the exposure to ‘sovereign risk’\textsuperscript{.75} As a United Nations Conference on Trade and Development (UNCTAD) publication on the ‘Scope and Definition’ of investment treaties explains ‘the purpose of the definition of “territory” generally is not to describe the land territory of the parties, but to indicate that “territory” includes maritime zones over which the host country exercises jurisdiction. The significance is that investments located within the host country’s maritime jurisdiction, such as mineral exploration or extraction facilities, would be covered by the agreement.’\textsuperscript{76}

Hence, nothing in IIAs can give the notion of territory a broader legal qualification than that intended for the purposes of the respective investment regimes. In our case, the BIT does not intend to define the Contracting Parties’ territories for the purposes of public international law. The drafters could not predict that Russia would invade Ukraine and that certain investors therein would attempt to hold Russia accountable for infringement with their investments. At any rate, IIAs are not the appropriate legal tools for addressing questions of title over territories. Instead, the BIT intents to define the spatial limitation within which investors can claim protection and benefits for their investments.\textsuperscript{77}

Therefore, efforts to interpret “territory” as well as the reference to international law under the BIT in the abstract miss the wood for the trees. The question is not whether international law limits the definition of “territory” to \textit{de jure} territory only or permits to include \textit{de facto} controlled areas as well. Rather the question is whether international law permits interpreting “territory” as including unlawfully acquired territories as well, with the sole purpose of hearing investment claims of aggrieved investors against the Respondent state, which exercises exclusive authority over the respective territory.

\subsection*{3.1.2.2. Object and Purpose}

\textsuperscript{77} Kenneth J. Vandeveld, \textit{Bilateral Investment Treaties: History, Policy, and Interpretation} (Oxford University Press 2010), 2-4.
Pursuant to Article 31(1) VCLT, a treaty must also be interpreted considering its object and purpose.\textsuperscript{78} The Tribunal in \textit{Sanum Investments v Laos} stipulated that:

\begin{quote}
[t]he larger scope the Treaty has the better fulfilled the purposes of the Treaty are in this case: more investors—who would not otherwise be protected—are internationally protected, and the economic cooperation benefits a larger territory that would otherwise not receive such benefit.\textsuperscript{79}
\end{quote}

The BIT in its Preamble defines the treaty’s object and purpose as in pursuance of the Contracting Parties’ intention to create and maintain favorable conditions for mutual investments.

This thesis contends that acknowledging IIAs application beyond the \textit{de jure} territory of a state serves the treaty’s object and purpose better than in case of a limited application.\textsuperscript{80} The \textit{Stabil} Tribunal noted that:

\begin{quote}
[t]he object and purpose of the Treaty does not support a restrictive interpretation which would exclude investments that ended up being located on a Contracting State’s territory as the result of that State’s territorial expansion.\textsuperscript{81}
\end{quote}

Furthermore, Sir Brownlie argued that in certain cases a treaty’s reference to “territory” could be construed as a reference to jurisdiction. Such a reading allows us to avoid a legal vacuum and provides practical way outs without inquiring into the roots of the title:

\begin{quote}
Ultimately territory cannot be distinguished from jurisdiction for certain purposes. Both terms refer to legal powers, and, when a concentration of such powers occurs, the analogy with territorial sovereignty justifies the use of the term “territory” as a form of shorthand.\textsuperscript{82}
\end{quote}

As the ICJ established in the \textit{Namibia Case}, physical control over territory, and not sovereignty or legitimacy of title is the basis of State liability for acts affecting other states.\textsuperscript{83}

\begin{footnotes}
\item[78] Dolzer, Kriebaum, and Schreuer (n 13) 37.
\item[79] \textit{Sanum Investments Ltd. v. Lao People’s Democratic Republic}, (2013) UNCITRAL, PCA Case no. 2013-13, Award on Jurisdiction, para 240.
\item[81] Stabil (n 42) para 158.
\item[82] Ian Brownlie, \textit{Principles of Public International Law} (7th edn, Oxford University Press 2008) 112–3; Happ, Wuschka (n 80) 260-1.
\end{footnotes}
Since IIAs seek to protect investors from arbitrary State interferences with their investments, the effective control over the territory coupled with its administrative functions under LO posits the occupying power in the same *de facto* position in relation to foreign investors as the *de jure* sovereign.\(^8^4\)

In essence the scope of the authority that the occupying power exercises suffice to fulfill the obligations under IIAs.\(^8^5\) Since investors ask arbitral tribunals to rule upon their individual interests, title and sovereignty are not decisive factors for tribunals’ jurisdiction *ratione loci*.\(^8^6\)

However, for such an effect occupation needs to have elevated to a level of stability slightly beyond the level of effective control. The Crimea scenario does not apply *mutatis mutandis* to eastern Ukraine. As I argue below although Russia exercised effective control in the region since 2014, it was with the annexation act in October 2022 that Russia shouldered the obligations under the respective IIAs *vis-à-vis* foreign investors.

### 3.1.2.3. Good faith

The principle of good faith interpretation, enshrined in Article 31(1) VCLT, supports the application of the BIT in the annexed territories. Russia asserts its sovereignty over these territories by treating them as its own, as evidenced by unilateral declarations and the enactment of various legislative measures.

