FOREIGN INVESTMENTS: LEGAL ASPECTS OF PROTECTION BY STATES DURING ARMED CONFLICTS

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ABSTRACT

The purpose of this article is to examine the rules and regulations established by international law for the protection of foreign investment during armed conflict. In addition to discussing definitions of the concepts of investment and armed conflict, the article focuses on the status of investment treaties during an occupation regime and the commitment of the occupying power to protect foreign investment. In this context, and along with the analysis of case law, the example of Crimea will be discussed. The Article also analyzes the legal standards that are part of almost all the investment treaties and that create significant guarantees during armed conflicts. Moreover, since the goal of investors is to obtain financial benefits, the article analyzes the issue of compensation for damages as a result of armed conflict. Finally, the Article discusses the circumstances precluding the obligation of the state to protect the investment and state's responsibility for damage caused by armed conflicts.

Keywords: Investment law; Foreign direct investment; Bilateral Investment Treaty; Armed conflict; Occupation; War Clauses; Standards of investment protection

INTRODUCTION

In the armed conflicts that currently exist in various parts of the world, international rules still play an important role. Even though existing international law encompasses a wide pattern of norms and regulations on situations of armed conflict, a factual review of conflicts in the recent past in Libya, Syria and Ukraine has revealed a number of additional issues of importance to be regulated within the framework of international law.

International investment law has developed in leaps and bounds during recent decades. Many foreign investments nowadays benefit from the existence of standards of protection, guaranteed by thousands of investment protection treaties, that will be discussed in the Article. Despite the establishment of guarantees for investor protection, one of the most serious threats to a foreign investor is the emergence of violence in the host state. This not only leads to instability in the national economy and legal order of the host state, but also frequently results in requisition, physical damage, or destruction of assets representing the investment. One of the more intricate situations for foreign investment occurs when the part of the host state′s territory, where the investment is situated, is forcibly taken over by another state. For instance, the situation in Crimea (Ukraine) in recent years has triggered lively discussions among experts about what is the level of protection of foreign investments in occupied territories.

Ensuring a stable legal and economic environment for investment protection is primarily in the interest of the foreign investors whose assets are at stake. On a general level, it is also

of an interest for the potential investors who are considering options of where to invest. Last, but not least, the author of this article is of the firm opinion that the protection of foreign investments is clearly in the interest of the state, has the potential of attracting new foreign investments, contributes to maintaining the economic and social stability of the host country, and helps to strengthen the process of post-conflict recovery.

1. WHAT IS AN INVESTMENT?

A definition of the concept of investment will help us to examine the issues in the Article in a more appropriate and informed manner. Therefore, this section will be devoted to the definition of investment.

It should be noted that the term "investment" does not have a single legal definition. According to a study by Juliard and Carreau, published by the Organization for Economic Co-operation and Development, the absence of a common legal definition is due to the fact that the meaning of the term "investment" varies according to the object and purpose of the various investment instruments which contain it.[1]

Traditionally, foreign investments have been categorised as either direct or portfolio investments. During the nineteenth and the early years of the twentieth century, the predominant form of foreign investment was portfolio investment, mainly in the form of bonds issued by governments of developing countries and floated in the financial markets.[2]

Most of the multilateral and bilateral investment treaties and trade agreements, in which provisions related to investment can be found, contain a fairly broad definition of investment. These provisions usually apply to "any form of asset", followed by a list, albeit incomplete, of these "assets". Most of the definitions cover both direct and portfolio investments.

Portfolio investment is normally represented by a movement of money for the purpose of buying shares in a company formed or functioning in another country. It could also include other security instruments through which capital is raised for ventures. The distinguishing element is that, in portfolio investment, there is a separation between, on the one hand, management and control of the company and, on the other, the share of ownership in it.[3]

This article will focus on foreign direct investment. It, therefore, will be sufficient to consider the definition of the concept of investment in bilateral investment agreements and international case law.

