

For justice and compensation Ukraine takes Russia to the international courts

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On 2 May, the Permanent Court of Arbitration based in The Hague passed a ruling in a case brought by a group of Ukrainian companies and one individual against the Russian Federation. It unanimously granted their claims to the assets lost as a consequence of the annexation of Crimea and imposed an obligation on the Russian side to pay US\$159 million in compensation. This verdict is the first to have been delivered in a number of cases brought by Ukrainian private companies and the Ukrainian state to the Permanent Court of Arbitration and the International Criminal Court, the International Court of Justice and the European Court of Human Rights linked to the Russian occupation of the Crimean Peninsula and Russian military operation in eastern Ukraine.

After the ruling passed in February this year by the Stockholm Arbitration Court in the dispute between Naftogaz and Gazprom, that of the Hague Court is another success attained by the Ukrainian side in international courts. It proves that the legal measures taken by Ukraine are successful and will become an instrument to be employed in Ukraine's foreign and domestic policy, especially in the face of subsequent rulings expected to be favourable to Kyiv. However, since the Russian Federation has refused to recognise the court decisions, enforcing the payment of the compensation will be a long and complicated process. Therefore, Ukrainian companies will make efforts to take over assets owned by the Russian state located in Ukraine.

Court rules in favour of Ukraine

The petition brought in June 2015 was initiated by eighteen Ukrainian companies linked to the oligarch Ihor Kolomoyskyi¹ and his close aide, Oleksandr Dubilet. The line of accusation was based on the claim that Russia had breached the Russian-Ukrainian investment protection agreement of 1998². The plaintiffs argued that the Russian side had breached the provisions of the agreement by taking measures that made

investing impossible to firms, that had finally led to expropriation of the firms. Pursuant to the provisions of the agreement (article 5), the seizure or expropriation of assets owned by entities registered in the territory of one of the states required compensation agreed and accepted by all parties. In August 2014, Ihor Kolomoyskyi's investments in Crimea were nationalised and then put on sale without the knowledge and participation of their owner³.

The Russian Federation has refused to recognise the verdict regardless of the fact that in 2017 the Permanent Court of Arbitration in The

¹ *Everest Estate LLC et al. v. The Russian Federation*, Permanent Court of Arbitration, <https://pca-cpa.org/ru/cases/133/>

² *Крим. Анексована Власність*, ed. Ю. Тищенко, UCIPR 2016, p. 8, http://www.ucipr.org.ua/publicdocs/Annexed%20property_ua.pdf

³ *Государственный совет Крыма принял решение о национализации имущества Коломойского*, TASS, 3 September 2014, <http://tass.ru/ekonomika/1416926>

Hague confirmed its competences to resolve the dispute on the grounds of the regulations under the agreement of 1998 recognising the arbitration verdict of the United Nations Commission on International Trade Law as binding and final for both parties (article 9). Prior to that Russia had ignored the arbitration meetings and did not respond to repeated requests to express its opinion on the plaintiffs' claims.

Even though the Permanent Court of Arbitration confirmed its competences to resolve the case, Russia refused to recognise the verdict, ignoring the arbitration meetings and failing to respond to repeated requests to express its opinion on the plaintiffs' claims.

In the letters sent to the court in September and August 2015 the Russian side only stated that the agreement of 1998 "cannot be used as grounds for appointing arbitration to settle the plaintiff's claims" and declared that it "does not recognise the jurisdiction of the Permanent Court of Arbitration in this matter." It also categorically emphasised that no content of the correspondence "should be viewed as the Russian Federation's consent to recognise the Permanent Court of Arbitration, to participate in the arbitration proceedings or to take procedural action as part of the proceedings."⁴ The main argument employed by the Russian side for its refusal to participate in the proceedings are the provisions of the agreement of 1998 on which the claims were based. Pursuant to article 1 of the agreement, the term 'investments' is used to refer to both tangible and intangible assets which represent an investment contribution of one of the parties to the agreement being made in the territory of

the other party and which is subject to its laws⁵. According to the Russian interpretation of this provision, assets owned by Ukrainian business entities acquired before the annexation of the Crimean Peninsula to the Russian Federation cannot be classified as investments in Russian territory because Crimea at that time was part of Ukraine. Thus, in the opinion of the Russian side, the investments being the subject of the complaint are not subject to the provisions of the aforementioned agreement, and for this reason the agreement cannot be used as grounds for the Ukrainian companies' claims⁶. However, the Permanent Court of Arbitration did not accept this line of argument used by the Russian side and imposed the obligation for it to pay compensation to the Ukrainian companies. This happened as a result of adopting an unprecedented interpretation of the term 'territory' referred to in the agreement of 1998. The judges of the court concluded that this notion refers to both a sovereign area and one which is *de facto* under the control of another state, making it responsible for investments located there⁷.