These declarations have not created law under the principle *ex factis oritur jus* (the law arises from the facts). However, arbitral tribunals consider these declarations in the spirit of the principle *ex injuria non oritur jus* (illegal acts do not create law). Article 15 of the Draft Articles supports this understanding. Also, Article 31(1) VCLT contains the principle of *ut magis valeat quam pereat*, which supports the BIT application to the annexed territories.\(^8^7\) This principle emphasizes interpreting laws in a way that gives them effect, rather than rendering them ineffective. As the ICJ observed in its *Kosovo Advisory Opinion*, the law cannot ‘emerge out of grave violations of international humanitarian law, but rather as a response or reaction to these latter.’\(^8^8\)

---

\(^8^4\) Ackermann (n 46) 84.

\(^8^5\) Happ, Wuschka (n 80) 263.

\(^8^6\) Costelloe (n 32) 363; Ackermann (n 46) 84.

\(^8^7\) Vriese (n 70) 340.

Principle 1 of the Guiding Principles Applicable to Unilateral Declarations of States capable of creating legal obligations stipulates that ‘declarations publicly made and manifesting the will to be bound may have the effect of creating legal obligations.’ According to Paragraph 10 of the Guiding Principles:

A unilateral declaration that has created legal obligations for the State making the declaration cannot be revoked arbitrarily.

Furthermore, the ICJ in the Nuclear Tests cases stipulated that:

[the unilateral undertaking resulting from [French] statements cannot be interpreted as having been made in implicit reliance on an arbitrary power of reconsideration].

At any rate, Russia could not deny the application of its treaties to the annexed territories. It would be estopped from doing so under the *venire contra factum proprium non valet* (it is not allowed to come against one’s own fact) principle. Finally, Russia would not challenge the application of its treaties to the newly acquired territory, as it would want to reap the benefits of this acquisition.

4. The Crimea jurisdiction

The Crimea claims are based on the BIT. Ad hoc arbitral tribunals handle cases under the UNCITRAL Arbitration Rules, with the PCA serving as the registry. The claims were filed by Ukrainian investors who made their investments in Ukraine before 2014. Ukraine participated in the proceedings as a non-disputing party. Awards remain confidential, except for the Stabil and Oschadbank cases, as well as the partially disclosed interim award in the PrivatBank case. The bulk of the information about the tribunals’ reasonings comes from reports by the Investment

---

90 Nuclear Tests (n 22) para 53.
92 Happ, Wuschka (n 80) 262
Arbitration Reporter, decisions by the Swiss Federal Tribunal,\textsuperscript{95} and the Hague Court of Appeal.\textsuperscript{96} The \textit{Oschadbank} award became available during enforcement proceedings in the United States.

\textbf{a. Everest Estate v. Russia}

On 20 March 2017, the \textit{Everest Estate} Tribunal unanimously confirmed its jurisdiction. The arbitrators determined that the BIT applied to the entire Russian territory according to Article 29 VCLT, including Crimea.\textsuperscript{97} Since neither party challenged the BIT’s application to Crimea, the Tribunal sidestepped the issue of legality Russia’s occupation.\textsuperscript{98} In its \textit{amicus curiae} submission, Ukraine asserted that while Crimea remained part of Ukraine’s territory, the fact of occupation led to the view that Crimea constituted Russian territory, for the purposes of the BIT.\textsuperscript{99}

The central issue for the Tribunal was the applicability of the BIT to Ukrainian investments made prior to the annexation. Arbitrators highlighted that under IHL occupation typically creates previously non-existent obligations for the occupying power. Therefore, the physical location of an investment at its inception was not crucial as long as it eventually fell within the territory of the Respondent. The \textit{Stabil} Tribunal arrived at a similar conclusion regarding its jurisdiction \textit{ratione temporis}.\textsuperscript{100}

Applying a teleological interpretation, the Tribunal emphasized the ‘synallagmatic character of the BIT, which persisted even after the annexation.’ Therefore, allowing the BIT’s application would be ‘more responsive to the purposes and objects of the BIT.’

\textbf{b. Stabil LLC and Others v. Russia}


\textsuperscript{99} Everest (n 98) para 163.

\textsuperscript{100} Stabil (n 42) para 132.
The Stabil Tribunal determined that Russia had taken effective control of Crimea by occupying and incorporating it in February and March 2014, respectively, and claiming sovereignty over it.\textsuperscript{101} Ukraine contested the lawfulness of Russia’s annexation of Crimea but conceded that Russia had achieved effective control over the territory.\textsuperscript{102}

Regarding the territorial application of the BIT, the tribunal examined the ordinary meaning of “territory” under Article 31(1) VCLT.\textsuperscript{103} The Tribunal pointed out that legal dictionaries in English, Russian, and Ukrainian define “territory” without mentioning a reference to sovereignty.\textsuperscript{104}

Additionally, the Tribunal noted that the BIT covered all territories, including the EEZ and continental shelves, defined ‘in accordance with international law’. However, the phrase referred to EEZ and continental shelves only and did not limit the meaning of “territory”. Arbitrators supported this conclusion by pointing out that this phrase appeared only in investment treaties that Russia had signed with states sharing maritime borders with Russia.\textsuperscript{105} They observed that Ukraine and Russia had linked the term “territory” to sovereignty where they intended so.\textsuperscript{106} Yet, the BIT at hand did not contain such limitations.\textsuperscript{107} The tribunal also considered Ukraine’s submission on the status of Crimea.\textsuperscript{108}