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[1] OECD, "Definition of Investor and Investment in International Investment Agreements", International Investment Law: Understanding Concepts and Tracking Innovations, (2008): 46, https://www.oecd.org/daf/inv/internationalinvestmentagreements/40471468.pdf [accessed 07.05.2020].

[2] Ibid., p. 48.

[3] Muthucumaraswamy Sornarajah, The International Law on Foreign Investment, 2017: Cambridge University Press: 80.

1.1 The definition of investment according to the ICSID[4]

It is important to analyze how the international investment dispute resolution system defines investments. The World Bank's International Center for the Settlement of Investment Disputes (ICSID), founded in 1966, after half a century is synonym for the international investment law field.[5] And the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) is one of the main instruments for resolving investment disputes in the international legal context. Article 25 of the Convention refers to the subject-metter jurisdiction of the Center, however, neither this article nor any other provision of the Convention provides us with the definition of investment. According to the first part of Article 25:

"The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally."

The reference to the term "investment" in the jurisdictional section of the Convention puts the notion of investment into a central place since the Convention itself does not define what constitutes investment, or what the indicators of investment activities are.[6] The result of the definitional tussle regarding the notion of investment were subjective and objective approaches. The "subjective approach" has been adopted by ICSID tribunals that seek to merge the consent of the parties with the jurisdictional requirement of ICSID. In other words, the jurisdictional requirement regarding the notion of investment is deemed satisfied when parties that are consenting to the ICSID arbitration, have conveyed their meaning of investment.[7] The position of these tribunals may not be far from the position expressed by Aron Broches. According to Broches, "*the requirement that the dispute must have arisen out of an investment may be merged into the requirement of consent to jurisdiction*".[8] The "objective approach", on the other hand, denotes the existence of an independent ICSID notion of investment, in accordance with the object and purpose of the ICSID Convention.

The ICSID tribunal established the criteria regarding investment for jurisdictional

[4] ICSID -International Centre for Settlement of Investment Disputes, Convention on the Settlement of Investment Disputes between States and Nationals of Other States, April, 2006.

[5] Irina Aghapishvili, "Evolution of International Legal Regulation of Foreign Investment in Developing Countries: The Importance of ICSID Mechanisms and BIT", Levan Alexidze Journal of International Law, 2020: 80, http://laf.ge/journals/index.php/test/issue/view/2 [accessed 12.06.2020].

[6] Nasiruddeen Muhammad, "Notion of investment under the ICSID Arbitration: A jurisdictional dilemma between subjective and objective approaches ", Dubai Business School, 1st International Conference on Advances in Business, Management and Law (2017): 127.

[7] Ibid, p. 128.

[8] Aron Broches, Selected Essays: World Bank, ICSID, and Other Subjects of Public and Private International Law, (Martinus Nijhoff Publishers, 1995):168.

purposes, for the first time, in the "Salini case", as follows:[9] purpose, duration, and risk, as well as the existence of the contribution. To explain in more detail: for the existence of investment, it is necessary for the investor to invest money or assets in another state, which will benefit the host state's economic development. The activities carried out by the investor must be for a certain period (it should be noted that the exact duration is not specified) and should contain an element of risk. After the formation of the "Salini test", a practice developed dynamically: In *Joy Mining Machinery v. The Arab Republic of Egypt*[10], the tribunal applied the "Salini test". In *Saba Fakes v. The Republic of Turkey*[11], the ICSID tribunal rejected consideration of the fourth element applied in the "Salini test", namely the determination that the investment existed in reality. In this regard, the *Quiborax v. Bolivia* case is of interest,[12] because the element of "existence" was not considered either. The tribunal pointed out that ICSID's requirement for investment to contribute to the economic development of the host state was the result and not necessarily the precondition for the investment's actual existence.[13] In *Mitchell v. Congo* it was decided that it was not necessary that the actions taken to contribute to the economic development of the host state be successful nor to determine the extent of the result of such contribution, which was not always possible.[14]

In *Phoenix Action Ltd v. the Czech Republic*[15], two elements were added to the "Salini test", namely nessesity of legal and bona fide investment - an approach that was not developed any further in other decisions. The two elements were not considered to be part of determining the existence or non-existence of the investment, more precisely, they are not necessary to establish jurisdiction ratione materiae, but importance in a substantive review of the case.

