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**2020-2021 YOUNG ITA WRITING COMPETITION AND AWARD:
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**ISSUES OF JURISDICTION AND ADMISSIBILITY IN THE “CRIMEAN” ARBITRAL
PROCEEDINGS**

by Martina Ercolanese

I. INTRODUCTION

Had David’s victory over Goliath not prevented the giant’s people to take over David’s land, this biblical story would not have become the same metaphor for success. Disregarding this lesson, in the proceedings against Russia for the “Crimean” investments, each ruling of the arbitral tribunals awarding millions to the Ukrainian investors was celebrated and considered a success of the arbitral community,¹ as these were modern-day Davids. The proceedings were brought under the Russia-Ukraine Bilateral Investment Treaty (BIT)² for the alleged seizure of investments made

¹ Hughes Hubbard & Reed LLP, *Firm Wins Last Two Jurisdiction Decisions in Crimea Arbitrations*, July 20, 2017, <https://www.hugheshubbard.com/news/firm-wins-last-two-jurisdiction-decisions-in-crimea-arbitrations>; Lalive, *Landmark Decision by Swiss Federal Supreme Court Regarding Crimea Awards*, Oct. 24, 2018, <https://www.lalive.law/news/landmark-decision-by-swiss-federal-supreme-court-regarding-crimea-awards/>; Krzysztof Nieczypor, *For justice and compensation. Ukraine takes Russia to the international courts*, OSW COMMENTARY 271, June 11, 2018, <http://aei.pitt.edu/94333/>; Covington & Burling LLP, *Covington Secures Victory for Naftogaz in Crimea Arbitration Against Russia*, March 1, 2019, <https://www.cov.com/en/news-and-insights/news/2019/03/covington-secures-victory-for-naftogaz-in-crimea-arbitration-against-russia/>.

² Agreement between the Government of the Russian Federation and the Cabinet of Ministers of Ukraine on the Encouragement and Mutual Protection of Investments, Nov. 27, 1998.



in the Crimean Peninsula¹ after Russia had gained control over the territory.

The elephant in the room, i.e., the issue of sovereignty, was of such magnitude that it gave rise to a heavy doctrinal debate over whether the tribunals had jurisdiction to decide the claims. The primary issue raised by the existence of these proceedings lies in the fact that any decision on the merits is premised on the consideration that Crimea is to be considered as part of the territory of Russia. Indeed, it is the purpose of this paper to demonstrate that the jurisdiction of the tribunal would have required an investigation on the territorial scope and applicability of the BIT in question. With no other solution than to consider the changes to the territory of Crimea as unlawful and void, however, the tribunals should have declined to hear the case.

Furthermore, the peculiarity of these proceedings consists in the fact that the claimants were domestic investors at the time the investments were made in a part of Ukraine's territory. Therefore, these claims appeared to question the premise of investment arbitration and investment protection, which is that investment treaties have the purpose of protecting investments made *ab initio* in the territory of another party to the treaty.²

As creatures of international law and akin to all international instruments, investment treaties are bound by the requirements of territorial continuity or, in

¹ Aeroport Belbek LLC and Mr. Igor Valerievich Kolomoisky v. Russia, Permanent Court of Arbitration, Case No. 2015-07; PJSC CB PrivatBank and Finance Company Finilon LLC v. Russia, Permanent Court of Arbitration, Case No. AA 568; PJSC Ukrnafta (Ukraine) v. Russia, Permanent Court of Arbitration, Case No. 2015-34; Stabil LLC et al., Permanent Court of Arbitration Case No. 2015-35; Everest Estate LLC et al. v. Russia, Permanent Court of Arbitration Case No. AA 577; LLC Lugzor et al. v. Russia, Permanent Court of Arbitration Case No 2015-29; Oschadbank v. Russia, Permanent Court of Arbitration Case No. 2016-14; NJSC Naftogaz of Ukraine et al. v. Russia, Permanent Court of Arbitration Case No. 2017-16; PJSC DTEK Krymenergo v. Russia, Permanent Court of Arbitration ; NEK Ukrenergo v. Russia, Permanent Court of Arbitration.

² Christoph Schreuer, *Diversity & Harmonization of Treaty Interpretation in Investment Arbitration*, in *TREATY INTERPRETATION & THE VIENNA CONVENTION ON THE LAW OF TREATIES: 30 YEARS ON* 129, 129 (Fitzmaurice et al. eds., 2010); Daniel Costelloe, *Treaty Succession in Annexed Territory* 65 *INT'L & COMPARATIVE LAW QUARTERLY* 343, 348 (2016); Carlo Brooks, *Arbitrability in Bilateral Investment Treaties: the Case that Applied International Law to Justify its Non-Application*, 23 *SW. J. INT'L L.* 303 (2017).



cases of changes to the structure of the territory, by the rules of state succession.³ The ongoing dispute between Ukraine and Russia over the territory of Crimea, which has taken place in different *fora*⁴ and that—to some extent—appeared to be decided before arbitral tribunals, once again gave rise to questions on the intersection between investment arbitration and international law.

Indeed, although it is accepted that Crimea does not legally belong to Russia and, contrary to Russia’s claims, it is not part of its *de jure* territory, it is also undisputed that Russia is exercising *de facto* control over the area in breach of the territorial integrity of Ukraine.⁵ While Russia had decided not to participate in the proceedings, Ukraine was allowed as *amicus curiae* in all proceedings and has argued in favour of the applicability of the BIT protection for its investors on grounds of the *de facto* control.⁶ It appeared that the tribunals had agreed and had “sided” with the investors, accepting jurisdiction and deciding to hear the claims.⁷

³ Matthew Craven, *The Problem of State Succession and the Identity of States under International Law*, 9 EURO. J. INT’L L. 142 (1998); Claude Emanuelli, *State Succession, Then and Now, With Special Reference to the Louisiana Purchase (1803)* 63 LA. L. REV. 1277 (2003); Marko Milanovic, *The Tricky Question of State Succession to International Responsibility*, Feb. 16, 2009, <https://www.ejiltalk.org/the-tricky-question-of-state-succession-to-international-responsibility/>.

⁴ Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), I.C.J. (Application of Jan. 16, 2017); Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. Russian Federation) Permanent Court of Arbitration, Case No. 2017-06; Ukraine .v Russia (re Crimea), Eur. Ct. H.R. (Application No. 20958/14).

⁵ Michael Bothe, *The Current Status of Crimea: Russian Territory, Occupied Territory or What* 53 MIL. L. & L. WAR REV. 99, 100 (2014); Katharina Wende, *The Application of Bilateral Investment Treaties in Annexed Territories: Whose BITs are Applicable in Crimea after its Annexation?* Hague Y.B. Int’l L. 133, 137 (2018); President of Ukraine, Extraordinary Message of the President of Ukraine to the Verkhovna Rada, Aug. 29, 2019, <https://www.president.gov.ua/en/news/pozachergove-poslannya-prezidenta-ukrayini-do-verhovnoyi-rad-56981>.

⁶ Luke Eric Peterson, *In Jurisdiction Ruling, Arbitrators Rule that Russia is Obligated Under BIT to Protect Ukrainian Investors in Crimea Following Annexation*, INV. ARB. REPORTER, Mar. 9, 2017, <https://www.iareporter.com/articles/in-jurisdiction-ruling-arbitrators-rule-that-russia-is-obliged-under-bit-to-protect-ukrainian-investors-in-crimea-following-annexation/>.

⁷ Jarrod Hepburn, *Investigation: Full Jurisdictional Reasoning Comes to Light in Crimea-Related BIT Arbitration vs. Russia*, INV. ARB. REPORTER, Nov. 9, 2017,



Russia's change of strategy⁸ to challenge the jurisdiction of the tribunals and the awards, along with the ensuing set aside proceedings and decisions of domestic courts, more specifically of the Swiss Tribunal Federal ("STF"),⁹ has provided an effective and insightful vantage point to examine the reasoning of the arbitral tribunals in those cases for the first time. Although prior to those proceedings broad speculation ensued as to the basis of the tribunals' jurisdiction and whether it was appropriate for those claims to be heard by an arbitral tribunal, these decisions upholding the validity of the awards were not met with equal fervour. This paper will address these recent developments. In an attempt to reconcile the arguments that preceded them, it takes the view that the decisions to hear the claims were based on a misconstrued interpretation of the territorial applicability of the BIT and that the tribunals should have declined to hear the case.

In Section I, this paper briefly considers the historical context in which the Crimean proceedings ought to be framed and then examines the territorial scope of the BIT. In Section II, this paper submits that the tribunals should have declined to hear the disputes as they lacked jurisdiction *ratione materiae*. Finally, Section III argues that even if the tribunals were to find jurisdiction, they should have declared the claims inadmissible.

As new disputes are pending at the jurisdictional stage and new disputes might arise in the near future,¹⁰ this paper aims to consider the issue systematically within

<https://www.iareporter.com/articles/full-jurisdictional-reasoning-comes-to-light-in-crimea-related-arbitration-everest-estate-v-russia/>.

⁸ Sebastian Perry, *Russia challenges Crimea awards and changes strategy*, GLOBAL ARB. REV., June 6, 2019, <https://globalarbitrationreview.com/article/1193767/russia-challenges-crimea-awards-and-changes-strategy>.

⁹ Tribunal fédérale [STF], Oct. 16, 2018, 4A_396/2017, http://www.swissarbitrationdecisions.com/atf-4a-396-2017-2?search=4A_396%2F2017; Tribunal fédérale [STF], Oct. 16, 2018, 4A_398/2017, http://www.swissarbitrationdecisions.com/atf-4a-398-2017?search=4A_398%2F2017; Tribunal fédérale [STF], Dec. 12, 2019, 4A_244/2019, http://www.swissarbitrationdecisions.com/atf-4a-244-2019?search=4A_244%2F2019; Tribunal fédérale [STF], Dec. 12, 2019, 4A_246/2019, http://www.swissarbitrationdecisions.com/atf-4a-246-2019?search=4A_246%2F2019.

¹⁰ Jarrod Hepburn, *Ukrainian Energy Firm Ukrenerg is Latest to File a Crimea-Related Arbitration Claim Against Russia*, INV. ARB. REPORTER, 2Aug. 29, 2019,



the international legal order by challenging the decisions that have already been reached and proposing the logical and coherent reasoning for the proceedings to come.

II. SECTION I

A. The “Territorial” Issue

Through a BIT, a state assumes the obligation to protect nationals of the other contracting party for investments made in its own territory.¹¹ The jurisdiction of a tribunal is therefore limited by the “territorial scope of consent” given by the parties.¹² Thus, whether Russia could be held responsible by an arbitral tribunal on the basis of the Russia-Ukraine BIT requires an analysis of the status of Crimea and the applicability of the BIT.