This ruling is important, given the fact that seven more proceedings are pending in front of the Permanent Court of Arbitration (see Appendix) initiated upon a motion from Ukrainian private and state-owned companies. A significant part of them are based on Russia's breach of the investment protection agreement of 1998. This provides grounds for the prediction that decisions favourable to Ukrainian companies

⁵ "Термін "інвестиції" означає усі види майнових і інтелектуальних цінностей, що вкладаються інвестором однієї Договірної Сторони на території іншої Договірної Сторони відповідно до її законодавства", *Угода між Кабінетом Міністрів України і Урядом Російської Федерації про заохочення та взаємний захист інвестицій*, http://zakon0.rada.gov.ua/laws/show/643_101

⁶ О. Макаров, А. Артемьев, И. Ткачев, *Коломойский подал новый иск к России в гаагский арбитраж*, 24 February 2016, <https://www.rbc.ru/business/24/02/2016/56cdbce99a7947634ef4e486>

⁷ М. Солдатенко, С. Сидоренко, *У чергу за Коломойським: що отримає Україна від поразки Росії в Гаазі*, 14 May 2016, <https://www.eurointegration.com.ua/articles/2018/05/14/7081651/>

⁴ *Arbitration between Everest Estate LLC and others as claimants and The Russian Federation*, Permanent Court of Arbitration, 5 April 2017, <https://pcacases.com/web/sendAttach/2105>

will be passed in these cases as well. The case concerning assets of Naftogaz and its six Crimean subsidiaries, including Chornomornaftogaz, is of key importance. The ruling concerning especially the latter one will be decisive because it owns seventeen oil and gas fields on the Black Sea shelf, and its output was at 1.7 billion m³ of gas annually. Naftogaz's claims total US\$2.6 billion.

However, it will not be easy to enforce the compensation awarded by the court. Even though both Ukraine and Russia are parties to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 which imposes on the other signatory states the obligation to respect international arbitral awards, this does not mean that it is automatically possible to enforce the compensation awarded through the seizure of the foreign assets of the debtor state. The courts of a given state have national jurisdiction to rule on the recognition a foreign arbitral award or whether to deem it to be enforceable; this means that

The Permanent Court of Arbitration did not grant the Russian side's arguments and imposed the obligation to pay compensation to Ukrainian companies.

the execution of the court's verdict may not be recognised by the domestic courts in a country where the Ukrainian side will try to enforce the awarded compensation. As proven by the example of the award concerning the Yukos case in which the Hague Arbitration Court imposed the obligation on the Russian Federation to pay record-high compensation to the company's shareholders of US\$50 billion, enforcing this amount in other countries turned out to be extremely difficult due to legal actions taken by the Russian side. The granting of the Russian appeal by the Hague District Court made it possible to successfully block the compensation

claims⁸. However, it is possible that the assets owned by the Russian state in Ukraine will be subject to enforcement under the award concerning Ihor Kolomoyskyi's companies. The process of claim enforcement can be facilitated by the draft amendment of the Sanctions Act that has recently been put forward for discussion at the Verkhovna Rada (the Ukrainian parliament). According to the presented amendments, the Ukrainian government will be able to decide to nationalise selected foreign companies or to impose extremely high fines on them⁹.

Kyiv's international judicial offensive

Ukraine has sued the Russian Federation in a number of other cases pending in various international courts. The most important of these include:

- **The Permanent Court of Arbitration in The Hague**

In addition to the cases mentioned above, proceedings concerning the Russian Federation's violation of the Ukrainian state's right to use the resources located in the territorial waters in the Sea of Azov, the Black Sea and the Kerch Strait as a result of the annexation of Crimea are also pending in the Permanent Court of Arbitration in The Hague¹⁰. This case concerns depriving Ukraine of the possibility to use coastal infrastructure and sea reserves and at the same time illicit usage thereof by Russia. The accusation points to the illegal activity of Russian business entities in territories which belong to the Ukrainian state, including the construction of a bridge in the Kerch Strait, oil and gas extrac-

