

Crimea cases against Russia to proceed



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A tribunal at the Permanent Court of Arbitration has held that it has jurisdiction to hear claims brought by Ukrainian investors in Crimea in the wake of the peninsula's annexation by Russia in 2014 – in two of eight known cases raising the question of the applicability of the Ukraine-Russia bilateral investment treaty.

It is believed to be the first time that a tribunal has found a BIT to be applicable to territory regarded as illegally occupied by the international community.

A tribunal issued the awards on 24 February, in cases brought by Aeroport Belbek and Ukrainian-Israeli billionaire Igor Kolomoisky in relation to the seizure of a airport terminal in Sebastopol by Russian forces; and by Ukraine's largest commercial bank, Privatbank, and its affiliate Finilon Finance Company in relation to the loss of their banking operations in Crimea.

The tribunal is chaired by French arbitrator **Pierre Marie-Dupuy** and includes co-arbitrators **Sir Daniel Bethlehem** and **Vaclav Mikulka**, who are British and Czech respectively.

In press releases, the PCA says simply that the interim awards address "certain issues of jurisdiction and admissibility". GAR understands that the tribunal held that Russia became responsible for Ukrainian investments in Crimea under the 1998 Ukraine-Russia BIT on 21 March 2014, the date on which President Vladimir Putin signed formal instruments bringing Crimea under Russian control, albeit they were backdated to 18 March.

Both interim awards are understood to be lengthy and include legal reasoning that is broadly similar. Because Russian troops seized control of the Belbek terminal on 27 February 2014, the first of them includes detailed analysis of precisely when the BIT started to apply to Ukrainian investments in Crimea. The banks' alleged losses in the second case did not happen until after 21 March.

In both awards, the tribunal said it had no need to make a finding as to the legality of the occupation, as Russia exercised de facto control of Crimea from 21 March. Ukraine made submissions in the case as a non-disputing party, which are understood to have reassured the tribunal that it could find the BIT applicable without such a ruling.

The awards follow a single hearing on jurisdiction and admissibility in both cases that was held in Geneva last July, after which the claimants complied with an invitation to file post-hearing submissions in October. In both cases, the claimants are represented by a team from Hughes Hubbard & Reed led by **John Townsend** in Washington, DC, and by Swedish arbitration specialist **Kaj Hober** of 3 Verulam Building in London.

Russia has refused to participate in these two cases or others that are proceeding at the PCA over the annexation of Crimea. In letters sent to the institution last year, the state said that the Ukraine-Russia BIT “cannot serve as a basis for composing an arbitral tribunal to settle [the claimants’ claims]” and that it does not recognise the jurisdiction of any of the tribunals.

Russia clarified that nothing in its correspondence should be taken as its consent to “constitution of an arbitral tribunal, participation in arbitral proceedings, or as procedural actions taken in the framework of the proceedings”. It has not submitted defences to any of the claims or appointed counsel. Arbitrators have been selected on its behalf by appointing authorities nominated by the PCA.

Two of the other cases are also expected to reach a jurisdictional ruling soon, brought against Russia by Ukrainian oil companies Ukrnafta and Stabil over the loss of petrol stations in Crimea. A hearing in those cases took place at roughly the same time as the one in the *Aeroporto Belbek* and *Privatbank/Finilon* cases, before a tribunal composed of **Gabrielle Kaufmann-Kohler**, **Daniel Price** and **Brigitte Stern**.

A third tribunal composed of **Andrés Rigo Sureda**, **Michael Reisman** and **Rolf Knieper** is hearing a case against Russia brought by a group of real estate companies led by Everest Estates. That case is less advanced: the jurisdictional hearing took place in December.

Ukrnafta, Stabil and Everest are all represented by Hughes Hubbard & Reed alone, without input from Hober. They and the other claimants mentioned so far are all understood to be linked to Kolomoisky, who is a fierce opponent of Russia’s annexation of Ukraine and raised his own militia to resist it.

There are two other cases of a similar nature being administered by the PCA, with different counsel for the claimants and no participation from Russia. A claim over real estate losses led by a company called Lugzor was initiated in 2015 and is being heard by **Donald McRae**, **Bruno Simma** and **Eduardo Zuleta**.

The Lugzor claimants, who have also been linked to Kolomoisky, are represented by a team from Fieldfisher led by partner **Simon Moore** and by **Zachary Douglas QC** and **Luis Gonzalez Garcia** from Matrix Chambers in London.