All the cases considered above shed light on how the practice of international tribunals can vary on the elements of investment.

1.2 The definition of investments in bilateral investment treaties

Bilateral Investment Agreements (hereinafter referred to as BIT) are concluded between two states and protect the investment of a national of one state in the territory of the other Contracting Party.[16]

When defining investment in those bilateral investment treaties, four main characteristics

[9] Salini Costruttori SpA v. Morocco, ICSID Case No. ARB/00/4.
[10] Joy Mining Machinery Limited v. Arab Republic of Egypt, ICSID Case No. ARB/03/11.
[11] Saba Fakes v. Republic of Turkey, ICSID Case No. ARB/07/20.
[12] Quiborax S.A., Non Metallic Minerals S.A.and Allan Fosk Kaplún v. Plurinational State of Bolivia, ICSID Case No. ARB/06/2.
[13] Ibid, para 221.
[14] Mr. Patrick Mitchell v. Democratic Republic of the Congo, ICSID Case No. ARB/99/7.
[15] Phoenix Action, Ltd. v. The Czech Republic, ICSID Case No. ARB/06/5.
[16] Marie-France Houde, Katia Yannaca Small, "Relationships between International Investment Agreements", OECD Working Papers on International Investment, 2004/01, OECD Publishing, accessed 07.05.2020 http://dx.doi.org/10.1787/171461325566.

stand out: Form of investment, Area of economic activity, Timing of the investment, and the investor's Relationship with the Contracting State.[17]

In the "*Belgium-Luxembourg BIT*", investment is defined as any type of asset, a direct or indirect monetary contribution that is invested or reinvested in any sector of economic activity.[18] The definition of an investment in the "Japan-Korea BIT" is very specific: it includes, in particular, enterprises, stocks, funds, loans, intellectual property.[19]

The "*Georgia-Turkey BIT*" also contains a specific but incomplete list of investment areas. Its article 2 states that:

"The term 'investment' should include all types of assets, including:

i. Shares, bonds and other forms of participation in companies;

ii. Reinvested income, cash demand, or any other right to legal action that has financial value associated with the investment;

iii. Movable and immovable property, as well as all kinds of rights, such as mortgage, pledge, seizure and other similar rights;

iv. Copyright, industrial and intellectual property rights, such as patents, licenses, industrial design, technical processes, as well as trademarks, "Goodwill", "know-how", and other rights;

v. Business concessions of the Georgia-Turkey Bilateral Investment Agreement, transferred under the legislation or contract, which include, as defined below, concessions for the search, cultivation, extraction and exploitation of natural resources".[20]

The "*BIT between Mexico and Greece*", in addition to an incomplete list of investment areas, contains a negative definition of the investment concept, namely that: "*...the investment does not include the obligation to pay or give a loan to the Contracting State or to its enterprise*".[21]

In conclusion, it would have been desirable to arrive at a common definition of investments in bilateral investment treaties, so that the ensuing economic activities would benefit from the protection standards guaranteed by BITs. In practice, however, the vague term has never been troublesome and in every concrete case, parties negotiate in the bilateral investment treaty the definition of the investment. Accordingly, this approach is known as the two-tiered approach.[22]

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[17] Jeswald Salacuse, NP Sullivan, Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and their Grand Bargain", Harv. Int'l L.J. (2005): 7, DOI:10.1093/acprof:oso/9780195388534.003.0005 [accesed 07.05.2020].

[18] Belgium-Luxembourg Model BIT, Article 1.2 (2002).

[19] Japan-Korea BIT, Article 1.2 (2003).