⁸ Гаагский суд против Гаагского суда: РФ не должна платить \$50 млрд экс-акционерам ЮКОСа, TASS, 20 April 2016, <http://tass.ru/ekonomika/3225417>

⁹ Російські банки та компанії в Україні можуть націоналізувати, "Економічна правда", 10 May 2018, <https://www.epravda.com.ua/news/2018/05/10/636673/>

¹⁰ This case is being conducted on the grounds of the regulations of Appendix VII to the United Nations Convention on the Law of the Sea UNCLOS, Ukraine v. The Russian Federation, PCA, <https://pcacases.com/web/sendAttach/2135>

tion from fields located in the Black Sea, and also fishing and archaeological research in the Crimean coastal area.

• The International Criminal Court

The International Criminal Court (ICC) is considering the case concerning the developments that took place in Ukraine between 21 November 2013 and 22 February 2014. The proceedings were extended in August 2015 to include the events that took place after 20 February 2014 in Crimea and eastern Ukraine. A motion concerning this case was registered at the ICC, even though neither Russia nor Ukraine had ratified the provisions of the Rome Statute of the International Criminal Court. However, the Ukrainian government recognised the jurisdiction of the ICC in the case of the war crimes committed in Ukraine¹¹. As part of the enquiry conducted by a prosecutor from the International Criminal Court over 1,200 cases of crimes committed in the Donbass have been registered, and 10,225 casualties and 25,541 injured as a consequence of the military conflict in the east of the country have been reported¹². The evidence in the investigation being conducted by an ICC prosecutor includes a report drawn up on the initiative of a Polish Member of European Parliament, Małgorzata Gosiewska, which was submitted at the ICC's office in April 2016¹³. In the report for 2016 from the ICC prosecutor, Fatou Bensouda, the annexation of Crimea was recognised as equivalent to an international military conflict between Russia and Ukraine in which "the Russian Federation deployed members of its armed forces to gain control over parts of the Ukrainian territory without

the consent of the Ukrainian Government"¹⁴. The critical evaluation of Russia's actions in the report was most probably the reason why several days after the report was published President Vladimir Putin passed a regulation on the withdrawal from ratifying the Rome Statute of the International Criminal Court; this means the Russian Federation's de facto refusal to recognise the jurisdiction of the ICC. The Russian Ministry of Foreign Affairs, explaining this move, stated that the ICC "failed to meet the expectations to become a truly independent, authoritative international tribunal"¹⁵. It is worth emphasising that the ICC is tasked with prosecuting and passing decisions concerning the most serious international crimes, i.e. genocide, crimes against humanity and war crimes, and the jurisdiction of the ICC has been restricted solely to enforcing the liability of individuals.

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• The European Court of Human Rights

The four Ukrainian complaints registered at the European Court of Human Rights in Strasbourg are of a similar nature. Ukraine accuses the Russian Federation in these complaints of having violated a wide array of articles of the Convention for the Protection of Human Rights and Fundamental Freedoms by occupying and exercising effective control of part of the Ukrainian territory and by supporting armed group-

¹¹ Рада передала в Международный уголовный суд преступления на Майдане и в Донбассе, "Зеркало недели", 4 February 2015, https://zn.ua/POLITICS/rada-peredala-v-mezhdunarodnyy-ugolovnyy-sud-prestupleniya-na-maydane-i-v-donbasse-165976_.html

¹² Report on Preliminary Examination Activities 2017, International Criminal Court, 4 December 2017, https://www.icc-cpi.int/itemsDocuments/2017-PE-rep/2017-otp-rep-PE_ENG.pdf

¹³ Report: Russian War Crimes in Eastern Ukraine in 2014, 25 December 2015, http://ji-magazine.lviv.ua/engl-vers/2015/Russian_War_Crimes_in_Eastern_Ukraine_in_2014.pdf

¹⁴ Report on Preliminary Examination Activities 2016, International Criminal Court, 14 November 2016, https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE_ENG.pdf

¹⁵ Statement by the Russian Foreign Ministry, 16 November 2016, http://www.mid.ru/press_service/spokesman/official_statement/-/asset_publisher/t2GCdmD8RNlr/content/id/2523566?p_p_id=101_INSTANCE_t2GCdmD8RNlr&_101_INSTANCE_t2GCdmD8RNlr_languageId=en_GB

ings operating in the east of the country and in Crimea. This in particular concerns violations of the right to life, freedom of religion, the right of assembly, freedom of speech, the prohibition of discrimination¹⁶, the prohibition of torture and inhuman or degrading treatment, the right to a fair trial, and the right to education and free elections¹⁷. In the fifth complaint, Ukraine applied for consideration of the case of the abduction of three groups of children in eastern Ukraine and their transportation to Russia¹⁸.