1. Factual Background

Following the revolution in Ukraine in February of 2014 and the formation of a new government which replaced a pro-Russia President, civil unrest continued in Crimea.¹³ Shortly after the election, military personnel who were believed to be

<https://www.iareporter.com/articles/ukrainian-energy-firm-ukrenergo-is-latest-to-file-a-crimea-related-arbitration-claim-against-russia/>; Damien Charlotin et al., *Russia Round-Up: An Update on 19 Treaty-Based Arbitrations Against the State*, INV. ARB. REPORTER, May 17, 2020, <https://www.iareporter.com/articles/russia-round-up-an-update-on-19-treaty-based-arbitrations-against-the-state/>; Javier Echeverri, *Three are in Place to Hear Ukrenergo's Claims in Crimea-Related Dispute*, INV. ARB. REPORTER, Aug. 6, 2020, <https://www.iareporter.com/articles/russia-round-up-an-update-on-19-treaty-based-arbitrations-against-the-state/>.

¹¹ ANDREA BJORKLUND ET AL., INV. TREATY LAW, REMEDIES IN INT’L INV. LAW EMERGING JURISPRUDENCE OF INT’L LAW 313-14(2009); ZACHARY DOUGLAS, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS 284-327 (2009); JESWALD W. SALACUSE, THE LAW OF INVESTMENT TREATIES 174 (2nd ed., 2015); Odysseas G. Repousis, *Why Russian Investment Treaties Could Apply to Crimea and What Would This Mean for the Ongoing Russo-Ukrainian Territorial Conflict*, 32 ARB. INT’L 459, 462 (2016).

¹² CHIN L. LIM ET AL., INTERNATIONAL INVESTMENT LAW AND ARBITRATION: COMMENTARY, AWARDS AND OTHER MATERIALS 131 (2018).

¹³ William Booth, *Ukraine’s Parliament Votes to Oust President; Former Prime Minister is Freed from Prison*, Feb. 22, 2014, https://www.washingtonpost.com/world/ukrainian-parliament-after-ousting-president-tries-to-consolidate-power-frees-prisoners/2014/02/23/9246255c-9ca6-11e3-9080-5d1d87a6d793_story.html.



“Russian soldiers in disguise”¹⁴ began to take control over Crimea.¹⁵ On March 17, 2014, Crimea held a referendum and declared its independence,¹⁶ which was recognized by Russia on the same day.¹⁷ The next day, an agreement between Russia and Crimea was signed for the “accession” of Crimea to Russia.¹⁸

As a preliminary remark, it is necessary to properly frame the Crimean situation. First, because of the referendum, it would *prima facie* appear to be a case of secession. However, it is worth noting that unilateral secessions are generally not recognized¹⁹ because “a state . . . is entitled to maintain its territorial integrity.”²⁰ Furthermore, as the referendum took place with foreign armed troops already on the

¹⁴ Bothe, *supra* note 7, at 102.

¹⁵ BBC, *Russian parliament approves troop deployment in Ukraine*, Mar. 1, 2014, <https://www.bbc.com/news/world-europe-26400035>.

¹⁶ State Council Republic of Crimea Res. 1745-6/14(Mar. 17, 2014); Steven Lee Myers & Ellen Barry, *Putin Reclaims Crimea for Russia and Bitterly Denounces the West*, Mar. 18, 2014, <https://www.nytimes.com/2014/03/19/world/europe/ukraine.html>.

¹⁷ President of Russia Press Release, *Executive Order on Recognising Republic of Crimea*, Mar. 17, 2014, <http://en.kremlin.ru/acts/news/20596>.

¹⁸ *Treaty between the Russian Federation and the Republic of Crimea on the Acceptance of the Republic of Crimea into the Russian Federation and on the Creation of New Federative Entities within the Russian Federation* (unofficial translation) Mar. 18, 2014, www.academia.edu/6481091/A_treaty_on_accession_of_the_Republic_of_Crimea_and_Sebastopol_to_the_Russian_Federation._Unofficial_English_translation_with_little_commentary; Address by the President of the Russian Federation, Mar. 18, 2014, <http://en.kremlin.ru/events/president/news/copy/20603>; Press Release on the Agreement on the Accession of the Republic of Crimea to the Russian Federation, Mar. 18, 2014, <http://en.kremlin.ru/events/president/news/copy/20604>; President of Russia, *Laws on Admitting Crimea and Sevastopol to the Russian Federation*, Mar. 21, 2014, <http://eng.kremlin.ru/acts/6912>.

¹⁹ James Crawford, *State Practice and International Law in Relation to Unilateral Secession*, Report to Government of Canada Concerning Unilateral Secession by Quebec (Feb. 19, 1997), https://is.muni.cz/el/1422/jaro2006/MP803Z/um/1393966/INTERNATIONAL_LAW_AND_UNILATERAL_SECESSION.pdf; Pierre Emmanuel Dupont, *Foreign Investment and the Status of Kosovo in International Law*, 10 J. World Inv. & Trade 937, 941 (2009).

²⁰ Supreme Court of Canada [SCC], Reference re Secession of Quebec [1998] 2 S.C.R. 217, ¶ 154.



ground,²¹ the prevailing view is that it is unlawful and invalid.²² Secondly, it should be considered that the whole situation unfolded in less than two days. The incident being the “quickest” and “shortest” case of secession ever²³ alone should raise a few eyebrows. Ultimately, considering the claim that Ukraine brought against Russia before the European Court of Human Rights (“ECtHR”), alleging “cases of torture or other forms of ill-treatment and of arbitrary deprivation of liberty of civilians” and “unlawful automatic imposition of Russian citizenship,”²⁴ it appears that the correct framing is one of annexation. Annexation is indeed the gaining of effective control of a territory “through non-consensual and forcible means,”²⁵ joined to the claim of sovereignty over the territory.²⁶

In response to this situation unfolding, the United Nations General Assembly (UNGA) issued Resolution 68/262 (2014) calling upon “all States, international organizations and specialized agencies not to recognize any alteration of the status of the Autonomous Republic of Crimea and the city of Sevastopol on the basis of the

²¹ Anne Peters, *Sense and Nonsense of Territorial Referendums in Ukraine, and Why the 16 March Referendum in Crimea Does Not Justify Crimea’s Alteration of Territorial Status under International Law*, Apr. 16, 2014, <https://www.ejiltalk.org/sense-and-nonsense-of-territorial-referendums-in-ukraine-and-why-the-16-march-referendum-in-crimea-does-not-justify-crimeas-alteration-of-territorial-status-under-international-law/>.

²² President of the European Council, *Statement of G-7 Leaders on Ukraine*, Mar. 12, 2014, https://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/141460.pdf; President of the European Council, *Joint Statement on Crimea by the President of the European Council, Herman Van Rompuy, and the President of the European Commission, José Manuel Barroso*, Mar. 16, 2014, https://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/141566.pdf.

²³ Patrick Dumberry, *Requiem for Crimea: Why Tribunals Should Have Declined Jurisdiction over the Claims of Ukrainian Investors against Russian [sic] under the Ukraine–Russia BIT*, 9 J. INT’L DISP. SETTLEMENT 506, 511 (2018).

²⁴ European Court of Human Rights [ECtHR], Registrar of the Court Press Release, *Grand Chamber hearing on inter-State case Ukraine v. Russia (re Crimea)* Sept. 11, 2019, [https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjR6sb3k4fsAhVVhlwKHQfsD9gQFjACegQIBhAB&url=https%3A%2F%2Fhudoc.echr.coe.int%2Fapp%2Fconversion%2Fpdf%2F%3Flibrary%3DECHR%26id%3D003-6498871-8572177%26filename%3DGrand%2520Chamber%2520hearing%2520Ukraine%2520v.%2520Russia%2520\(re%2520Crimea\).pdf&usg=AOvVawOgLmqe015TadgRy3ioeC4v](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjR6sb3k4fsAhVVhlwKHQfsD9gQFjACegQIBhAB&url=https%3A%2F%2Fhudoc.echr.coe.int%2Fapp%2Fconversion%2Fpdf%2F%3Flibrary%3DECHR%26id%3D003-6498871-8572177%26filename%3DGrand%2520Chamber%2520hearing%2520Ukraine%2520v.%2520Russia%2520(re%2520Crimea).pdf&usg=AOvVawOgLmqe015TadgRy3ioeC4v).

²⁵ Costelloe, *supra* note 4, at 353.

²⁶ *Id.* at 354.



[invalid] referendum.”²⁷

However, since 2015, a number of claims have been brought by Ukrainian investors against Russia for the expropriation of their investments in the Crimean Peninsula under the dispute resolution clause of Article 9 Russia-Ukraine BIT. Admittedly, much has remained unknown about the “Crimean” proceedings and the tribunals’ reasoning in those proceedings until Russia challenged firstly, the interim awards on jurisdiction in the 2017 cases of *Stabil* and *Ukrnafta* and secondly, the final awards in 2019 before the Swiss Tribunal Federal.²⁸ Upholding the validity of the awards in both instances, the STF reported that the arbitral Tribunals had found that “[Russia] has acquired *de facto* control over the Crimean Peninsula and regards it as part of its territory.”²⁹ On this premise, challenged in the following paragraph, the STF held that the BIT was applicable to Crimea.³⁰

2. Territorial Applicability of the Bilateral Investment Treaty

BITs are fundamental instruments for the protection of foreign investments.³¹ However, they are international treaties and, hence, are subject to the rules of treaty interpretation and application. Under Article 29 of the Vienna Convention on the Law of the Treaties (VCLT),³² treaties are “binding upon each party in respect of its entire territory,” which *a contrario* implies that they are only applicable to the territory of a state and not beyond it.

The applicability of the Russia-Ukraine BIT, for example, is limited pursuant to Article 12 “to all investments carried out by the investors of one Contracting Party on the territory of the other Contracting Party, as of January 1, 1992,” with the term

²⁷ G.A. Res. A/RES/68/262, (Apr. 1, 2014).

²⁸ *Ukrnafta I*, *supra* note 11; *Stabil I*, *supra* note 11; *Ukrnafta II*, *supra* note 11; *Stabil II*, *supra* note 11.

²⁹ *Ukrnafta I*, *supra* note 11, ¶ 4.2; *Stabil I*, *supra* note 11, ¶ 4.2.

³⁰ *Ukrnafta I*, *supra* note 11, ¶ 4.3; *Stabil I*, *supra* note 11, ¶ 4.3.

³¹ Christian J. Tams, *State Succession to Investment Treaties: Mapping the Issues*, 31 ICSID REV. 314, 305 (2016).

³² Vienna Convention on the Law of Treaties, United Nations Treaty Series, vol. 1155, 331, art. 29 (May 23, 1969).