[20] Georgia - Turkey BIT, Article 2(1992), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1325/download [accessed 09.05.2020].

[21] Mexico-Greece BIT, Article 1 (2000), https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/1808/greece---mexico-bit-2000-

[22] Irina Aghapishvili, "Evolution of International Legal Regulation of Foreign Investment in Developing Countries: The Importance of ICSID Mechanisms and BIT", Levan Alexidze Journal of International Law, 2020: 90.

1.3 The definition of armed conflict and its impact on international investment treaties

After analyzing the practice that has developed around the definition of foreign investment, it is important to focus on the definition of armed conflict.

It should be noted at the outset that the management of foreign investment in various types of armed conflict, depending on the nature of the conflict itself, may be regulated differently. Therefore, for the purposes of this Article, it is important to distinguish between international and non-international armed conflicts. International humanitarian law – a part of the system of international law[23] that regulates armed conflict - distinguishes between two types of armed conflict: international and non-international armed conflict. International armed conflict implies the confrontation of two or more states.[24] Non-international armed conflict can be described as an armed conflict between the armed forces, on the one hand, and non-governmental armed groups, on the other, or between each of such groups.[25] Non-international armed conflicts are regulated by two different regimes of humanitarian law: Common Article 3 of the Geneva Conventions of 1949 and the Second Additional Protocol to the said Conventions. If Article 3 applies to all types of non-international armed conflict, the implementation of the Second Additional Protocol requires specific factual preconditions to be satisfied.[26]

The question of investment protection in armed conflicts within international law is a correlation of rules provided in international humanitarian law and in international investment treaties. The problem is illustrated by several norms of international humanitarian law that allow a State, either expressly or by implication, to seize private property in certain situations. Illustrative in this respect is Article 53 of the Hague Regulations[27], which states the exceptions to the general prohibition of confiscation of private property.[28] Article 38 of the Fourth Geneva Convention refers to another provision on investment protection by implication[29]. In addition, a special rule exists for the

[23] For more details, see: Levan Aleksidze, Modern International Law (updated and supplemented edition), edited by Ketevan Khutsishvili, Professor of International Law (Tbilisi, World of Lawyers, 2014): 2.

[24] According to the Common Article 2 to the 1949 Geneva Conventions, war or any other armed conflict may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

[25] International Committee of the Red Cross (ICRC) Opinion Paper „How is the Term "Armed Conflict" Defined", March 2008, https://www.icrc.org/en/doc/assets/files/other/opinion-paper-armed-conflict.pdf [accessed 09.06.2020].

[26] According to the Article 1 of Protocol II of the 1949 Geneva Conventions, this protocol shall apply to armed conflicts "... which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol .Article 3 of the Convention does not require such preconditions.

[27] International Conferences (The Hague), Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, 18 October 1907, https://www.refworld.org/docid/4374cae64.html [accessed 07.05.2020].

[28] International Conferences (The Hague), Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, 18 October 1907, Article 53 https://www.refworld.org/docid/4374cae64.html [accessed 07.05.2020].

[29] Ibid, Article 38.

confiscation of property of the belligerent party, which contradicts the non-discrimination principle in the international law on foreign investments.[30]

Consequently, the question arises: which corpus of norms can be considered as *lex specialis* in the situation of armed conflict - humanitarian law or investment law?

To consider the issue, some basic aspects of *lex specialis* in international law have to be examined. Legal literature generally accepts *lex specialis* as a widely accepted maxim of legal interpretation and technique for the resolution of normative conflicts; it is construed to resolve a collision of norms that are defined as general norms and special norms. A rule may be general or special depending on its subject-matter or the number of actors whose behavior is regulated by it.[31]

However, no rule can be general or special "in abstract"; it must be based on a concrete case of collision.[32]

Tony Cole purports that by entering into investment treaties, States significantly limit the freedoms that public international law allows them during an armed conflict.[33] Christoph Schreuer appears to support this argument in various legal papers. This position is obviously correct when an investment treaty encompasses a clause that directly relates to the situation of armed conflict.[34] Otherwise, it must be assumed that provisions of international humanitarian law prevail over investment standards in BITs.