In early 2016, Ukraine’s state owned commercial bank Oschadbank also filed for UNCITRAL arbitration against Russia at the PCA, represented by a team from Quinn Emanuel Urquhart & Sullivan led by partner **Alex Gerbi** in London.

And last October, Ukraine’s state energy company Naftogaz filed a €2.6 billion arbitration claim against Russia, bringing the number of known Crimea-related cases brought under the 1998 BIT to eight.

Naftogaz is represented by a team from Covington & Burling including partner **Marney Cheek** in Washington, DC. Covington has also helped Ukraine to make non-disputing party submissions on the interpretation of the BIT in some of the above-mentioned arbitrations brought by private Ukrainian investors.

All the cases are proceeding under the UNCITRAL 1976 rules that applied at the time the BIT entered the force. This means that both sides must consent to the publication of the latest awards, which looks unlikely given Russia’s non-participation in the cases.

News of the interim awards coincides with the conclusion of a first round of hearings at the International Court of Justice in The Hague in a case brought by Ukraine against Russia.

In that case, Ukraine alleges that Russia has violated two UN conventions through its support of “illegal armed groups” in eastern Ukraine and its mistreatment of Crimea’s Tatar and ethnic Ukrainian population following the annexation. Unlike in the BIT arbitrations, Russian government representatives did appear at the hearing.

Aeroport Belbek and Igor Valerievich Kolomoisky v Russian Federation (PCA case no. 2015-07)

PJSC CB PrivatBank and Finance Company Finilon v Russian Federation (PCA Case no. AA568)

Tribunal

- **Pierre-Marie Dupuy** (France) (President)
- **Daniel Bethlehem QC** (UK) (appointed by claimants)
- **Vaclav Mikulka** (Czech Republic) (appointed by appointing authority **Bruno Simma**, in the first case, and **Michael Hwang SC** in the second)

Counsel to claimants

- **Hughes Hubbard & Reed**
Partners **John Townsend**, **James Boykin** and associate **Vitaly Morozov** in Washington DC; partner **Marc-Olivier Langlois** and associate **Leon Ioannou** in Paris
- **Kaj Hobér** of 3 Verulam Buildings in London

Counsel to Russia

- Russia is not participating in proceedings

PJSC Ukrnafta (Ukraine) v Russian Federation (PCA case no 2015-34)

Stabil LLC et al (Ukraine) v Russian Federation (PCA case no 2015-35)

Tribunal

- **Gabrielle Kaufmann-Kohler** (Switzerland) (President)
- **Daniel Price** (US) (appointed by claimants)
- **Brigitte Stern** (France) (appointed by appointing authority, Michael Hwang SC)

Counsel to claimants

- **Hughes Hubbard & Reed**
Partners **John Townsend** and **James Boykin** and associate **Vitaly Morozov** in Washington, DC; partner **Marc-Olivier Langlois** and associate **Leon Ioannou** in Paris

Counsel to Russia

- Russia is not participating in the proceedings

Everest Estate LLC et al v Russian Federation (PCA case no 2015-36)

Tribunal

- **Andrés Rigo Sureda** (Spain) (President)
- **Michael Reisman** (US) (appointed by claimants)
- **Rolf Knieper** (Germany) (appointed by appointing authority, Michael Hwang SC)

Counsel to claimants

- **Hughes Hubbard & Reed**
Partners **John Townsend** and **James Boykin** and associate **Vitaly Morozov** in Washington, DC; partner **Marc-Olivier Langlois** and associate **Leon Ioannou** in Paris

Counsel to Russia

- Russia is not participating in the proceedings

Lugzor, Libset, Ukrintervest, DniproAzot and Aberon v Russian Federation (PCA case no 2015-29)

Tribunal

- **Donald McRae** (Canada)(President)
- **Bruno Simma** (Germany) (appointed by claimants)
- **Eduardo Zuleta** (Colombia) (appointed by appointing authority)

Counsel to claimants

- Fieldfisher
Partners **Simon Moore**, **Alexandra Underwood** and **Tracey Wright**
- **Zachary Douglas QC** and **Luis Gonzalez Garcia** of Matrix Chambers in London

Oschadbank v Russian Federation

Tribunal unknown

Counsel to claimants

- Quinn Emanuel Urquhart & Sullivan
Partners **Alex Gerbi**, **Stephen Jagusch QC** and **Epaminontas Triantafilou** in London

Naftogaz v Ukraine

Counsel to Naftogaz

- Covington & Burling
Partners **Marney Cheek**, **David Pinsky**, **Jeremy Wilson** and **Erin Thomas**