Citing Belbek\textsuperscript{109} and Everest Estate\textsuperscript{110} decisions, the Tribunal noted that the phrase ‘entire territory’ in Article 29 VCLT was not restricted to sovereign territory.\textsuperscript{111} Absent a different intention in the BIT, arbitrators concluded that the BIT applied to Crimea.\textsuperscript{112} The meaning of “territory” in the BIT was wide enough to include territories under Russia’s effective control.\textsuperscript{113}

The Tribunal then conducted a contextual interpretation and pointed out that other provisions in the BIT related the concept of territory to the legislative authority of the state in an area.

\textsuperscript{101} Ibid paras 188-9, 193.
\textsuperscript{102} Ibid para 133.
\textsuperscript{103} Ibid para 138.
\textsuperscript{104} Ibid para 140.
\textsuperscript{105} Ibid para 141.
\textsuperscript{107} Stabil (n 42) para 142.
\textsuperscript{108} Ibid para 145.
\textsuperscript{109} Aeroport Belbek LLC and Mr. Igor Valerievich Kolomoisky v. The Russian Federation, PCA Case No. 2015-07, Decision on Jurisdiction, 24 February 2017, para 200.
\textsuperscript{110} Everest (n 98) para 146.
\textsuperscript{111} Stabil (n 42) para 146.
\textsuperscript{112} Ibid para 148.
\textsuperscript{113} Ibid para 146.
Accordingly, Russia was the only state with the practical ability to legislate in Crimea and had exercised this authority extensively.\(^{114}\)

Arbitrators highlighted that the BIT had two main objectives: promoting economic cooperation and protecting foreign investments.\(^{115}\) Hence, a narrow interpretation of the BIT that excluded investments located in a contracting state’s \textit{de facto} territory would be contrary to the BIT’s purposes. As the Tribunal determined:

\begin{quote}
It would indeed go against the object and purpose of the Treaty to leave without protection foreign investments on a territory over which a State exercises exclusive control and claims sovereignty, particularly in circumstances where that State is not only the main beneficiary-State of these investments but also the only State in a position to protect foreign investments.\(^{116}\)
\end{quote}

Examining the issue through the lens of good faith interpretation, the Tribunal established that Russia could not ‘blow hot and cold’ as the Latin maxim of \textit{allegans contraria non audiendus est} (a person adducing to the contrary is not to be heard) dictates.\(^{117}\) Since Russia claimed sovereignty over Crimea, it could not deny the BIT protection to the investments in the region. Doing so would go against the principle of consistency.\(^{118}\)

Citing the Guiding Principles Applicable to Unilateral Declarations of States and the \textit{Nuclear Tests} case, the Tribunal held that Russia’s repeated unilateral declarations created legal obligations that could be used by third parties. Consequently, Russia’s territorial scope included Crimea for the purposes of the BIT.\(^{119}\)

\begin{flushleft}
\textbf{c. Belbek v. Russia, PrivatBank v. Russia}
\end{flushleft}

\textit{Aeroport Belbek v. Russia}\(^{120}\) and \textit{PrivatBank v. Russia}\(^{121}\) were heard by the same arbitrators, which upheld their jurisdiction on 24 February 2017. The \textit{PriavatBank} Tribunal ruled that “territory” in

\begin{footnotes}
\item \(^{114}\) Ibid para 150.
\item \(^{115}\) Ibid para 154.
\item \(^{116}\) Ibid para 158.
\item \(^{117}\) Ibid para 166.
\item \(^{118}\) Ibid paras 174-5; \textit{PrivatBank and Finance Company Finilon LLC v. The Russian Federation}, PCA Case No. 2015-21, Interim Award (Corrected), 27 March 2017, para 138; Belbek (n 109) para 265, as cited in Stabil (n 42) para 174; Ilia V. Rachkov and Elizaveta I. Rachkova, ‘Crimea-Related Investment Arbitration Cases against Russia before International Investment Arbitration Tribunals’ (2020) MJIL (4) 119, 140.
\item \(^{119}\) Stabil (n 42) para 176.
\item \(^{120}\) Belbek (n 109).
\item \(^{121}\) PrivatBank (n 118).
\end{footnotes}
the BIT was used in accordance with the meaning under Article 29 VCLT. The term included territory over which a state exercised effective control. Tribunals in Belbek and the majority in Naftogaz concurred with this understanding.

Both Tribunals sidestepped the issue of the legality of Crimea’s annexation. Arbitrators emphasized Russia’s effective control, which resulted in its responsibility toward Ukrainian investors in Crimea starting from 21 March 2014. The Claimants had argued for an earlier date due to Russia’s earlier occupation of the territory. Ukraine intervened as a non-disputing party and acknowledged that Russia exercised unlawful but effective control over Crimea.

d. Oschadbank v. Russia

The Oschadbank Tribunal clarified that it would refrain from commenting on Crimea’s status under international law and found it unnecessary to issue a corresponding ruling. Arbitrators also rejected the argument that the dispute between Russia and Ukraine over Crimea meant that the BIT no longer applied to the region.