The 2010 Draft Articles on Effects of Armed Conflict on Treaties of the International Law Commission confirms the position that investment treaties, unless they include express provisions on the protection of investments, would not take precedence over international humanitarian law.[35] According to Article 3 of that document, the outbreak of an armed conflict does not *ipso facto* terminate or suspend the operation of treaties. An armed conflict provides a State with the right to terminate, or withdraw from, or suspend a BIT in a formal procedure of notification, but it cannot affect the investment protection

[30] Viacheslav Liubashenko, "Treatment of Foreign Investments during Armed Conflicts: The Regimes", Journal of Conflict & Security Law Oxford University Press 2018 :148, https://doi.org/10.1093/jcsl/kry031 [accessed 12.07.2020] A detailed discussion of the general principle of prohibition of discrimination in investment law goes beyond the scope of the article. Detailed informations see.: Andrew D.Mitchell, David Heaton&Caroline Henckels, "Non-discrimantion and the role of regulatory purpose in International Trade and Investment Law", 2016, https://www.researchgate.net/publication/281556324_Non-Discrimination_and_the_Role_of_Regulatory_Purpose_in_International_Trade_and_Investment_Law [accessed 09.06.2020].

[31] Ibid.

[32] E.g., there may be a conflict between the provisions of international humanitarian law on the one hand, which allow the state to confiscate private property, and, on the other hand, the norms of international investment law, which prohibit or restrict expropriation.

[33] Tony Cole, The Structure of Investment Arbitration, (Routledge, 2013): 173.

[34] Christoph H. Schreuer, The protection of investments in armed conflicts, Cambridge University Press, Cambridge (2012).

[35] International Law Commission, Draft articles on the effects of armed conflicts on treaties, New York, 9 December 2011.

regime laid down in general international law. Therefore, investment protection remains in force even after the outbreak of conflicts.

A problematic issue arises in relation to wars against terrorism. Generally, the right of a State to confiscate property derives from an international treaty or custom. With regard to wars against terrorism, UN Security Council Resolution 1373 of 2001, adopted only a few days after the terrorist attacks in the USA on 11 September 2001[36], authorized States to freeze and therefore confiscate private property without due process and observance of international human rights standards.[37] In that case, public authorities were vested with large powers to confiscate the property of foreign investors if defined as sponsors of terrorism.[38]

Generally, international humanitarian law, not the international law on foreign investments, nor legal provisions within a UN Security Council resolution, serves as a basis for a legal analysis of the treatment of foreign investors by States during an armed conflict.

According to Article 4 of the 2011 Draft Articles on Effects of Armed Conflict on Treaties, however, "*Where a treaty itself contains provisions on its operation in situations of armed conflict, those provisions shall apply*".[39]

When the investor cannot rely on the protection provided for in the agreement between the state of his nationality and the host state, the customary rules of international humanitarian law remain the only means of the protection of property. These rules oblige all parties to the conflict, both international and non-international, not to destroy or seize the property of the owner without offering compensation and without military necessity.[40]

As the discussion in this chapter shows, before discussing the legal regulation of foreign investment in armed conflict, it is necessary to determine whether there is an armed conflict or not, and if there is an armed conflict, whether it is an international or non-international conflict. The correlation between the norms of humanitarian law and investment law is important - general international law recognizes the priority of international humanitarian law over international investment law. "*There is no evidence or practice whatsoever to justify the position that international investment agreements such as BITs, the preambles to which state that their goal is limited to promoting investment or*

[36] On 11.09.2001, 19 men trained by al-Qaeda carried out a coordinated terrorist attack on the United States that had been planned for years. The attackers simultaneously hijacked four large passenger aircraft with the intention of crashing them into major landmarks in the United States, inflicting as much death and destruction as possible. Three of the planes struck their targets; the fourth crashed into a field in Pennsylvania. In a single day, these deliberate acts of mass murder killed nearly 3,000 human beings from 57 countries.