“territory” being defined as that of “the Russian Federation or the territory of the Ukraine and also their respective exclusive economic zone and the continental shelf as defined in conformity with the international law.”³³ Whether Russia could be responsible under the BIT for the expropriation of the “Crimean investments” made by Ukrainians would have required its territory to have “expanded” to cover Crimea, therefore replacing Ukraine’s sovereignty over the territory.³⁴ The changes in responsibility for a territory and the ability to represent it, even for the purposes of a treaty, are a matter of state succession and must be analysed in consonance with the relevant rules.³⁵

(i) Obligation of Non-Recognition

As a preliminary consideration, it is important to note that the tribunals should have abstained from finding that Crimea is to be deemed as part of Russia’s territory under the principle of *ex iniuria ius non oritur*. This principle, enshrined in Article 41(2) of the Articles on Responsibility of States for International Wrongful Acts (ARSIWA),³⁶ prohibits the recognition of a situation created by a violation of *ius cogens*. This encompasses the obligation to not recognise an unlawful annexation and “not to render aid or assistance in maintaining the situation created by it.”³⁷ Crimea’s annexation should be considered as having “no legal validity,”³⁸ avoiding its validation through the recognition of ordinary legal consequences.³⁹ Being a rule of customary

³³ Russia-Ukraine BIT, *supra* note 2, at art. 1(4).

³⁴ Costelloe, *supra* note 4, at 246.

³⁵ Christoph Schreuer, *The Waning of the Sovereign State: Towards a New Paradigm for International-Law?* 4 EURO. J. INT’L L. 447, 455 (1993); ROBERT JACKSON, *SOVEREIGNTY: THE REVOLUTION OF AN IDEA* (2007); RICHARD RAWLINGS ET AL., *SOVEREIGNTY AND THE LAW: DOMESTIC, EUROPEAN AND INTERNATIONAL PERSPECTIVES* 24 (2013); Tams, *supra* note 33, at 317; Richard Happ & Sebastian Wuschka, *Horror Vacui: Or Why Investment Treaties Should Apply to Illegally Annexed Territories* 33 J. INT’L ARB. 245, 253 (2016).

³⁶ International Law Commission (ILC), *Draft Article on Responsibility of States for Internationally Wrongful Acts*, Supp. No. 10 (A/56/10), ch. IV.E.1 (Nov. 2001).

³⁷ *Id.* at art. 41; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J., 136, 159 (Advisory Opinion of July 9).

³⁸ Comm’n. of Human Rights Res. 2005/8, *Human Rights in the Occupied Syrian Golan*, at 5 (Apr. 14, 2005); S.C. Res. 662, at 2 (Aug. 9, 2004); Bothe, *supra* note 7, at 101.

³⁹ Legal Consequences for States of the Continued Presence of South Africa in Namibia (South



international law, this obligation in investment arbitration should have been binding for the tribunals as their authority is limited by the principles of international law.⁴⁰

In the cases of *Stabil* and *Ukrnafta*, the STF reasoned that, in order to accept jurisdiction over the disputes, the Tribunals “[were] not required to address the question of permissibility of the accession of Crimea into the Russian Federation or the lawfulness of the associated territorial claims.”⁴¹ However, it is submitted that it is not possible to separate the subject matter of the claims from the unlawful annexation, sidestepping the latter. In *Sanum*, one of the few investment proceedings which addressed the issue of state succession in investment treaties, the Singapore High Court held that it would not be able to consider the claims without first considering the territorial applicability of the BIT and the issue of state succession.⁴² Similarly, in the case of *East Timor*, the International Court of Justice (ICJ) found that to consider the subject of the claim concerning a territory, it first had to predetermine the lawfulness of its acquisition.⁴³

Thus, pursuant to the principles of *competence-competence* and *iura novit curia*,⁴⁴ the tribunals should have considered the fact that providing protection to the investors under the terms of the treaty would have meant recognising the legal consequences of the annexation. In abiding by their duty to respect international law, the tribunals should have declined to find that the BIT was applicable to the case, and they should have therefore dismissed the claims on this ground.

West Africa) Notwithstanding Security Council Resolution 276, 1971 I.C.J. 149 (Advisory Opinion of June 21, Sep. Op. of Onyeama, J.); Stefan Talmon, *The Duty Not to “Recognize as Lawful” a Situation Created by the Illegal Use of Force or Other Serious Breaches of a Jus Cogens Obligation: An Obligation without Real Substance?*, in *THE FUNDAMENTAL RULES OF THE INTERNATIONAL LEGAL ORDER: JUS COGENS AND OBLIGATIONS ERGA OMNES* 125 (2005).

⁴⁰ Christoph Schreuer, *Jurisdiction and Applicable Law in Investment Treaty Arbitration*, 1 MCGILL J. DISP. RES. 1 (2014); Dumberry, *supra* note 25, at 527.

⁴¹ *Ukrnafta I*, *supra* note 11, ¶ 4.2; *Stabil I*, *supra* note 11, ¶ 4.2.

⁴² *Government of the Lao People’s Democratic Republic v. Sanum Investments Ltd* [2015] SGHC 111, ¶ 38.

⁴³ *East Timor (Portugal v. Australia)*, 1995 I.C.J. 90 (Judgment of 30 June 1995).

⁴⁴ *Repousis*, *supra* note 13, at 480.



(ii) State Succession

The STF further reasoned that the term “territory” under Article 1(4) Russia-Ukraine BIT should “not be interpreted ‘restrictively’ with respect to the territorial scope to the agreement, such that it would be understood to mean only territories over which a given Contracting State lawfully has sovereignty under the principles of international law.”⁴⁵ Relying on Article 29 VCLT, the STF held that treaty borders are “flexible” and would apply to the “entire territory” of a contracting state, even in cases of changes to it.⁴⁶ This consideration on the “flexibility” of borders, which refers to the so-called Moving Treaty Frontiers (MTF) rule set forth in Article 29 of the VCLT and Article 15 of the Vienna Convention on Succession of States in respect of Treaties (VCST),⁴⁷ implies acknowledgment that state succession had taken place with regard to the territory of Crimea.

However, the STF failed to consider that the rules on state succession only refer to the lawful changes to the territory. In the VCST, Article 6 specifically points towards an interpretation of Article 15 to only cover *de jure* territory.⁴⁸ Although Russia did not ratify the VCST Convention, it is recognised that such a principle is part of customary international law.⁴⁹ The VCLT contains no limitation similar to Article 6 VCST, however, the commentary to Article 29 appears to suggest that it is limited to *de jure* territory.⁵⁰ The definition of “territory” in Article 1 of the BIT, which ought to be determined “in conformity with international law,”⁵¹ reiterates this

⁴⁵ *Ukrnafta I*, *supra* note 11, ¶ 4.3.2; *Stabil I*, *supra* note 11, ¶ 4.3.2.

⁴⁶ *Id.*

⁴⁷ Vienna Convention on Succession of States in Respect of Treaties, United Nations Treaty Series, vol. 1946, 3 (Aug. 23, 1978).

⁴⁸ Costelloe, *supra* note 4, at 347.

⁴⁹ *Sanum Investments Ltd. v. Laos*, UNCITRAL, Permanent Court of Arbitration, Award on Jurisdiction, ¶¶ 220–21 (Dec. 13, 2013); *Sanum*, *supra* note 44, ¶ 47; *Sanum Investments Ltd. v. Government of Lao People's Democratic Republic* [2016] SGCA 57, ¶ 75; Gerhard Hafner & Gregor Novak, *State Succession in Respect of Treaties*, in *THE OXFORD GUIDE TO TREATIES* 411 (Duncan Hollis ed., 2012).

⁵⁰ Costelloe, *supra* note 4, at 350; Kerstin Odendahl, *Commentary to Article 29 in THE VIENNA CONVENTION ON THE LAW OF TREATIES* 498–500 (Oliver Dorr & Kristen Schmalenbach eds., 2012).

⁵¹ Russia-Ukraine BIT, *supra* note 2, at art. 1(4).



concept as the qualifying definitions thereunder are limited to the lawful exercise of a state right over an area.⁵²

Applying the MTF in the first round of the before-mentioned *Sanum* saga, the arbitral Tribunal had found that the Laos-China BIT is applicable to the territory of Macau, which had been returned by Portugal to China in 1999, although the BIT had been signed in 1993.⁵³ This was subsequently upheld by the Court of Appeal of Singapore.⁵⁴ However, the inherent difference between this case, as Macau was lawfully transferred, and the unlawful annexation of Crimea, should be noted. As the latter should have not been given any legal consequence, it is submitted that it could not be subjected to the same treatment.

Ultimately, it has been argued that Ukraine's intervention has influenced the decision of the tribunals.⁵⁵ In the *Everest* case, the Tribunal held that there had been an agreement between the parties for the continuation of the BIT because, as *amicus curiae*, Ukraine submitted that the *de facto* control was sufficient to establish jurisdiction.⁵⁶ On similar considerations, the arbitral Tribunal in *World Wide Minerals*⁵⁷ accepted a claim from a Canadian investor against Kazakhstan, which was part of the USSR prior to its dissolution, on the basis of the Canada-USSR BIT.⁵⁸ This decision was indeed founded on the behaviour of Kazakhstan, which had acted as a successor of the USSR, therefore implying a tacit agreement for the "extension" of

⁵² Costelloe, *supra* note 4, at 365.

⁵³ *Sanum* (Award on Jurisdiction), *supra* note 51, ¶ 290.

⁵⁴ *Sanum* (SGCA), *supra* note 51, ¶ 75.

⁵⁵ Dumberry, *supra* note 25, at 508.

⁵⁶ Lisa Bohmer, *Law of The Sea Tribunal Accepts Jurisdiction Over a Limited Number of Ukrainian Claims Against Russia but Declines to Examine the Parties' Sovereignty Dispute over Crimea*, INV. ARB. REPORTER, Mar. 30, 2020, <https://www.iareporter.com/articles/law-of-the-sea-tribunal-accepts-jurisdiction-over-a-limited-number-of-ukrainian-claims-against-russia-but-declines-to-examine-the-parties-sovereignty-dispute-over-crimea/>.

⁵⁷ *World Wide Minerals v. Kazakhstan*, UNCITRAL (case reference unknown).

⁵⁸ Luke Eric Peterson, *In a Dramatic Holding, UNCITRAL Tribunal Finds that Kazakhstan is Bound by Terms of Former USSR BIT with Canada*, INV. ARB. REPORTER, JAN. 28, 2016, <https://www.iareporter.com/articles/in-a-dramatic-holding-uncitral-tribunal-finds-that-kazakhstan-is-bound-by-terms-of-former-ussr-bit-with-canada/>.



the BIT.⁵⁹ First, however, in the more recent cases *Gold Pool v. Kazakhstan* and *Oleg Deripaska v. Montenegro*, the Tribunals there conversely found that the Russia-Canada BIT and the Russia-Yugoslavia BIT could not be applicable to Kazakhstan and Montenegro, respectively, because there is no rule of automatic succession to BITs.⁶⁰ In any case, pursuant to the “critical date” doctrine, it is submitted that Ukraine’s submissions in the proceedings should have not been given weight. After a dispute has crystallised,⁶¹ which it is submitted should be the date the arbitral proceedings begin,⁶² the factual behaviour of the those involved, especially that of a state not party to the proceedings, and their conduct cannot influence the decisions of the tribunal.