The issue to determine was whether there had been a change in the state responsible for fulfilling the BIT obligations. Arbitrators found that “territory” in the BIT referred to jurisdiction or control exercised over a specific geographical area. The term “territory” appeared 17 times in the BIT and referred to the ability to legislate and enforce laws in the territory. To support this finding, the Tribunal highlighted the Preamble and Article 2 of the BIT, which require the promotion and protection of investments. Consequently, the term “territory” meant “a geographical area over which a Party exercises jurisdiction or control.”

---

122 Ibid paras 185-6.
123 Ibid para 197.
126 Oschadbank v. The Russian Federation, PCA Case No. 2016-14, Award, 26 Nov 2018, para 190.
128 Ibid para 201.
130 Ibid paras 209-12.
Arbitrators further established that the BIT applied to the entire territory of Russia under Article 29 VCLT. Based on Russia’s effective control and claims of sovereignty, “entire territory” included Crimea for the purposes of the BIT.

e. The Swiss Federal Tribunal

The Swiss Federal Tribunal, on 16 October 2018, rejected Russia’s bid to annul jurisdictional awards in Stabil v. Russia and Ukrafta v. Russia. Citing Article 29 VCLT, the Tribunal held that determined that the BIT had a “dynamic” territorial application. Therefore, the territory did not necessarily have to be under Russian control when the investment was made but only at the time of the alleged breach.

Recalling the object and purpose of the BIT, the Tribunal dismissed Russia’s argument that a bona fide interpretation of the BIT should deny treaty protection to investments made by Ukrainian investors in Crimea prior to the annexation.

f. The Hague Court of Appeal

On 19 July 2022, the Hague Court of Appeal issued decisions concerning Russia’s move to set aside arbitration awards in Belbek, Naftogaz, Everest, and PrivatBank cases. The judges ruled that the Tribunals in those cases did not express a view on the issue of sovereignty over Crimea, contrary to Russia’s claim.

The Court ruled that the BIT applied to the “entire territory” of the parties pursuant to Article 29 VCLT. Therefore, it encompassed the de facto territory, without it being necessary to rule on the sovereignty over that territory.

132 Ibid para 214.
133 Ibid paras 215-8.
136 Both decisions are identical with varying factual backgrounds.
137 Stabil (n 134), Ukrafta (n 135) paras 4.3.1, 4.3.2.
138 Ibid, 4.4.3, 4.4.4.
139 The Hague Court of Appeal, Case numbers: 200.266.442/01 and 200.266.444/01, Arbitration Case Number: PCA Case No. 2015-21, Judgment of 19 July 2022 concerning the Russian Federation v. JSC CB PrivatBank [2022] ECLI:NL: GHDHA:2022:1294, para 5.5.5; Aeroport Belbek (n 123) para 5.4.4; Naftogaz (n 124), para 5.4.4; Everest Estate (n 98) para 5.3.4.
140 Ibid Privatbank para 5.7.9; Aeroport Belbek (n 123) para 5.5.7; Naftogaz (n 124) para 5.5.7; Everest (n 98) para 5.4.6.
Finally, the Court concluded that for the investments to fall within the scope of the BIT application, it was sufficient that they were in the territory of the other contracting party at the time of the alleged breach.\(^{141}\)

5. Certain jurisdictional hurdles under international law
   5.1. Non-recognition

Article 31(3)(c) VCLT requires tribunals to consider ‘any relevant rules of international law applicable in the relations between the parties.’ In this case, a ‘relevant rule of international law’ includes the prohibition of the use of force under Article 2(4) of the Charter of the United Nations (UN Charter).\(^ {142}\)

The international community must adhere to the non-recognition rule in case of territorial acquisitions in violation of Article 2(4). The rule or policy of non-recognition\(^ {143}\) reflects the principle of \textit{ex injuria non oritur jus}.\(^ {144}\)

It is trite that arbitral tribunals are bound by the rules of general international law.\(^ {145}\) Arbitrators will not (intentionally) overlook any legal aspect that could be used to challenge the award.\(^ {146}\) In both ICSID and non-ICSID contested proceedings, if parties do not raise jurisdictional objections, the tribunal may interpret this as a basis for accepting jurisdiction \textit{forum prorogatum}, although they still can review their jurisdiction \textit{proprio motu}.\(^ {147}\) However, in default proceedings, a tribunal is obligated to review its jurisdiction \textit{ex officio}.\(^ {148}\)

\(^{141}\) PrivatBank (n 139) para 5.8.9; Everest (n 98) para 5.6.14; Naftogaz (n 124) para 5.8.10; Aeroport Belbek (n 123) para 5.7.13.

\(^{142}\) Charter of the United Nations [1945] 1 UNTS XVI.

\(^{143}\) Enrico Milano, ‘The Non-Recognition of Russia’s Annexation of Crimea: Three Different Legal Approaches and One Unanswered Question’ (2014) 1 QIL 35.

\(^{144}\) Hersch Lauterpacht, \textit{Recognition of States in International Law} (Cambridge University Press 1947) 420.


\(^{146}\) Article 52(1)(b) of the ICSID Convention; Article V of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

\(^{147}\) ICSID Arbitration Rule 41(2); Article 17 (1) of the UNCITRAL Rules; SCC Arbitration Rule 23 (1); ICC Rules 22 (2).