[37] UNSC, Resolution 1373 (2001) Adopted by the Security Council at its 4385th meeting, (2001).

[38] See, e.g.: Kadi and Al Barakaat International Foundation v Council and Commission (2008) C-402/05, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:62005CJ0402 [accessed 09.06.2020].

[39] International Law Commission, Draft articles on the effects of armed conflicts on treaties, New York, 9 December 2011, Article 4.

[40] Rudolf Dolzer and Christoph Schreuer, Principles of International Investment Law, (Oxford 2008): 166.

fostering economic ties, can implicitly displace general international law."[41] Consequently, in the case of a contradiction, the rule of international humanitarian law prevails over the provisions of a Bilateral Investment Treaty (BIT) unless the treaty is construed in such a way that it embodies in its text a special clause regarding the armed conflict.

2. THE STATUS OF INTERNATIONAL INVESTMENT TREATIES IN OCCUPIED TERRITORIES

Although international customary law prohibits states from interfering in each other's internal affairs,[42] in the 21st-century cases prohibited by the international law of military occupation still occur. When such a violation of the sovereignty of the state occurs, a number of issues arise between the host and occupying state, including who is responsible for the legal regulation of foreign investment and what is the status of investment agreements in the occupied territories. Before discussing the issue of foreign investment protection during the occupation regime, it has to be clarified when the occupation exists. "*Occupation is a regime where a certain part of the territory is under the effective control of the opposing army*".[43] International public law, in particular the two branches of this system of law - international humanitarian law and international human rights law - regulate the obligations of the military occupier and the protection of civilians in the occupied territories. However, international law does not regulate business activities and their protection in the occupied territories.[44] IHL treaties do not allow victims of IHL violations to seek redress for their economic losses. Nowadays, civilians may file complaints before regional human rights courts or before the International Court of Justice (ICJ). But these options have their limitations and may not always be available to all the victims of IHL violations.[45]

Foreign investors may suffer losses when the territory they invested in, is under military occupation. The occupation authorities may either seize or destroy foreign-owned assets in the course of military operations or as part of an annexation plan. They may also enact regulations affecting the value of foreign investments.[46]

With the proliferation of Bilateral Investment Treaties (BITs) since the 1990s, civilians may now turn to investment-treaty arbitration to challenge the acts of the occupant and seek compensation for their losses. In fact, several Ukrainian companies invoked the *Russia-Ukraine BIT of 1998* to bring investment claims against Russia for the alleged seizure of their assets in occupied Crimea. Russia refused to participate in these proceedings because

[41] Gleider Hernandez, "The Interaction between Investment Law and the Law of Armed Conflict in the Interpretation of Full Protection and Security Clauses", Cambridge University Press, 2013: 29.

[42] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, ICJ Reports 1986, para. 202.

[43] Saba Pipia, Dissertation on "The scope of authority of the occupying force in the administration of the occupied territories" : 134 http://press.tsu.ge/data/image_db_innova/disertaciebi_samartali/saba_fifia.pdf [accessed 20.06.2020].

[44] Ibid.

[45] Ofilio J. Mayorga, "Occupants, beware of BITs: applicability of investment treaties to occupied territories", Forthcoming, Palestine Yearbook of International Law, Volume XIX (2017): 2, accessed 28.05.2019 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2890281.

[46] Ibid.

it considers that the claimants' investments fall outside the scope of protection of the "*Russia-Ukraine BIT*".[47]

In 2014, after the annexation of Crimea, the Russian Federation made a number of economic changes in the occupied territories of Ukraine. The changes particularly affected the energy sector. The Ukrainian company *PJSC Ukrnafta*[48] claimed that measures introduced by the Russian Federation were directed at expropriating petrol stations on the territory of Crimea. This violated the Ukraine-Russia Bilateral Investment Agreement. On June 3, 2015, PJSC Ukrnafta initiated arbitration proceedings against the Russian Federation under UNCITRAL[49], in accordance with Ukrainian-Russian BIT[50] and demanded $ 50,314,336 in compensation.[51] The Russian Federation contested the tribunal's jurisdiction and refused to participate in the process as a Party.