As state succession could not take place with regard to the territory of Crimea on the basis of the unlawful change of control, the tribunals should have found the BIT inapplicable and declined to have jurisdiction.

(iii) Extraterritorial Application

In the alternative, drawing from an analogy from human rights treaties, as argued by Costelloe and Wende,⁶³ the tribunals could have found the BIT to apply extraterritorially. Whether or not the change of control is lawful, human rights protection “devolves with the territory” as their application is based on the concept of jurisdiction.⁶⁴

⁵⁹ *Id.*

⁶⁰ Vladislav Djanic, *Kazakhstan Fends Off Claims by Canadian Gold Miner, as Tribunal Finds it is Not a Successor to USSR BIT*, INV. ARB. REPORTER, Aug. 4, 2020, <https://www.iareporter.com/articles/kazakhstan-fends-off-claims-by-canadian-gold-miner-as-tribunal-finds-it-is-not-a-successor-to-ussr-bit/>; Vladislav Djanic, *Revealed: Reasons Surface for Tribunal’s Decision that Montenegro was not Bound by the Russia-Yugoslavia BIT*, INV. ARB. REPORTER, July 3, 2020, <https://www.iareporter.com/articles/revealed-reasons-surface-for-tribunals-decision-that-montenegro-was-not-bound-by-the-russia-yugoslavia-bit/>.

⁶¹ John Shijian Mo, *The Dilemma of Applying Bilateral Investment Treaties of China to Hong Kong and Macao: Challenge Raised by Sanum Investments to China*, 33 ICSID REV. 125, 130 (2018).

⁶² *Sanum* (Award on Jurisdiction), *supra* note 51, ¶ 67.

⁶³ Costelloe, *supra* note 4, at 346, 359; Wende, *supra* note 7, at 139.

⁶⁴ Tams, *supra* note 33, at 327; Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, ETS 5 (Nov. 4, 1950); Human Rights Committee, General Comment No 31: The Nature of the General



The jurisprudence of the ECtHR has confirmed that *de facto* control can amount to the exercise of jurisdiction within the scope of the European Convention of Human Rights.⁶⁵ As Russia is a Member State of the Council of Europe, the “Ukrainian investors” could have, therefore, claimed interference with the “the peaceful enjoyment of . . . possessions” under Article 1 of Protocol 1 to the Convention, which has been clarified to also encompass ownership of shares.⁶⁶

However, the argument in favour of extraterritorial application fails to consider the striking difference between human rights protection and the BITs in question. The former is based on the idea that once protection of rights is given to individuals, that cannot simply be taken back.⁶⁷ The latter, however, never accorded protection to the Ukrainian investors in a part of Ukraine’s territory.

Lastly, the fact that the BIT limits its applicability to the “territory of the Contracting States” must be read as excluding its extraterritorial application. Most Model BITs contain clauses expressly mentioning “jurisdiction” as the basis for their application.⁶⁸ Had that been the intention of the parties here, they could have simply made it explicit. The definition of “territory” contained in Article 1 of the BIT itself excluded this hypothesis.

Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13 (Mar. 29, 2004); Inter-American Court of Human Rights, Advisory Opinion OC-23/17 (Nov. 15, 2017); MARKO MILANOVIC, *THE EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES: LAW, PRINCIPLES AND POLICY* (2011).

⁶⁵ *Loizidou v. Turkey*, App. No. 15318/89, Eur. Ct. H.R. 10, ¶¶ 52, 62-64 (Mar. 23, 1995); *Cyprus v. Turkey*, App. No. 25781/94, Eur. Ct. H.R. 331, ¶ 77 (May 10, 2001); *Banković v. Belgium*, Admissibility, App. No. 52207/99, Eur. Ct. H.R. ¶¶ 61, 67 (Dec. 12, 2001); *Ilaşcu and Others v. Moldova and Russia*, App. No. 48787/99, Eur. Ct. H.R., ¶¶ 312-13 (July 8, 2004); *Issa and ors v. Turkey*, Merits, App. No. 31821/96, Eur. Ct. H.R., ¶ 69 (Nov. 16, 2004); *Al-Skeini and Others v. United Kingdom*, App. No. 55721/07, Eur. Ct. H.R., ¶ 138 (July 7, 2011); *Sargysian v. Azerbaijan*, App. No. 40167/06, Eur. Ct. H.R., ¶¶ 117-19 (Dec. 14, 2011); *Chiragov and Others v. Armenia*, App. No. 13216/05, Eur. Ct. H.R., ¶ 119 (June 16, 2015).

⁶⁶ *Sovtransavto Holding v. Ukraine*, App. No. 48553/99, Eur. Ct. H.R., ¶¶ 91-92 (July 25, 2002); *Marini v. Albania*, App. No. 3738/02, Eur. Ct. H.R., ¶ 64 (Dec. 18, 2007); Maria Fanou & Vassilis P Tzevelekos, *The Shared Territory of the ECHR and International Investment Law* in *RESEARCH HANDBOOK ON HUMAN RIGHTS AND INVESTMENT* (Yannick Radi ed., 2018).

⁶⁷ Tams, *supra* note 33, at 336.

⁶⁸ South Africa 1998 Model BIT; Germany 2008 Model Treaty; United States 2012 Model BIT; The Netherlands 2019 Model BIT.



In conclusion, it is submitted that the tribunals should have found that the Russia-Ukraine BIT was not applicable to the claims and, having no basis of jurisdiction, they should have declined to hear the cases. Any argument, in practice, would have implied recognising the legal consequences of the annexation in breach of the duty to not recognise violations of *ius cogens*.

III. SECTION II

A. *Jurisdiction: A Matter of Authority*

Alternatively, in case the tribunals were to find the BIT applicable to the territory of Crimea, they should have nonetheless declined to hear the case for lack of jurisdiction. In order for tribunals to assume jurisdiction, which is their authority to hear a case,⁶⁹ it must be established that the claimant is a covered investor within the scope of the BIT (*ratione personae*), that the subject matter of the dispute is a covered investment (*ratione materie*) and that the treaty was in force when the dispute arose (*ratione temporis*).⁷⁰

As a preliminary remark, it should be noted that it is not the purpose of this paper to directly challenge the jurisdiction *ratione personae*. It is accepted that, at least theoretically, the claimants in the proceedings could be “legally capable, under the legislation of [their] respective Contracting Party, to carry out investments on the territory of the other Contracting Party.”⁷¹ It is also not challenged that the treaty would have been considered to be in force at the time of the breach, had the treaty been applicable to Crimea.

Conversely, it is argued that the tribunals did not have jurisdiction *ratione materiae* for two reasons. First, because the subject matter of the dispute was not merely over investments but required a predetermination over the *status* of Crimea. Second, because the Russia-Ukraine BIT would have required the investments to be

⁶⁹ Alex Mills, *Arbitral Jurisdiction* in OXFORD HANDBOOK OF INTERNATIONAL ARBITRATION 1 (Thomas Schultz and Federico Ortino eds., 2020).

⁷⁰ Filippo Fontanelli, *Reflections on the Indispensable Party Principle in the Wake of the Judgment on Preliminary Objections in the Norstar Case*, 1 Rivista di Diritto Internazionale 121 (2017).

⁷¹ Russia-Ukraine BIT, *supra* note 2, at art. 1(2).



made *ab initio* in the territory of Russia.

1. Indispensable Issues

The protection of the Russia-Ukraine BIT is limited, in Article 1, to investments “which are put in by the investor of one Contracting Party on the territory of the other Contracting Party”.⁷² Deciding on whether the investments made by Ukrainian investors in Crimea could fit this definition would have required, as mentioned above, the recognition that Russia was responsible for the territory of Crimea. A predetermination on sovereignty over Crimea was therefore an “indispensable” and “necessary prerequisite”⁷³ to determine whether the investments were entitled to protection under the BIT. It should be noted that the jurisdiction of the arbitral tribunals invested with the “Crimean” proceedings is strictly limited, under the terms of the treaty, to “investment disputes.”⁷⁴ The required ruling on sovereignty would have therefore been outside the scope of the tribunals’ jurisdiction.

Pursuant to the doctrine of *indispensable issues*, any court or tribunal required to make a predetermination of the lawfulness of matters outside their direct jurisdiction, which are not simply a mere factual or an ancillary consideration, is bound to decline to have jurisdiction.⁷⁵ In *Chagos Marine*, the majority declined jurisdiction over Mauritius’ claim against the United Kingdom because a decision on the dispute would have required an implicit decision on sovereignty over a contended territory.⁷⁶ As clarified in *The South China Sea Arbitration*, arbitral tribunals should decline to have jurisdiction if the subject matter of the dispute would require a decision, implicitly or explicitly, on sovereignty.⁷⁷ This was also confirmed by the

⁷² *Id.* at art. 1(4).

⁷³ Peter Tzeng, *Investments on Disputed Territory: Indispensable Parties and Indispensable Issues*, 14 REVISTA DE DIREITO INTERNACIONAL 121, 131 (2017).

⁷⁴ Russia-Ukraine BIT, *supra* note 2, at art 9.

⁷⁵ Aegean Sea Continental Shelf (Greece v. Turkey), 1978 I.C.J. 3, ¶¶ 83–86 (Dec. 19); Application of the Interim Accord of 13 September 1995 (Macedonia v. Greece), 2011 I.C.J. GL No. 142, 2011 I.C.J. 644, ¶ 37 (Dec. 5); Tzeng, *supra* note 75, at 131.

⁷⁶ Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom), Permanent Court of Arbitration, Award (Mar. 18, 2015).

⁷⁷ The Republic of Philippines v. The People's Republic of China, Permanent Court of



Tribunal in the proceedings brought by Ukraine against Russia pursuant to the United Nations Convention on the Law of the Sea (UNCLOS), which also concerned the dispute over Crimea. The Tribunal ruled that the matter of sovereignty was not a merely ancillary determination and it declined to hear claims “to the extent that a ruling of the Arbitral Tribunal on the merits of Ukraine’s claims necessarily require it to decide, expressly or implicitly, on the sovereignty of either Party over Crimea.”⁷⁸ It is worth mentioning that Ukraine in the UNCLOS case did not challenge that its claims are premised on a determination of the issue of sovereignty.⁷⁹

It is further submitted that Ukraine’s submissions as non-disputing party cannot be considered as “dispensing” the tribunals from the issue of sovereignty. Arbitral tribunals, pursuant to the *kompetenz-kompetenz* doctrine,⁸⁰ have the duty to investigate the extent of their jurisdiction and the lack thereof cannot be cured by the behaviour of the parties.⁸¹ Once an issue vitiating jurisdiction exists, arbitral tribunals have no alternative but to dismiss the case.