\(^{148}\) Article 30 (1) (b) of the UNCITRAL Rules; ICSID Arbitration Rule 42 (4); Sebastian Wuschka, ‘Procedural Aspects of the Obligation of Non-Recognition Before International Investment Tribunals’ in Katia Fach Gómez, Anastasios Gourgourinis, Catharine Titi (eds), \textit{European Yearbook of International Economic Law – Special Issue: International Investment Law and the Law of Armed Conflict} (Springer 2019) 149.
The ILC emphasized that non-recognition does not refer to the formal recognition of illegal situations only but also prohibits acts that would imply such recognition. The question at hand is whether considering Ukraine’s affected territories as part of Russia for the purposes of IIAs implies recognition of a *jus cogens* norm violation.

In its Advisory Opinion, the ICJ extended the rule of non-recognition to all illegal territorial situations due to their *erga omnes* character. The UN General Assembly (GA) Resolution 68/262 calls for non-recognition of any ‘alteration of the status of Crimea, explicit as well as implicit. Similarly, GA Resolution ES-11/4 calls for non-recognition of any alteration of the status of Donetsk, Kherson, Luhansk or Zaporizhzhia regions of Ukraine.

In this context, the rule is relevant as far as it prohibits Russia to benefit from its aggression against Ukraine. The notion that non-recognition also serves as a sanction additionally supports this understanding. On the other hand, if the rule leads to the denial of arbitral jurisdiction, Russia will benefit from its unlawful conduct.

Furthermore, since the IIA obligations rest on the protection of individual rights and interests, applying a BIT to occupied territories to benefit of the affected investors serves the non-recognition duty better than leaving them without an effective remedy. This tenet finds support in the “Namibia exception”, which stipulates that the non-recognition ‘should not result in depriving the people of Namibia of any advantages derived from international co-operation’.

---

150 Dumberry (n 69); Vaccaro-Incisa (n 70).
151 Namibia (n 83) 56, 200; Enrico Milano, *Unlawful Territorial Situations in International Law: Reconciling Effectiveness, Legality and Legitimacy* (Developments in International Law) (Brill 2005) 184; Milano (n 143) 45.
156 Dumberry (n 69) [contrary authority] 532-33.
157 Namibia (n 83) paras 122, 125.
Lastly, arbitral tribunals function within narrowly defined mandates, focusing solely on investment dispute resolution. Tribunals in Crimea cases acknowledged that it was neither possible nor necessary for them to rule upon the question of the legality of Russia’s actions in Crimea.158

5.2. The Monetary Gold Principle

Since tribunals’ primary focus is to resolve specific investment issues, their decisions concern the disputing parties only. Hence, the ICJ’s ‘indispensable parties’ principle, which emerged in the Monetary Gold case,159 does not impose jurisdictional hurdles for tribunals. In a nutshell, this principle would prohibit an arbitral tribunal to exercise jurisdiction over a dispute if the legal interest of a third State formed the ‘very subject-matter’ of the decision, which is the case only if the decision requires a ‘prerequisite determination’160 on the legal responsibility of the State.161

The subject matter of a tribunal’s jurisdiction decisions is different from Ukraine’s legal interest. Tribunals were merely asked to determine whether the affected territories fell within Russia’s treaty obligations. Such a ruling does not impact Ukraine’s sovereignty over the territories according to general international law.

At any rate, Ukraine’s active participation in the Crimea proceedings further emphasizes the irrelevance of the Monetary Gold principle in this context. While it is undisputed that investment tribunals do not exist in a legal vacuum, it is important not to overestimate the impact of their decisions on the status of annexed territories, and on general international law.

6. Potential arbitral proceedings in eastern Ukraine

After examining the relevant legal framework and case law in the preceding chapters, the thesis proceeds to apply these findings to the potential investment disputes in eastern Ukraine.

Recent events showcase the importance of this discussion in the context of eastern Ukraine. On 11 April 2023, SCM, a company owned by Mr. Akhmetov, one of the wealthiest individuals in

---

158 Section 4.
161 Tzeng (n 91) 125.
Ukraine, announced that Akhmetov filed an arbitration claim against Russia under the BIT. The Claimant seeks compensation for the losses and expropriation of certain investments by the DPR and LPR. Among these assets are the Azovstal Iron and Steel Works in Mariupol and the “Donbass Arena,” a football stadium owned by Mr. Akhmetov. Furthermore, reports from industry media indicate that a number of assets in this region have been affected since 2014.

In the context of eastern Ukraine, the issue of jurisdiction *ratione temporis* hinges on an important nuance. While parts of Donetsk and Luhansk Oblasts have been under Russian effective control since May 2014, the regions of Kherson and Zaporizhzhia were affected only in February 2022. Consequently, should tribunals consider the moment of formal annexation as the triggering event for the application of jurisdiction, or can they rely on the concept of effective control as a basis for jurisdiction?

While international arbitration lacks the principle *stare decisis*, the thesis contends that the findings related to the territorial application of the BIT in Crimea cases will generally apply *mutatis mutandis* to potential claims in these regions. The primary focus of this section is to determine the specific point in time when these territories should be considered part of Russia for the purposes of the BIT.