On June 26, 2017, the International Arbitration Tribunal recognized its jurisdiction over the dispute and issued the following decision: The territorial element for the use of the "*Ukrainian-Russian BIT*" was satisfactory, since the Russian Federation exercised de facto control over Crimea, and under Article 4 (1) of the bilateral agreement, Crimea came within the definition of "territory". Moreover, in determining the fairness of the annexation of Crimea, the use a BIT was not necessary. The tribunal also ruled that PJSC Ukrnafta was an investor under Article 1.2(b) of the Ukraine-Russia Bilateral Investment Treaty. In view of the above, the Arbitration Tribunal ruled that it had jurisdiction over the dispute under Article 9 of the Ukraine-Russia BIT.

On August 14, 2017, the Russian Federation appealed the decision of the Arbitration Tribunal in the Swedish Supreme Court on three main grounds: The Russian Federation claimed that in the "Ukraine-Russia BIT", "territory" meant only the territories within the Contracting States at the time of the signing of the agreement; that PJSC Ukrnafta's facilities were not investments; and PJSC's Ukrnafta was not the investor.

The Supreme Court of Sweden rejected the arguments of the Russian Federation and confirmed the jurisdiction of the Arbitration Tribunal on the following legal grounds: According to Article 29 of the Vienna Convention on the Law of Treaties, *unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory*".[52] In this case, Crimea had become part of the territory of the Russian Federation as a result of the occupation, since Russia had been exercising de facto control over it since March 21, 2014.

The Supreme Court ruled that the definition of "investment" was very broad, in view of the fact that the Ukraine-Russia bilateral investment treaty contained a long list of assets that

[47] Ibid, p. 3.
[48] Ukrnafta – Ukrainian oil and natural gas extracting company.
[49] UNCITRAL - The United Nations Commission on International Trade Law.
[50] Russian Federation - Ukraine BIT (1998), art 9.
[51] PJSC Ukrnafta v. The Russian Federation, UNCITRAL, PCA Case No. 2015: 34, https://www.italaw.com/cases/4032 [accessed 03.07.2019].
[52] United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, Article 29, https://www.refworld.org/docid/3ae6b3a10.html [accessed 16.06.2019].

could be qualified as investment.[53] The Court also held that PJSC was an investor under the BIT. Finally, the Swedish Supreme Court ruled that the Arbitration Court had jurisdiction over the case.[54]

The dispute between PJSC Ukrnafta and the Russian Federation demonstrates the necessity to accurately define the provisions of investment agreements between states, including the definition of the terms and the scope of the agreement. Moreover, it highlights the challenges and difficulties that accompany the issue of the legal protection of foreign investment during an occupation regime.

2.1. The status of treaties in occupied territories

When discussing the protection of foreign investments in occupied territories, it is important to determine the status of agreements concluded before the establishment of this regime.

Throughout the second half of the 19th century and until a few decades after the end of World War II, it was assumed that treaties of the occupied state did not bind the occupant, especially in matters related to trade, commerce, and the treatment of aliens. The presumption against the continuity of treaties in occupied territories was a corollary of the widely-held view at the time that "treaties between warring states were automatically abrogated with the outbreak of war".[55] According to the commentaries of the International Committee of the Red Cross (ICRC) to the Fourth Geneva Convention, the Occupying Power "*is not bound by the treaties concerning the legal status of aliens which may exist*".[56] By the middle of the 20th century, international law started to move away from the presumption that the outbreak of armed conflict ipso facto terminated or suspended existing treaties.[57]