2. “Foreign” Investment

Had the tribunals decided that the BIT is nonetheless applicable to the claims and that the issue of sovereignty did not impinge on their jurisdiction, it is submitted that they should have declined jurisdiction because the relevant investments could not be considered “protected investments.” Indeed, these investments had originally been “domestic” as made by Ukrainians in a part of Ukraine’s territory. As such, they were not entitled to protection under the BIT.

It is a well-established principle of investment protection that the investment

Arbitration, Award on Jurisdiction and Admissibility (Oct. 29, 2015).

⁷⁸ Bohmer, *supra* note 58.

⁷⁹ *Coastal State Rights*, *supra* note 6, Rejoinder of Ukraine on Jurisdiction, ¶¶ 10–11 (Mar. 28, 2019); Lawrence Hill-Cawthorne, *International Litigation and the Disaggregation of Disputes: Ukraine/Russia as a Case Study*, 68 INT’L & COMP. L.Q. 779, 786 (2019).

⁸⁰ NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 335 (5th ed. 2009); Fontanelli, *supra* note 72 at 111.

⁸¹ August Reinisch, *Jurisdiction and Admissibility in International Investment*, in GENERAL PRINCIPLES OF LAW AND INTERNATIONAL INVESTMENT ARBITRATION 130 (Adrea Gattini et al., eds., 2018).



shall be made on the territory of the host state,⁸² as the purpose of any investment treaty is to reduce the risks associated with another state's enforcement jurisdiction in its territory.⁸³ Conversely, investments not made on the territory of the host state should not benefit from the BIT protection and would not be covered by it.⁸⁴

In *Stabil* and *Ukrnafta*, upholding the reasoning of the arbitral Tribunals, the STF maintained that the investments were not required to be made in the “other contracting state from the outset.”⁸⁵ This point is the core of the issue brought before the tribunals. That is, whether a change of control over a territory can be the source of a change of “nationality” of the investment, thereby turning a former “domestic investment” into a “foreign” one. According to STF, the wording of Article 1 which is “put in by the investor of one Contracting Party on the territory” diverges from the wording of Article 12, which is “carried out by the investors of one Contracting Party on the territory[.]”⁸⁶ By comparing these provisions in the original languages of the BIT, Russian and Ukrainian, the STF concluded that while the term “investment” and the verb form used in relation to it in Article 12 appears to have a temporal element, i.e., covering investments “made in the territory”, Article 1 appears to simply require the investments to be “present” in the territory of the other State to be considered “covered investments.”⁸⁷

In upholding this reasoning, however, both the arbitral Tribunals and the STF failed to consider the principle of international law under which terms of a treaty

⁸² Fedax N.V. v. The Republic of Venezuela, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction, ¶ 41 (July 11, 1997).

⁸³ Zachary Douglas et al., PROPERTY, INVESTMENT, AND THE SCOPE OF INVESTMENT PROTECTION OBLIGATIONS 383 (2014).

⁸⁴ SGS Société Générale de Surveillance S.A. v. Republic of the Philippines, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, ¶ 99 (Jan. 29, 2004); The Canadian Cattlemen for Fair Trade v. United States of America (formerly Consolidated Canadian Claims v. United States of America), Award on Jurisdiction, ¶ 221 (Jan. 28, 2008).

⁸⁵ *Ukrnafta I*, *supra* note 11, ¶ 4.4.2; *Stabil I*, *supra* note 11, ¶ 4.4.2.

⁸⁶ *Id.*

⁸⁷ *Ukrnafta I*, *supra* note 11, ¶ 4.4.3; *Stabil I*, *supra* note 11, ¶ 4.4.3.



must be understood to have the same meaning throughout the instrument.⁸⁸ Moreover, considering that the purpose of translated texts is to aid interpretation,⁸⁹ it is submitted that the English version of the definition of investment as “being put” in the territory of the other state should have not been undermined.

Furthermore, the STF held that, pursuant to Article 31 VCLT, the scope of the Russia-Ukraine BIT, which is “to create and maintain favourable conditions for mutual investments [and] economic cooperation between the Contracting Parties”⁹⁰ would require the extension of the treaty protection to the “newfound” foreign investors.⁹¹

While these are again the reasons in *Stabil* and *Ukrnafta*, it can be presumed that similar considerations have been made in the other proceedings. It is submitted, however, that those reasons are not sufficiently convincing.

First, the purpose of BITs is to increase the desirability of a particular state for foreign investors by guaranteeing that foreign investments will be provided legal protection.⁹² Second, the rationale of the limited application of investment treaties to a specific territory is that it ensures that the investments effectively made on the basis of the BIT can contribute to the development of the economy of the host state.⁹³ The purpose of the BITs, therefore, is to protect foreign investors and their investment⁹⁴ and the wording of the most prominent investment treaties appears to

⁸⁸ Vienna Convention on the Law of Treaties, *supra* note 34, at art. 33; Schreuer, *supra* note 4.

⁸⁹ Reports of the International Law Commission on the Second Part of its Seventeenth Session and on its Eighteenth Session, art. 29, [1966] 2 Y.B. Int'l L. Comm'n 224, art. 29, U.N. Doc. A/CN/4/SER.A/1966/Add.1.

⁹⁰ Russia-Ukraine BIT, *supra* note 2, at Preamble.

⁹¹ *Ukrnafta I*, *supra* note 11, ¶ 4.4.3; *Stabil I*, *supra* note 11, ¶ 4.4.3.

⁹² RUDOLF DOLZER & CHRISTOPH SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 22 (2nd ed. 2012).

⁹³ Consortium Groupement L.E.S.I.- DIPENTA v. République algérienne démocratique et populaire, ICSID Case No. ARB/03/08, Award, ¶ 47 (Jan. 10, 2005); *Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, ¶ 374 (Aug. 4, 2011); Michael Waibel, *Investment Arbitration: Jurisdiction and Admissibility*, University of Cambridge Faculty of Law Research Paper No. 9/2014), 1248-49, <https://ssrn.com/abstract=2391789>; Salacuse, *supra* note 13, at 188.

⁹⁴ *Dumberry*, *supra* note 25, at 518.



point to the fact that the investment should be “foreign” since the beginning.⁹⁵ To summarise, BITs were never intended to protect domestic investors.⁹⁶

Furthermore, this argument is reiterated by the systematics of investment protection. In *Pugachev v. Russia*, the Tribunal declined jurisdiction holding that the investor must have a foreign nationality at the moment of the investment, not merely at the time of the breach.⁹⁷ Moreover, the prohibition of treaty shopping, which is defined as the “process of routing an investment as to gain access to a BIT where one did not previously exist,”⁹⁸ infers that in investment arbitration, it is required that investors do not seek protection they were not originally entitled to.⁹⁹

At last, the functional interpretation of the treaty fails to consider that by extending the protection to Ukrainian investors, it is actually limiting the protection of the investment that fit the requirement of the BIT since the beginning. Recognising that Ukrainian investments in Crimea qualify as foreign means ruling that the Russian investments made in Crimea are not protected anymore. While admittedly Ukraine would not be responsible for their expropriation because it could claim non-

⁹⁵ North American Free Trade Agreement, Dec. 17, 1992, art. 1101(1), reprinted in 32 I.L.M. 289 (1993); Energy Charter Treaty, Dec. 17, 1994, art. 26(1); Christina Knahr, *Investments “in the Territory” of the Host State*, in INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER 46 (Christina Binder et al. eds., 2009).

⁹⁶ Wende, *supra* note 7, at 156.

⁹⁷ Damien Charlotin, *Analysis: Pugachev v. Russia Tribunal Sees no Obstacle to BIT Claims by Dual National, but a Majority Declines Jurisdiction after Finding no Foreign Nationality at the Time of the Investment*, INV. ARB. REPORTER, June 23, 2020, <https://www.iareporter.com/articles/analysis-pugachev-v-russia-tribunal-sees-no-obstacle-to-bit-claims-by-dual-national-but-a-majority-declines-jurisdiction-after-finding-no-foreign-nationality-at-the-time-of-the-investment/>.

⁹⁸ Inna Uchkunova, *Drawing a Line: Corporate Restructuring and Treaty Shopping in ICSID Arbitration*, KLUWER ARB. BLOG, Mar. 6, 2013, <http://arbitrationblog.kluwerarbitration.com/2013/03/06/drawing-a-line-corporate-restructuring-and-treaty-shopping-in-icsid-arbitration/>.

⁹⁹ *Philip Morris Asia Limited v. The Commonwealth of Australia*, Permanent Court of Arbitration, Award on Jurisdiction and Admissibility (Dec. 17, 2015); Julien Chaisse, *The Treaty Shopping Practice: Corporate Structuring and Restructuring to Gain Access to Investment Treaties and Arbitration*, 11(2) HASTINGS BUS. L.J. 225 (2015); JORUM BAUMGARTNER, *TREATY SHOPPING IN INTERNATIONAL INVESTMENT LAW* (2016).



attribution,¹⁰⁰ it does indeed demonstrate the paradox of a strictly functional interpretation. As the Tribunal in *Plama Consortium Limited v. Republic of Bulgaria* maintained, one should not over-extend the method of looking at the object and purpose.¹⁰¹

(i) State-to-State Arbitration

In any case, as the issue is of interpretation of a clause of the BIT and how to reconcile the different provisions, it should be noted that the Russia-Ukraine BIT, like most BITs,¹⁰² contains two dispute resolution clauses. Article 10 of the BIT, indeed, also provides for state-to-state arbitration for disputes concerning “the interpretation and application of the Agreement.” State-to-state clauses are intended to solve either “purely” theoretical questions of interpretation¹⁰³ or to clarify issues of interpretation or application that arise in actual investor-State disputes.¹⁰⁴ These clauses are specifically aimed to allow states to be “involved in a particular

¹⁰⁰ Wende, *supra* note 7.

¹⁰¹ ICSID Case No. ARB/03/24, Decision on Jurisdiction, ¶ 193 (Feb. 8, 2005).

¹⁰² Anthea Roberts, *State-To-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority*, 55 HARV. INT’L L.J. 1, 3 (2014).