### 6.1. Status of the affected territories

From 2014 to February 2022, Russia consistently denied its official involvement in Donetsk and Luhansk. However, under Article 42 HR, a ‘territory is considered occupied when it is actually placed under the authority of the hostile army.’

It is the factual criteria that determine “authority.” It involves the exercise of effective control over the territory of another state by the forces of at least one state, without the consent of the occupied state. Occupation forces do not need to be present in all locations for effective control

---


164 Ukraine and the Netherlands (n 2).


to be established.\textsuperscript{167} In this vein, Russia’s financial, political, and military support played a crucial role in sustaining the existence of the separatist entities.\textsuperscript{168}

6.1.1. Attribution

Due to Ukraine’s loss of factual control over parts of its territory, acts committed in these areas are not attributed to Ukraine. Under IHL the responsibility for the acts on these territories generally falls upon Russia.

Russia’s denial of its involvement is legally irrelevant. The crucial factor is determining whether the actions of the DPR and LPR can be attributed to Russia under international law.\textsuperscript{169} Articles 4 to 11 of the ILC Articles on State Responsibility\textsuperscript{170} (ASR) outline the responsibility of states for their conduct under international law. Article 8 ASR specifies that ‘the conduct of a person or group of persons shall be considered an act of state under international law if the person or group of persons is, in fact, acting on the instructions of, or under the direction or control of, that state in carrying out the conduct’.

International law offers two tests to evaluate whether Russia directed or controlled the actions of individuals. The effective control test, first employed in the \textit{Nicaragua} decision of the ICJ, attributes the actions of individuals to a state if the state directs or enforces those actions.\textsuperscript{171} The overall control test, which was first used in the \textit{Tadić} decision of the International Criminal Tribunal for the formal Yugoslavia (ICTY), recognizes that the degree of control may vary based on the factual circumstances of each case, and a strict standard cannot be applied universally.\textsuperscript{172}

The ICJ subsequently rejected the overall control test, stating that it did not align with the stricter effective control test and was inconsistent with Article 8 of the ASR.\textsuperscript{173} This decision received

\begin{flushleft}
\textsuperscript{167} Ibid para 8.
\textsuperscript{168} Stefan Lorenzmeier, Reznick Maryna, ‘Investment Law and the Conflict in the Donbas Region: Legal Challenges in a Special Case’ in Tobias Ackermann and Sebastian Wuschka (eds), \textit{Investments in Conflict Zones: The Role of International Investment Law in Armed Conflicts, ‘Frozen’ Conflicts, and Disputed Territories} (Brill Nijhoff 2020) 436.
\textsuperscript{169} Ibid 443.
\textsuperscript{171} Nicaragua (n 61) paras 109, 115.
\textsuperscript{172} \textit{Prosecutor v. Duško Tadić}, ICTY-94-1 [1999], para 117.
\end{flushleft}
significant criticism. Therefore, the total dependence of the separatist entities on Russia can persuade tribunals to attribute their actions to Russia for the purposes of *ratione personae* jurisdiction.

6.2 Jurisprudence related to eastern Ukraine

In its admissibility decision in *Ukraine and the Netherlands v. Russia*, the European Court of Human Rights (ECtHR) concluded that Russia had effective control over all territories taken by the separatists since 11 May 2014. Importantly, the Court found that Russia exercised political control over DPR and LPR.

In its *Georgia v. Russia (II)* judgment in 2021, the ECtHR had held that Russia did not exercise extraterritorial jurisdiction under Article 1 of the Convention due to the ongoing hostilities. However, in *Ukraine and the Netherlands v. Russia*, the Court clarified that *Georgia v. Russia (II)* judgment did not exclude a state’s jurisdiction under Article 1 ECtHR during an International Armed Conflict (IAC). There could be instances where a state exercises personal or spatial extraterritorial jurisdiction under the Convention during an ongoing armed conflict. This consideration can convince tribunals to include the pre-annexation period in their jurisdiction *ratione temporis*.

The Hague District Court arrived at a similar conclusion in its decision on 17 November 2022. The Court determined that Russia had ‘overall control’ over the forces of the self-proclaimed DPR in 2014. Although rendered in a criminal case, this decision is instructive in the question of attribution. Additionally, the Office of the Prosecutor (OTP) of the International Criminal Court (ICC) found that Russia had ‘exercised control over armed groups in eastern Ukraine.’

---

175 Ukraine and the Netherlands (n 2) para 695.
176 Ibid para 671.
177 *Georgia v. Russia (II)* App no. 38263/08 (ECtHR, 21 January 2021), paras 126, 137.
178 Ukraine and the Netherlands (n 2) para 558.
6.3 Interim conclusion

This thesis contends that the respective findings of these Courts and OTP do not directly assist potential tribunals in establishing jurisdiction over disputes in these regions prior to the formal annexation. One of the central aspects in the context of this thesis is the object and purpose of IIAs. Unlike human rights treaties, IIAs seek to enhance and protect investments. 182 Therefore, applying a teleological interpretation, it can be argued that a state’s obligations under an IIA extend to territories where it can both benefit and protect the investments.