The court's awards are binding on the parties to the proceedings and serve as so-called 'judicial interpretation' that may be used as a point of reference for other countries in the case concerning the subject of the dispute.

According to the Ukrainian side, these rights were violated in a particularly flagrant manner, including the killing of the civilian population, the use of torture and illicit imprisonment and racial discrimination against Crimean Tatars and people who declare themselves to be Ukrainian citizens. On 9 May, four of the cases (nos. 20958/14, 8019/16, 42410/15 and 70856/16) were forwarded for further examination to the Grand Chamber of the Court, which happens when a case reveals serious discrepancies in the existing interpretations of the Convention for the Protection of Human Rights and Fundamental Freedoms or the protocols to it, and also if a case concerns serious issues of general significance. Execution of the award is an obligation

resulting from the membership of Russia and Ukraine in the Council of Europe (respecting the convention is a condition of membership in this organisation) and is binding on both parties to the proceedings.

• The International Court of Justice

Ukraine is also the plaintiff in a case pending in the International Court of Justice (ICJ) against the Russian Federation concerning the financing of terrorism and racial discrimination in Ukraine. The application submitted in January 2017 is based on accusing the Russian side of violating the International Convention on the Elimination of All Forms of Racial Discrimination of 1965 and the International Convention for the Suppression of the Financing of Terrorism of 1999¹⁹. The complaint binds together the legal moves previously taken by Ukraine (above all in front of the ICC and the European Court of Human Rights) aimed at pursuing claims in connection with the developments in Crimea and eastern Ukraine. The application describes acts of regular discrimination and repression against Crimean Tatars, including murders and abductions of Tatar minority activists, as well as violation of the right of assembly (banning the operation of the Mejlis of the Crimean Tatar People), the freedom of religion, the right to a fair trial, and freedom of speech. The Russian state was also accused of materially supporting terrorist groups operating in eastern Ukraine by supplying them with weapons. The Russian Federation's responsibility for the crash of the MH-17 aircraft of Malaysia Airlines and the shelling of the civilian population in locations in eastern Ukraine is presented among other acts in this context.

¹⁶ *Grand Chamber to examine four complaints by Ukraine against Russia over Crimea and Eastern Ukraine, European Court of Human Rights, case nos. 20958/14 and 8019/16, 9 May 2018, <https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-6081540-7832894&filename=Relinquishment%20to%20Grand%20Chamber%20of%20four%20interstate%20cases%20Ukraine%20v.%20Russia.pdf>*

¹⁷ *Ibid*, case nos. 42410/15 and 70856/16.

¹⁸ *Ibid*, case no. 43800/14.

¹⁹ *Application instituting proceedings filed in the Registry of the Court on 16 January 2017, International Court of Justice, <http://www.icj-cij.org/files/case-related/166/19314.pdf>*

In the order passed in April 2017, the ICJ obliged the parties to apply so-called 'interim measures' in some of the disputed issues²⁰. In passing this decision the court, contrary to Russia's argumentation, deemed itself competent to impose interim measures, presuming that it has jurisdiction (although this is not clear) also over the remaining part of the case brought by Ukraine. The judges, referring to the allegations of violating the International Convention on the Elimination of All Forms of Racial Discrimination, ruled that the Russian side must provide residents of Crimea with access to education in the Ukrainian language and enable the operation of the Mejlis. In turn, as regards the International Convention for the Suppression of the Financing of Terrorism, it was stated that at the present stage of the proceedings there was insufficient evidence to prove that Russia supported the armed forces of the so-called Donetsk People's Republic and Luhansk People's Republic. At the next stage of the proceedings, the court is expected to decide on its competence to consider this case and then pass a final decision. Even though the court's awards are not a commonly applicable source of international law, they are binding on the parties to the proceedings and at the same time serve as a so-called 'judicial interpretation' that may be used as a point of reference for other countries in the case concerning the subject of the dispute.