¹⁰³ *Italian Republic v. Republic of Cuba*, Ad Hoc State-to-State Arbitration, Interim Award (Mar. 15, 2005); *Republic of Ecuador v. United States*, Permanent Court of Arbitration, Request for Arbitration, 1 (June 28, 2011); Luke Eric Peterson, *ICSID Tribunal Declines to Halt Investor Arbitration in Deference to State-to-State Arbitration*, INVEST-SD: INV. LAW & POLICY WEEKLY NEWS BULLETIN (2003), https://www.iisd.org/itn/wp-content/uploads/2010/10/investment_investsd_dec19_2003.pdf; Michele Potestà, *State-to-State Dispute Settlement Pursuant to Bilateral Investment Treaties: Is There Potential?* in INTERNATIONAL COURTS AND THE DEVELOPMENT OF INTERNATIONAL LAW (Nerina Boschiero ed., 2013) 755-756; David Gaukrodger, *State-to-State Dispute Settlement and the Interpretation of Investment Treaties*, 3 O.E.C.D. WORKING PAPERS ON INTERNATIONAL INVESTMENT (2016); Murilo De Melo, *Host States and State-State Investment Arbitration: Strategies and Challenges*, 14 REVISTA DE DIREITO INTERNACIONAL 80 (2017).

¹⁰⁴ *Republic of Ecuador v. United States*, *supra* note 105, Expert Opinion with Respect to Jurisdiction of Professor Michael W. Reisman, 17, 22-23 (Apr. 4, 2012); Dapo Akande, *Ecuador v. United States Inter-State Arbitration under a BIT: How to Interpret the Word “Interpretation”?*, EJIL:Talk! Blog, Aug. 31, 2012, <https://www.ejiltalk.org/ecuador-v-united-states-inter-state-arbitration-under-a-bit-how-to-interpret-the-word-interpretation/%0ABY%23>; Roberts, *supra* note 104; Andreas Kulick, *State-State Investment Arbitration as a Means of Reassertion of Control—From Antagonism to Dialogue*, in REASSERTION OF CONTROL OVER THE INVESTMENT TREATY REGIME 128, 128 (Andras Kulick ed., 2016), reprinted in 27 SSRN Electronic Journal 1, 1 (2017).



dispute,”¹⁰⁵ as they allow states to act in diplomatic protection on behalf of an investor’s claim¹⁰⁶ prior to the commencement of investor-state proceedings.¹⁰⁷

Considering the particular circumstances of the “Crimean” proceedings and the extent to which Ukraine appeared to intend to be involved, state-to-state arbitration seeking clarifications of the terms of the treaty would have been the much-needed logical route to understand the applicability of the BIT.

3. Consequences of the Tribunals’ Jurisdictional Decisions

One of the implications of the tribunals’ recognition that Crimea can be regarded as Russian for the purposes of the BIT is the fundamental question of what type of protection would be available to investors that hold nationalities of third states, i.e., those who are neither Russian nor Ukrainian. It is questionable whether they could then commence arbitral proceedings against Russia on the basis of a BIT between Russia and their home state. First, not every state that has a BIT with Ukraine also has signed one with Russia. Above all, for exemplificatory purposes, the United States has a BIT with Ukraine but the one signed with Russia is currently not in force. Secondly, it is also submitted that those proceedings would be a breach of the duty of non-recognition, as they would be based on the recognition of the consequences of Crimea’s annexation.

Perhaps another state could espouse the claim of one of its investors, commencing state-to-state arbitration against Ukraine to seek clarity on the meaning of “territory” in the relevant BIT. Alternatively, these “foreign investors” could be protected through recourse to diplomatic protection,¹⁰⁸ which remains a viable mean in cases “where treaty regimes do not exist or have proved inoperative.”¹⁰⁹ As

¹⁰⁵ CHITTHARANJAN AMERASINGHE, *DIPLOMATIC PROTECTION* 341 (2008).

¹⁰⁶ Roberts, *supra* note 104, at 16-17.

¹⁰⁷ Amerasinghe, *supra* note 107, at 341.

¹⁰⁸ *Draft Articles on Diplomatic Protection*, 61 U.N. GAOR Supp. No. 49, at 505, U.N. Doc. A/RES/61/35, Supp. No. 10, U.N. Doc. A/61/10 (2006).

¹⁰⁹ Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo), 2007 I.C.J. 582, 614, ¶ 88 (May 24); Colin Warbrick, *Diplomatic Representations and Diplomatic Protection*, 51(3) INT’L COMP. L.Q. 723, 731 (2002).



diplomatic protection is at the discretion of the relevant state,¹¹⁰ predictions on its feasibility would require considerations on the interests that play a part in international relationships. That is, however, beyond the scope of this paper.

Although the awards in the “Crimean proceedings” would not be binding on any other arbitral tribunal,¹¹¹ it is important to note that the implications of the tribunals’ findings on jurisdiction are multifaceted. They stand on the predetermination that Crimea belongs to Russia and, possibly, imply restrictions of the rights of all other investors. Once again, as the BIT was not applicable in the proceedings and, in any case, as the tribunals could not have jurisdiction *ratione materiae*, they should have declined to hear the cases.

IV. SECTION III

A. Admissibility of the Claims: A Matter of Appropriateness

Even if the tribunals in the “Crimean” proceedings were to deem that they had jurisdiction, arguably finding the BIT applicable to Crimea and the investments as “foreign,” they should have then considered the issue of admissibility and dismissed the claims on this ground.¹¹²

Drawing a line between jurisdiction and admissibility is not always an easy task. Accepting Jan Paulsson’s distinction, jurisdictional objections are aimed at the tribunal’s authority while admissibility objections concern the propriety of the claim to be decided by an arbitral tribunal.¹¹³ Although a tribunal might have established that all jurisdictional requirements are met, there are scenarios in which the tribunal

¹¹⁰ *Mavrommatis Palestine Concessions* (Greece v. United Kingdom), Permanent Court of International Justice, 1924 P.C.I.J. (ser. A) No. 2, 12 (Aug. 30); *Barcelona Traction, Light and Power Company, Limited* (Belgium v. Spain), 1970 I.C.J. 3, ¶ 79 (Feb. 5); *Case Concerning Elettronica Sicula S.p.A. (ELSI)* (United States v. Italy), 1989 I.C.J. 15, ¶ 51 (July 20); *Abbasi & Anor v. Secretary of State for Foreign and Commonwealth Affairs*, [2002] EWCA Civ. 1598 [107-08]; *Case Concerning Avena and Other Mexican Nationals* (Mexico v. United States of America), 2004 I.C.J. 12 (Mar. 31).

¹¹¹ Schreuer, *supra* note 4, at 11.

¹¹² JAMES CRAWFORD, *BROWNIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 667 (2012).

¹¹³ Jan Paulsson, *Jurisdiction and Admissibility*, in *GLOBAL REFLECTIONS ON INTERNATIONAL LAW, COMMERCE AND DISPUTE RESOLUTION: LIBER AMICORUM IN HONOUR OF ROBERT BRINER* 616-17 (Gerald Aksen & Robert Briner eds., 2005).



cannot exercise its authority because the merits of the claims are not “suitable” to be subject to the tribunal’s adjudication.¹¹⁴

This paper submits that the claims should have been declared inadmissible because, first, they concerned the legal interests of a state not party to the proceedings, and second, because the subject matter of the claims is not arbitrable on the grounds of public policy considerations.

1. Indispensable Party Doctrine

While admissibility is generally understood to cover issues of “ripeness” of the claim, as in to cover the lack of exhaustion of domestic remedies or mootness of the dispute,¹¹⁵ it also requires claims to be dismissed when they concern the legal interests of third-parties not involved in the proceedings.¹¹⁶ The doctrine of indispensable parties, also known as “*Monetary Gold*” principle, requires courts or tribunals to decline to hear a case when its subject matter requires a determination of the rights and obligations of a third state.¹¹⁷ The consensual nature of arbitral proceedings would require this third state to be joined as a “full party” to the proceedings when its legal interests are affected.¹¹⁸

Although normally it is the parties who challenge the admissibility of the claim,¹¹⁹ this was predictably not to be expected in the “Crimean” proceedings. The investors, on one hand, were interested in ensuring that the proceedings would go ahead as to enjoy the protection of the BIT. On the other hand, Russia’s initial lack of participation in the proceedings impinged on the opportunity to raise the claim.

¹¹⁴ ZACHARY DOUGLAS, *THE INTERNATIONAL LAW OF INVESTMENT CLAIMS* 148 (2009); Paulsson, *supra* note 115, at 604; Martins Paparinskis, *Revisiting the Indispensable Third-Party Principle*, 1 RIVISTA DI DIRITTO INTERNAZIONALE 71 (2020).

¹¹⁵ Gozie Ogbodo, *An Overview of the Challenges Facing the International Court of Justice in the 21st Century*, 18 ANN. SURV. INT’L & COMP. L. 93, 98 (2012).

¹¹⁶ Crawford, *supra* note 114, at 672.

¹¹⁷ *Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America)*, 1954 I.C.J.19 (June 15); *East Timor*, *supra* note 45, ¶ 35; Paparinskis, *supra* note 116, at 49.

¹¹⁸ Christine Chinkil, *East Timor Moves into the World*, 4 EURO. J. INT’L L. 206 (1993).

¹¹⁹ Paparinskis, *supra* note 116, at 74.



Nonetheless, once again the principle of *iura novit curia* would have required the tribunals to address this point.¹²⁰ Indeed, arbitral tribunals should carefully consider the admissibility of the claims, in particular because decisions on jurisdiction will be reviewable, while decisions on admissibility are not.¹²¹

Although the necessary third-party doctrine is generally considered to force ruling bodies to refrain from deciding any dispute which implies a determination of the responsibility of a third state,¹²² it is submitted that this is not the core of the principle. Admittedly, none of the “Crimean” proceedings neither concern the responsibility of Ukraine nor compose the subject matter of the dispute. To the contrary, it is submitted that the meaning of this doctrine lies in prohibiting a tribunal or court to “decide over a dispute” between a state party to the proceedings and a state that is not a full party to the proceedings.¹²³

It is further submitted that the *Monetary Gold* principle should also apply to arbitral proceedings for the reason that tribunals in general “operate within the general confines of public international law.”¹²⁴ In *Larsen v. Hawaiian Kingdom*, the Tribunal dismissed the claim because “the sovereign rights of a State not a party to the proceedings [were] clearly called in question,” confirming that principles of international law must be considered in arbitral proceedings as well.¹²⁵

In any case, as mentioned above, the arbitral tribunals in the Crimean proceedings were bound to consider the territorial applicability of the BIT. Any such analysis is however premised on the required determination on sovereignty over the territory of Crimea. As Ukraine, which maintains its legal sovereignty over Crimea despite the *de facto* control exercised by Russia, was not a full party in the proceedings where

¹²⁰ Repousis, *supra* note 13, at 480; Saar Pauker, *Admissibility of Claims in Investment Treaty Arbitration*, 34 ARB. INT’L 4 (2018).