The integration of the eastern Ukraine Oblasts into Russia’s economic and political system is a significant factor in making this determination. 183 Consequently, the assumption of the BIT obligations by Russia in the annexed territories is applicable only either from 4 October 2022, when territories were formally annexed, or 30 September 2022, when the “accession” treaties were signed, onwards.

The territorial application of IIA differs from that of the European Convention on Human Rights (ECHR). 184 While Article 1 ECHR allows for the “extraterritorial” application of the Convention based on a state’s “effective control” over the territory, the concept of “effective control” in the context of an IIA refers to the state’s policies concerning the territory rather than its temporal military presence or administrative influence. 185 The focus is on the state’s actions regarding the territory rather than specific physical control or authority at a given time.

The threshold for establishing arbitral jurisdiction ratione loci is higher than that for the extraterritorial jurisdiction of a state under Article 1 ECHR. According to the Stabil Tribunal, the formal annexation of Crimea placed the territory under Russia’s “exclusive” control, 186 and as a result, the BIT became applicable to Russia in Crimea from 21 March 2014 onward. 187 The PrivatBank 188 and Belbek 189 Tribunals adopted identical approaches. While the Oschadbank Tribunal determined an earlier date for Russia’s responsibility under the BIT, starting from 18 March 2014, it also highlighted the impact of the formal acts of incorporation in establishing

---

182 Rees-Evans (n 72) 191.
183 Ackermann (n 46) 84.
185 Rees-Evans (n 72) 190.
186 Stabil (n 42) para 158.
187 Ibid para 175.
188 PrivatBank (n 118) para 195.
189 Peterson (n 126).
jurisdiction. Therefore, it is highly improbable that tribunals will find that Kherson and Zaporizhzhia Oblasts became part of Russia for the purposes of the BIT before 4 October or 30 September 2022.

This reasoning raises concerns about the potential lack of effective remedies for investors from March 2014 to September-October 2022. Placing excessive emphasis on Russia’s unlawful acts of annexation could present another issue. However, the discussion of alternative remedies for aggrieved investors during this period is beyond the scope of this thesis. Corollary, Russia assumed the obligations under the BIT in all four Ukrainian regions no earlier than 4 October or 30 September 2022, when the formal annexation was underway.

Conclusion

The thesis examined the impact of IHL on the legal protection afforded to investors in eastern Ukraine under Russia-Ukraine BIT. The extensive jurisprudence generated by the Crimea tribunals, along with the relevant academic discourse, underscores the importance of this research in assessing the potential viability of similar claims in eastern Ukraine. This research aimed to demonstrate the interaction between IHL and IIL, highlighting their complementary nature in complex situations like in Ukraine.

The research question guiding this thesis is whether the Law of Occupation gives investors in eastern Ukraine, based on the Crimea cases, recourse to investment arbitration against Russia. The succinct answer to the question is “no”. LO encompasses specific rules within IHL that delineate the obligations of the occupying power when it exerts effective control over the territory of another state.

Theoretically, Article 43 of the HR provides the only avenue for investors in eastern Ukraine to seek arbitration directly under IHL. This Article obliges the occupying power to respect the laws in force in the occupied territories. However, it is important to note that this requirement pertains to the conduct of the occupying power rather than the outcome. Although Russia is obliged to respect Ukraine’s IIAs as part of the laws in force, it never consented to assume Ukraine’s treaty

---

190 Oschadbank (n 127) paras 271-2.
191 On alternative remedies, Dumbery (n 69); Rees-Evans (n 72).
192 Dinstein (n 30); Natia Kalandarishvili-Mueller, *Occupation and Control in International Humanitarian Law* (Routledge 2021).
obligations. Therefore, LO per se does not provide for a recourse to arbitration, contrary to Mayorga’s tenet.

Instead, the availability of recourse to arbitration is contingent upon the outcome of interaction between IHL and IIL. In the case at hand, the culmination of this interplay lies in the fact that IHL does not suspend or terminate the IIL framework. Since IIAs remain in force despite ongoing hostilities, the subsequent process of submitting disputes to international arbitration follows the IIL mechanisms.

Turning to the remaining questions, it is important to note that unlike Crimea, which underwent a rapid annexation, Russia instigated an armed conflict through its proxies in the eastern territories of Ukraine until February 2022. It was not until September 2022 that Russia formally annexed Donetsk, Luhansk, Kherson, and Zaporizhzhia Oblasts of Ukraine. While the annexation is null and void under international law, the formal act of annexation plays a decisive role in determining arbitral jurisdiction in investment disputes against Russia.

The Crimea tribunals consistently interpreted “territory” in the BIT as covering the “entire territory” of Russia, including territories under its effective control. They emphasized that excluding investments in Crimea from protection would contradict the purpose and objectives of the BIT. The Swiss Federal Tribunal and the Hague Court of Appeal, where Russia tried to set aside and challenge certain awards, confirmed the applicability of the BIT to the entire territory of Russia, including de facto territories, without ruling on the issue of sovereignty. Arbitrators sidestepped this issue finding that both Ukraine and Russia did not contest BIT’s application over Crimea, or finding they don’t have to rule upon the sovereignty issue.

Some scholars have expressed the view that considering Crimea as part of Russia for the purposes of the BIT contradicts the principle of non-recognition. In any case, holding Russia accountable serves the non-recognition rule better than letting the occupying state benefit from its unlawful actions and leaving affected investors without remedies.

