

Court of Appeal in The Hague upholds partial award assuming jurisdiction in favour of Crimean investors

by *Practical Law Arbitration*, with *Van Oosten Schulz De Korte Advocaten*

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In *Russia v Naftogaz and others* (ECLI:NL:GHDHA:2022:1295), the Court of Appeal in The Hague largely upheld a partial award in which the tribunal accepted jurisdiction to hear claims by Naftogaz and others following the expropriation of their Crimean assets by Russia.

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The Court of Appeal in The Hague has largely upheld a partial award rendered in an investment treaty arbitration filed by Naftogaz and other Ukrainian gas and oil companies against Russia in which the tribunal accepted jurisdiction to hear claims concerning the expropriation of Crimean assets.

The court ruled that, when assessing the tribunal's jurisdiction, it was not restricted to the grounds on which the tribunal itself accepted jurisdiction, in line with the Dutch Supreme Court decision in *Hulley and others v Russia* (see [Legal update, Dutch Supreme Court reopens debate on setting aside of Yukos awards \(Full update\)](#)).

The court considered that Crimea fell within Russia's territory within the meaning of the BIT, because Russia effectively controlled Crimea and Russian law was applied in Crimea. It was not established that a territory should necessarily be a sovereign territory or that Russia's territory was fixed at the moment the BIT was entered into in 1998, when Russia did not control Crimea. The court took into account that Russia had in fact expropriated the Crimean assets of Naftogaz and other companies. The intention of the BIT was to protect investments made by companies domiciled in one state from expropriation by the other state.

As regards a purported lack of reciprocity, the court held that the arbitration did not concern the obligations by Ukraine under the BIT. And even if Ukraine had breached its obligations under the BIT, that did not entitle Russia to breach the arbitration agreement in the BIT.

The court ruled that the BIT only applied to investments made on or after 1 January 1992 and not to investments made earlier. This was confirmed by the fact that, before then, Russia and Ukraine, being part of the Soviet Union, did not exist as sovereign states. The court set aside the partial award insofar as it ruled that the tribunal had jurisdiction in respect of investments made before 1 January 1992. The court was unsure to what extent that finding by the tribunal was affected by a later procedural order confirming that the tribunal only had jurisdiction in respect of investments made after that date.

The court rejected the other arguments for setting aside of the award brought forward by Russia.

In decisions of the same day, the court upheld awards obtained by PrivatBank, Aeroport Belbek and Everest and others in arbitrations against Russia concerning similar BIT claims.

Case: *Russia v Naftogaz and others* (ECLI:NL:GHDHA:2022:1294) (Court of Appeal, The Hague) (19 July 2022).

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