¹²¹ Paulsson, *supra* note 115, at 601, 604; Paparinskis, *supra* note 116, at 74.

¹²² Tzeng, *supra* note 75, at 125; Fontanelli, *supra* note 72, at 127.

¹²³ Crawford, *supra* note 114, at 672; *Monetary Gold*, *supra* note 119, at 17.

¹²⁴ Schreuer, *supra* note 42.

¹²⁵ Permanent Court of Arbitration, Award, ¶¶ 11.16–11.17 (May 15, 2014).



determinations concerning its sovereign rights were a requirement,¹²⁶ it is submitted that the tribunals should have declined to hear the case and declared the claims inadmissible.

2. Arbitrability and Public Policy

Arbitrability, broadly understood, refers to whether a claim is “capable of being settled by arbitration.”¹²⁷ Although it has been sometimes unclear whether arbitrability should be treated as a jurisdictional or admissibility issue,¹²⁸ it is submitted that in investment arbitration it should rather be considered as an issue of admissibility, as it falls in the Paulsson’s category of limitations to the subject matter. As such it will be treated for the purposes of this paper.

Certain claims cannot be submitted to arbitration and are therefore non-arbitrable when they are outside of the rights that are at the disposal of the parties, such as when they involve public policy concerns or powers reserved to courts.¹²⁹ Although public policy and arbitrability considerations are sometimes distinguished,

¹²⁶ President of Ukraine, *supra* note 7.

¹²⁷ Loukas Mistelis, *Is Arbitrability a National or an International Law Issue?*, in *ARBITRABILITY: INTERNATIONAL AND COMPARATIVE PERSPECTIVES* 13 (Loukas Mistelis & Stavros Brekoulakis eds., 2009); Redfern & Hunter, *supra* note 82, ¶¶ 2.29–2.30; Paulsson, *supra* note 115, at 610 (citing PHILIPPE FAUCHARD, ET AL., *TRAITÉ DE L'ARBITRAGE COMMERCIAL INTERNATIONAL* 326 (2005); Mills, *supra* note 71, at 15–16; ILIAS BANTEKAS, *AN INTRODUCTION TO INTERNATIONAL ARBITRATION* 29 (2015).

¹²⁸ ICC Case No. 1110, 10 *ARB. LNT’L* 3, ¶ 282 (1963); ABDHULAY SAYED, *CORRUPTION IN INTERNATIONAL TRADE AND COMMERCIAL ARBITRATION* 64 (2004); Luis Miguel Velarde Suffer & Jonathan Lim, *Judicial Review of Investor Arbitration Awards: Proposals to Navigate the Twilight Zone between Jurisdiction and Admissibility*, 8 *DISP. RES. INT’L* 85, 89 (2014); Yas Banifatemi, *The Impact of Corruption on “Gateway Issues” of Arbitrability, Jurisdiction, Admissibility and Procedural Issues*, in *ADDRESSING ISSUES OF CORRUPTION IN COMMERCIAL AND INVESTMENT ARBITRATION* 17 (Domitille Baizeau & Richard Kreindler eds., 2015), <https://lrus.wolterskluwer.com/store/product/addressing-issues-of-corruption-in-commercial-and-investment-arbitration/>; Klára Drličková, *Arbitrability and Public Interest in International Commercial Arbitration*, 17 *INT’L & COMP. L. REV.* 55, 56 (2017).

¹²⁹ Elie Kleiman & Claire Pauly, *Arbitrability and Public Policy Challenges*, in *GLOBAL ARBITRATION REVIEW: THE GUIDE TO CHALLENGING AND ENFORCING ARBITRAL AWARDS* (1st ed. 2019), <https://globalarbitrationreview.com/chapter/1178487/arbitrability-and-public-policy-challenges#footnote-057>; Karl-Heinz Böckstiegel, *Public Policy as a Limit to Arbitration and its Enforcement*, *IBA J. DISP. RES.*, Special Issue 2008, The New York Convention: 50 Years, 11th IBA International Arbitration Day and United Nations New York Convention Day, 4 (2008)4; Banifatemi, *supra* note 130.



it is widely acknowledged that the determination of arbitrability encompasses considering issues of public policy.¹³⁰ This is based on the recognition that states do not exist in a vacuum but rather belong to the broader framework of global governance and exist and work within the confines of international law and the principles on which it is based.¹³¹ They therefore require due considerations in all *fora*¹³² for “the system of values that must be complied with either the law that governs the dispute,”¹³³ which corresponds to the principles of universal justice and *ius cogens*.¹³⁴

To summarise, arbitrability prevents certain matters from being decided in the private rooms of the arbitral proceedings and it aims at safeguarding the role of courts in protecting “the public interest”¹³⁵ or, better, the “larger interest of society.”¹³⁶ As it is the *lex arbitri* which governs the matter of arbitrability,¹³⁷ each

¹³⁰ Karl-Heinz Bockstiegel, *Public Policy and Arbitrability*, in *COMPARATIVE ARBITRATION PRACTICE AND PUBLIC POLICY IN ARBITRATION* 178 (Pieter Sanders ed., 1986); Fifi Junita, *Public Policy Exception in International Commercial Arbitration– Promoting Uniform Model Norms*, 5 *CONTEMP. ASIA ARB. J.* 45, 56–57 (2012).

¹³¹ Kim Moloney & Diane Stone, *Beyond the State: Global Policy and Transnational Administration*, 1 *INT’L REV. PUB. POL’Y* 104, 105 (2019).

¹³² *World Duty Free Company v. Republic of Kenya*, ICSID Case No. Arb/00/7, Award, ¶ 157 (Oct. 4, 2006).

¹³³ *Case Concerning the Application of the Convention of 1902 Governing the Guardianship of Infants (Netherlands v. Sweden)*, 1958 I.C.J. 55, 106–07 (Separate Opinion of Moreno Quintana, J., of 28 Nov.); *Parsons & Whittemore Overseas Co. Inc. v. Société Générale de l’Industrie du Papier RAKTA & Bank of America*, 508 F.2d 969 (2nd Cir. 1974); Kleiman & Pauly, *supra* note 131.

¹³⁴ Michael Byers, *Conceptualising the Relationship between Jus Cogens and Erga Omnes Rules*, 66 *NORDIC J. INT’L L.* 211, 219–20 (1997); Kamrul Hossain, *The Concept of Jus Cogens and the Obligation Under The U.N. Charter* 3 *SANTA CLARA J. INT’L L.* 72, 73 (2005); JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 79–80 (2007); Deeksha Malik & Geetanjali Kamat, *Corruption in International Commercial Arbitration: Arbitrability, Admissibility and Adjudication*, 1 *THE ARB. BRIEF* 1, 7 (2018).

¹³⁵ Thomas Carbonneau & Francois Janson, *Cartesian Logic and Frontier Politics: French and American Concepts of Arbitrability*, 2 *TUL. J. INT’L & COMP. L.* 193, 194–95 (1994); Bockstiegel, *supra* note 132, at 126.

¹³⁶ Carbonneau & Janson, *supra* note 137, at 209–10.

¹³⁷ Loukas Mistelis, *Arbitrability: International and Comparative Perspectives*, in *Arbitrability: International and Comparative Perspective* 13 (Loukas Mistelis & Stravros Brekoulakis eds., 2009).



state has sovereignty to determine the rules that will limit arbitration within its jurisdiction.¹³⁸ By choosing to locate the proceedings in a given jurisdiction, the parties submit to the laws of that state as applied by its courts and accept that their autonomy only exists within the limits of the mandatory provisions of the law of the seat.¹³⁹

The *lex arbitri* of all known seats in the “Crimean” proceedings, namely Switzerland, the Netherlands and France, mandate that the issue of arbitrability, and the public policy considerations that follow, must be examined by the tribunal.¹⁴⁰ As any award in the “Crimean” proceedings would imply the recognition of the unlawful annexation of Crimea in breach of *ius cogens*, contrary to international public policy, it is submitted that the claims were non-arbitrable.¹⁴¹

However, it appears that in the *Ukrnafta* and *Stabil* proceedings, both seated in Switzerland, the issues of arbitrability and public policy were not found to be relevant by the Tribunals. In fact, Russia challenged the arbitrability of the claims only during the setting aside proceedings of the final award. In a rather unsatisfactory manner, the STF held that no such concerns had arisen because “the subject matter of the arbitration was not the status of Crimea with regard to the 1998 BIT nor its status under international law,” but was rather a “pecuniary claim.”¹⁴²

This reasoning—in light of the abovementioned discussion—entirely failed to consider the fact that the Tribunals were, nevertheless, deciding over the sovereignty of Crimea. That was a matter, however, the parties could not “freely dispose of.” Whether explicitly or tacitly, no decision on jurisdiction could be made without finding that the annexation had given rise to state succession. In any case, the STF

¹³⁸ ANDREW TWEEDDALE & KEREN TWEEDDALE, *ARBITRATION OF COMMERCIAL DISPUTES: INTERNATIONAL AND ENGLISH LAW AND PRACTICE* ¶ 4.24 (2007).

¹³⁹ Redfern & Hunter, *supra* note 82, at 124; Mistelis, *supra* note 129, at 13; Drličková, *supra* note 130, at 68.

¹⁴⁰ Swiss Federal Statute on Private International Law (PILA) (1987) art. 177(1)-(2); Dutch Code of Civil Procedure (1986), art. 1020(3); French Civil Code (2016) arts. 2059-60.

¹⁴¹ Dumberry, *supra* note 25, at 528.

¹⁴² *Ukrnafta II*, *supra* note 11, ¶ 4.2; *Stabil II*, *supra* note 11, ¶ 4.2.



held that the “the territory of the Crimean Peninsula is to be considered part of [Russia]’s “territory” within the meaning of Art. 1(4) [BIT] 1998 and is included within the territorial scope of the agreement.”¹⁴³ This appears to demonstrate that the Tribunal did make such analysis but failed to consider it a ground to dismiss the case as non-arbitrable.

However, it is argued that the STF’s view on the matter should be better contextualised rather than being considered as a simple confirmation of the arbitrability of these claims. First, Swiss courts typically adopt a restrictive definition of public policy.¹⁴⁴ Accordingly, public policy would be violated only “when the recognition or the enforcement of a foreign award offends the Swiss concept of justice in an intolerable manner.”¹⁴⁵ Secondly, it should also be considered in the light of the Swiss courts’ stance on review of arbitral tribunals’ decisions on jurisdiction. Indeed, although Article 190 PILA includes lack of (or refusal to assume) jurisdiction as a ground to challenge an award issued by a tribunal seated in Switzerland, the Swiss courts typically defer to such determinations. In *Recofi v. Vietnam*, the STF held that while it could “freely review” the decision on jurisdiction, it cannot be used as a court of appeals.¹⁴⁶ It further added that it had to adhere to the factual findings contained in the award which could not be rectified “even if the facts were established in a blatantly inaccurate manner or in violation of the law.”¹⁴⁷ Third, as in *Ukrnafta* and *Stabil*, the arbitrability issue was only raised at the stage of the set aside proceedings after the final award; the STF—even if partially addressing the issue—did maintain the Tribunals’ decision on jurisdiction because limited by issue estoppel.¹⁴⁸

Considering these three points jointly, it becomes clear that the issue of arbitrability was to some extent severely undermined and not properly considered.