Considering the Crimea case law, the BIT’s territorial application will not present significant challenges. However, the main hurdle lies in establishing jurisdiction ratione temporis for eastern Ukraine. Unlike human rights treaties, the BIT arguably assumes stable control by Russia over

---

193 Everest (n 98), PrivatBank (n 118).
194 Oschadbank (n 127).
these territories. It is improbable that tribunals will consider these territories parts of Russia for the purposes of the BIT prior to the formal annexation. Crimea jurisprudence supports this reasoning.

However, the exploration of alternative options for affected investors falls beyond the scope of this thesis. Only time will tell how tribunals will handle these issues. Finally, Ukraine’s stance on this matter will play a significant role, as was the case in the Crimea proceedings.
Appendix I: Key Events

27 February 2014: Pro-Russia militia takes control of government buildings in Crimea.

16 March 2014: An unlawful secession referendum is held in Crime.

18 March 2014: Putin and the de facto authorities of Crimea sign an agreement to annex Crimea into Russia.

21 March 2014: Putin signs a law formalizing Russia’s annexation of Crimea.

7 April 2014: Pro-Russian protesters take over regional government buildings in Donetsk, Luhans, and Kharkiv.

11 May 2014: “Independence referendums are held in Donetsk and Luhans.

17 July 2014: Flight MH17 is shot down over eastern Ukraine.

21 February 2022: Russia recognizes the independence of the “DPR” and “LPR”. Russia signs Treaties of friendship, cooperation and mutual assistance with the separatist entities.

24 February 2022: Russia invades Ukraine in violation of international law.

27 February 2022: Ukraine files a lawsuit against Russia to the ICJ.

16 March 2022: The ICJ orders Russia to stop its aggression.

7 June 2022: Russian parliament ceases the ECHR’s jurisdiction in the country.

30 September 2022: Putin signs “accession treaties” formalizing the annexation of Donetsk, Luhans, Kharkiv, and Zaporizhzhia.

5 October 2022: Putin signs laws to formalize the annexation.
Table of cases

International Arbitrations


*NEK Ukrenergo v. The Russian Federation*, PCA Case No. 2020-17 [https://www.italaw.com/cases/7563](https://www.italaw.com/cases/7563)


*Oschadbank v. The Russian Federation*, PCA Case No. 2016-14 [https://www.italaw.com/cases/7491](https://www.italaw.com/cases/7491)


ICJ/PCIJ


ECtHR

Georgia v. Russia (II) App no. 38263/08 (ECtHR, 21 January 2021) https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-207757%22]}

Ukraine and the Netherlands v. Russia App nos. 8019/16, 43800/14, and 28525/20 (ECtHR, 30 November 2022) https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-222889%22]}

ICTY

IMT


PCA

*Island of Palmas (Netherlands v. United States of America)* (1928) PCA Case No. 1925-10 [https://pcacases.com/web/sendAttach/714](https://pcacases.com/web/sendAttach/714)

National jurisdictions


List of authorities

Legal instruments


Books

Ackermann T and Wuschka S (eds), *Investments in Conflict Zones: The Role of International Investment Law in Armed Conflicts, ‘Frozen’ Conflicts, and Disputed Territories* (Brill Nijhoff 2020)


Brownlie I, *Principles of Public International Law* (7th edn, Oxford University Press 2008)


Eyal Benvenisti, ‘Occupation, Belligerent’ MPEPIL (Oxford University Press 2009)


Hersch Lauterpacht, *Recognition of States in International Law* (Cambridge University Press 1947)


Milano E, *Unlawful Territorial Situations in International Law: Reconciling Effectiveness, Legality and Legitimacy* (Developments in International Law) (Brill 2005)


Tomuschat C and Thouvenin JM (eds), *The Fundamental Rules of the International Legal Order: Jus cogens and Obligations Erga Omnes* (Martinus Nijhoff 2005)


**Articles**

Peter Tzeng, ‘Investments on Disputed Territory: Indispensable Parties and Indispensable Issues’ (2017) 14 BJIL 122

Happ R, Wuschka S ‘Horror Vacui: or Why Investment Treaties Should Apply to Illegally Annexed Territories.’ (2016) JIA 33(3) 245


Repousis G. O, ‘Why Russian Investment Treaties Could Apply to Crimea and What Would This Mean for the Ongoing Russo-Ukrainian Territorial Conflict’ (2016) 32 AI 459


Dumberry P, ‘Requiem for Crimea: Why Tribunals Should Have Declined Jurisdiction over the Claims of Ukrainian Investors against Russia under the Ukraine–Russia BIT’ (2018) 9 JIDS 506


Mayorga J. O, ‘Occupants, Beware of BITs: Applicability of Investment Treaties to Occupied Territories’ (2016) 19 PYIL 136


Rachkov V. I, Rachkova I. E, ‘Crimea-Related Investment Arbitration Cases against Russia before International Investment Arbitration Tribunals’ (2020) MJIL (4) 119

Milano E, ‘The Non-Recognition of Russia’s Annexation of Crimea: Three Different Legal Approaches and One Unanswered Question’ (2014) 1 QIL 35

Blog posts


Media reports