Conclusions

Since the beginning of the conflict in eastern Ukraine and the occupation of the Crimean Peninsula, the government in Kyiv has been making efforts to actively use the international

courts to attract the attention of global public opinion to the issue of Russian aggression in its territory. In the great majority of the cases Ukraine is accusing Russia of waging a military aggression, supporting and financing terrorist groups in the so-called Donetsk People's Republic and Luhansk People's Republic, discriminating against ethnic minorities, violating human rights and civil freedoms in Crimea and eastern Ukraine. Pursuing the claims in the international courts, in addition to the moral and prestigious aspects, may also bring significant financial benefits. While enforcing possible compensation awarded to the Ukrainian side abroad may be problematic and take a long time, the seizure of assets owned by Russia in Ukrainian territory will be a much easier solution. The draft regulation on the nationalisation of Russian companies operating in the territory of Ukraine has been recently submitted to the Verkhovna Rada with this assumption in mind. The criminal and arbitration proceedings are also an important element in the image-building communication of the government in Kyiv. Given the absence of military successes and the ineffectiveness of international negotiations concerning the annexation of Crimea and settling the conflict in the Donbass, the proceedings in front of international courts and the likely further victories will be used by the government in Kyiv to show its determination in this area. Highlighting and emphasising the significance of the international courts' awards may be used to distract the public's attention away from the government's ineptness in reforming the state, especially in the face of the upcoming presidential and parliamentary elections scheduled for 2019.

²⁰ *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)*, International Court of Justice, 9 April 2017, <http://www.icj-cij.org/files/case-related/166/19394.pdf>

APPENDIX

International court proceedings brought against the Russian Federation by the Ukrainian state and private Ukrainian firms

International court	Name of the proceedings	Complainant	Date of the launch of the proceedings
Permanent Court of Arbitration in The Hague	Aeroport Belbek and Ihor Kolomoyskyi v. Russian Federation	Aeroport Belbek LLC and Ihor Kolomoyskyi	13 January 2015
	PrivatBank and Finilon v. Russian Federation	PrivatBank public joint-stock company, Finilon LLC	13.04.2015
	Lugzor Company v. Russian Federation	Lugzor LLC, Libset LLC,	13 April 2015
	Ukrinterinvest LLC, DniproAzot public joint-stock company	Ukrnafta public joint-stock company	26 May 2015
	Stabil v. Russian Federation	Stabil LLC, Rubenor LLC, Rustel LLC, Novel-Estate LLC, Kirovograd-Nafta LLC, Crimea-Petrol LLC, Pirsan LLC, Trade-Trust LLC, Elefteria LLC, VFK Satek LLC, Stemv Group LLC	15 June 2015
	Everest Estate v. Russian Federation	Everest Estate LLC, Edelveis-2000 private fund, Fortuna non-public joint-stock company, Ubk-Invest non-public joint-stock company, Niva-Tour LLC, IMME LLC, Planeta private fund, Krim Development LLC, Aerobud public joint-stock company, Privatoffice LLC, Dayris LLC, Diline LLC, Zhisa LLC, Privatland LLC, Dan Panorama LLC, Sanatorium Energetic LLC, AMC Finansovyy Kapital LLC, AMC Financial Vector LLC, Oleksandr Dubilet	19 June 2015
	Ukraine v. Russian Federation	Ukraine	16 September 2016
	Naftogaz v. Russian Federation	Naftogaz of Ukraine state-owned company, Chornomornaftogaz state-owned company, Ukrtransgaz public joint-stock company, Likvo subsidiary, Ukgazvydobuvannya public joint-stock company, Ukrtransnafta public joint-stock company, Gas of Ukraine subsidiary	17 October 2016

International court	Name of the proceedings	Complainant	Date of the launch of the proceedings
International Criminal Court		Ukraine	25 April 2014
European Court of Human Rights	Ukraine v. Russia (case no. 20958/14)	Ukraine	13 March 2014
	Ukraine v. Russia (V) (case no. 8019/16)	Ukraine	13 March 2014
	Ukraine v. Russia (IV) (case no. 42410/15)	Ukraine	27 August 2015
	Ukraine v. Russia (VI) (case no. 70856/16)	Ukraine	27 August 2015
International Court of Justice	Ukraine v. Russian Federation	Ukraine	16 January 2017

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