¹⁴³ *Ukrnafta I*, *supra* note 11, ¶ 4.3.2; *Stabil I*, *supra* note 11, ¶ 4.3.2.

¹⁴⁴ Tribunal fédérale [STF], July 28, 2010, 4A_233/2010, ¶ 3.

¹⁴⁵ *Id.*

¹⁴⁶ Tribunal fédérale [STF], Sept. 20, 2016, 4A_616/2015, ¶ 3.

¹⁴⁷ *Id.* ¶ 3.1.2.

¹⁴⁸ *Ukrnafta II*, *supra* note 11, ¶ 4.2; *Stabil II*, *supra* note 11, ¶ 4.2.



However, as the implications of any of those decisions go beyond what can be settled by arbitration, the tribunals could have also declined to hear the case on the grounds of arbitrability.

As Russia did take part in the more recent proceedings, with some of them not seated in Switzerland and with set aside proceedings currently pending,¹⁴⁹ the issue of arbitrability may have been raised in those proceedings in determining whether the tribunals should have exercised their jurisdiction. For example, French courts, being heirs of a different tradition, have continuously reiterated that arbitrators have the right to apply the rules of international public policy—the *competence sur la compétence* principle—and the duty to ensure compliance with them to the point that they can impose sanctions to parties for failure to comply with public policy.¹⁵⁰ The decision of the other courts on the set aside proceeding are, therefore, long awaited to understand whether the tribunals ruled on the issue of arbitrability and on which ground they accepted to have jurisdiction.

(i) Enforcement

The unexplored and underestimated issue in these cases remains the one of enforcement. In investment arbitration, given the consent of contracting states to the BIT, it would be expected that these states comply with their obligations arising from awards on the basis of the *pacta sunt servanda* principle, having therefore waived their immunity.¹⁵¹

In cases of non-ICSID awards, such as those issued in the “Crimean” proceedings,

¹⁴⁹ Nicholas Peacock et al., *Inside Arbitration: Crimean Investment Treaty Arbitration Claims: Recent Developments*, Feb. 28, 2020, <https://www.herbertsmithfreehills.com/latest-thinking/inside-arbitration-crimean-investment-treaty-arbitration-claims-recent-developments>.

¹⁵⁰ Cour de Cassation, Commercial Division [Cass. com.], Nov. 29, 1950, *Tissot v. Neff* (Fr.); Judgment of Nov. 29, 1968, *Colmar 2e*, 1970 J.C.P. II, No. 16246 (Fr.); Cour d’appel de Paris [Paris Court of Appeal], May 19, 1993, *Labinal v. Mors*, *REVUE DE L’ARBITRAGE* 645 (1993) (Fr.).

¹⁵¹ Susan Choi, *Judicial Enforcement of Arbitral Award under the ICSID and New York Convention*, 28 N.Y.U. J. INT’L L. & POL. 175, 175 (1995); Kamal Huseynli, *Enforcement of Investment Arbitration Awards: Problems and Solutions*, 3 BAKU ST. U. L. REV. 40, 41 (2017); Alan Alexandroff & Ian Laird, *Compliance and Enforcement: Recognition, Enforcement, and Execution of Investment Arbitration Awards*, in *THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW* 1174 (Thomas Schultz & Federico Ortino eds., 2020).



the enforcement is governed by the New York Convention (NYC).¹⁵² Article V of the NYC provides the grounds for refusal of enforcement, which includes both jurisdictional issues as well as arbitrability and public policy considerations.¹⁵³ There is, on these issues, a distinction to be made. With regard to jurisdiction, national courts adopt different standards of review which therefore means that some state courts at the stage of enforcement may defer to the tribunals' determination on jurisdiction.¹⁵⁴ Conversely, issues of arbitrability and public policy depend on the discretion of state courts which have the power to enforce, or refuse to enforce, the awards.¹⁵⁵ Admittedly, these latter approaches have not been widely adopted by national courts,¹⁵⁶ as it has been argued that such refusal should be interpreted narrowly and only applied if “the award contravenes principles which are considered in the host country as reflecting its fundamental convictions, or as having an absolute, universal value.”¹⁵⁷

It is worth repeating at this point that the obligation of non-recognition of an unlawful annexation is recognised to be *ius cogens* and, as such, is binding upon all states, which should therefore refuse the enforcement of the award.¹⁵⁸

In any case, it should be noted that there is a line to be drawn between the enforcement of awards, which depends on the discretion of courts the investor turns to, and the execution of the award, which is, to put it bluntly, the payment of the sums owed.¹⁵⁹ The latter consists of, for example, attacking a state's assets, which have

¹⁵² Huseynly, *supra* note 153, at 42, 45.

¹⁵³ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, art. V(2)(a)-(b), 21 U.S.T. 2517, 330 U.N.T.S. 38.

¹⁵⁴ Anthea Roberts & Christina Trahanas, *Judicial Review of Investment Treaty Awards: BG Group v. Argentina*, 108(4) AM. J. INT'L L. 150 (2014).

¹⁵⁵ New York Convention, *supra* note 155, at art. V; Huseynly, *supra* note 153, at 61.

¹⁵⁶ JULIAN LEW ET AL., *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION* 721 (2003).

¹⁵⁷ FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 996 (Emmanuel Gaillard & John Savage eds., 1999).

¹⁵⁸ Articles on State Responsibility, *supra* note 38, at art. 41.

¹⁵⁹ Lim-Ho-Paparinskis, *supra* note 14, at 460; Jacob Kuipers, *Too Big to Nail: How Investor-State Arbitration Lacks an Appropriate Execution Mechanism for the Largest Awards*, 39 B.C.



been anyway described as falling under state immunity.¹⁶⁰ As Russia tends to refuse enforcement and payment on public policy grounds,¹⁶¹ and considering that it challenged that the claims were not arbitrable, this does raise the question of whether these awards are simply going to become a rendition of *Yukos*.¹⁶²

Predictably, the Crimean saga will end the same way it began: with empty-handed investors but passing through the recognition by both tribunals and national courts that the Crimean Peninsula is effectively Russian.

V. CONCLUSION

To safeguard the legitimacy of their decision and the stability of the system in the international legal order, arbitral tribunals should not go beyond the scope of their jurisdiction.¹⁶³ While this premise is widely recognised, the tribunals in the “Crimean” proceedings decided not to take this obligation into account, only to reach their decisions without considering and “avoiding” the preliminary issue concerning the status of Crimea. Conversely, it has been the purpose of this paper to demonstrate that the tribunals were bound to address the “territorial” question of the applicability of the BIT. The ruling that the BIT could provide protection to the “Ukrainian investors” was rooted in the predetermination that Crimea is to be deemed as Russian. Indeed, the sole logical way that could have led the tribunals to accept jurisdiction was for them to have considered the “legal” consequences of the unlawful annexation of Crimea, which would have been in breach of the tribunals’ duty to abide by and respect the rules of international law. For these reasons, the tribunals in the “Crimean” proceedings should have declined to hear the disputes. Thus, it is submitted that any tribunal vested with claims concerning “Ukrainian” investments made in the territory of Crimea should decline to have jurisdiction on multiple

INT’L & COMP. L. REV. 417, 419 (2016).

¹⁶⁰ *Id.* at 419.

¹⁶¹ FOUCHARD GAILLARD GOLDMAN, *supra* note 159.

¹⁶² *Yukos Universal Ltd. (Isle of Man) v. The Russian Federation*, UNCITRAL, Final Award (July 18, 2014).

¹⁶³ Tzeng, *supra* note 75, at 135.



grounds, including (1) that the BIT was not applicable to the claims, (2) that the tribunal could not have jurisdiction *ratione materiae* and, (3) as a last resort, that the claims were not admissible.

It does not go unnoticed that the implication of this paper is the failure of the purpose of investment arbitration, which is to protect investors. Had the tribunals declined to hear the cases, the “Ukrainian” investors could have possibly been left empty-handed, with their investment having been expropriated by a foreign state but prevented from seeking compensation before an arbitral tribunal. Whether the awards can actually be considered a success for the investors and whether they will effectively be given the compensation that has been awarded is a completely different question that will, predictably, only be answered by further proceedings before national courts. The investors’ quest to commence arbitral proceedings, and Ukraine’s “intervention” in favour of its nationals, is nevertheless a failure to consider the other *fora* available to them, including recourse to the ECtHR, diplomatic protection, and state-to-state arbitration, the effectiveness of which is, however, beyond the scope of this paper.

Similarly, it is unclear what the future holds for investments made in Crimea by non-Ukrainians, especially whether they would be entitled to protection under investment treaties or whether they will have to turn to state courts.

In any case, the main issue originating from the “Crimean” proceedings is the disregard for the underlying recognition of Crimea as Russian, with the public’s discussion on the issue fading over the years. Therefore, it is submitted that the interest of the international community should have superseded those of the investors.¹⁶⁴ While the more legally correct decision may have led to a more unjust result, it is submitted that that should still not prevent any ruling body from reaching the said decision.

Although almost all materials of the “Crimean” proceedings remain locked in the private rooms where they took place, it appears that the tribunals decided otherwise and, on the basis of the arguments that have been hereby challenged, they had found

¹⁶⁴ Dumberry, *supra* note 25, at 532; Carbonneau & Janson, *supra* note 137, at 211.



sufficient grounds to accept jurisdiction. The decisions of national courts on the set-aside and enforcement proceedings that are currently pending¹⁶⁵ are therefore necessary to effectively understand the tribunals' reasoning. However, it would be a mistake to ignore that the proceedings ought to be correctly framed by considering Russia's lack of participation in the proceedings until 2019. Whether politics might have played a part in the tribunals' findings—and in the awards—is the underlying question that, to this day, remains unanswered.

After all, the intricacies of the international community can hardly be compared to the throw of a stone to a giant's forehead but, remaining in the unexplored field of stone-throwing metaphors, what should be of concern is the ripple effect of the "Crimean awards."

MARTINA ERCOLANESE is a trainee in the Litigation and Arbitration practice at Cleary Gottlieb Steen & Hamilton LLP, in Rome. She holds a Master's Degree in Law (*cum laude*) from Università degli Studi di Napoli Federico II and an LL.M. (with Distinction) from University College London.

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¹⁶⁵ Peacock et al., *supra* note 151.

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5201 Democracy Drive
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