According to Article 43 of the Hague Regulations, "*the authority of the legitimate power having actually passed into the hands of the occupant, the latter shall take all steps in his power to re-establish and insure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country*". [58] The phrase „*the laws in*

[53] Prof. Dr. Nathalie Voser (Partner), Schellenberg Wittmer Ltd, "Swiss Supreme Court dismisses challenges to interim awards on jurisdiction rendered in investor-state arbitrations", 28-Nov-2018, Switzerland, https://www.swlegal.ch/files/media/filer_public/ba/e1/bae13469-2c3f-4293-80f8-a1f5ae8a9ad7/181129_nathalie_voser_swiss_supreme_court_dismisses_challenges_to_interim_awards_on_jurisdiction.pdf [accessed 16.06.2019].

[54] PJSC Ukrnafta v. The Russian Federation, UNCITRAL, PCA Case No. 2015-34, https://www.italaw.com/cases/4032 [accessed 28.06.2020].

[55] Arnold Pronto, The Effect of War on Law – What Happens to Their Treaties when States Go to War? (Cambridge J. INT'L & COMP. 2013): 227.

[56] Commentary on the Geneva Conventions of 12 August 1949, IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War (J.S. Pictet et al., eds., ICRC 1958).

[57] Arnold Pronto, The Effect of War on Law – What Happens to Their Treaties when States Go to War? (Cambridge J. INT'L & COMP. 2013): 230.

[58] International Conferences (The Hague), Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, 18 October 1907, Article 43, https://www.refworld.org/docid/4374cae64.html [accessed 16.06.2019].

force in the country " is not limited to "laws", in the narrow sense of the term; this term has to be understood broadly in that all the components of the domestic legislative system are included. To the extent that, as a result of the war, the occupied country undergoes both drastic economic and social changes, the occupying power is authorized, and moreover, in some cases even obliged to take legislative or administrative measures to ensure public order and safety.

The International Law Commission's Draft Articles on the Effects of Armed Conflict on Treaties [59] could be cited as a significant departure from the view that the ousted sovereign's treaties do not bind the occupant. Under draft article 3, the existence of an armed conflict does not *ipso facto* terminate or suspend the operation of treaties between States parties to the conflict, nor treaties between a State party to the conflict and a State that is not a party to the treaty. The definition of the term "armed conflict" includes "the occupation of territory which meets with no armed resistance.[60] Thus, a BIT between the occupied State and the State of origin of the investor would *a priori* continue to operate in occupied territories.

Additionally, some BITs contain so-called "war clauses". A "war clause" may require the host State to compensate a foreign investor for losses arising out of the destruction of property by government forces in cases of armed conflict, state of emergency, revolution, insurrection, civil disturbance, or similar events, unless the said destruction was required by the necessity of the situation.[61] The inclusion of a "war clause" in a BIT strongly suggests that the treaty continues to operate during armed conflict (although there is no direct reference to the occupation in this document)[62].

In its *Namibia advisory opinion*, the ICJ held that "physical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States".[63] It follows that the occupant assumes international responsibility for its acts despite not having acquired sovereignty over the occupied territory. Given that the displaced sovereign's obligations are suspended because of the occupation, the breach of a BIT in force in the occupied territory would be attributable to the occupant and not to

[59] International Law Commission, Draft articles on the effects of armed conflicts on treaties, New York, 9 December 2011.

[60] The Fourth Geneva Convention of 1949 regulates the situation of military occupation. However, from a legal point of view, the occupation exists only in international armed conflict.

[61] Ofilio J. Mayorga, Occupants, beware of BITs: applicability of investment treaties to occupied territories, Forthcoming, Palestine Yearbook of International Law, Volume XIX (2017): 14, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2890281 [accessed 21.06.2020].

[62] Naomi Burke, A Change in Perspective: Looking at Occupation Through the Lens of the Law of Treaties: "[i]f the termination and suspension of treaty obligations are considered to operate equally in times of armed conflict and occupation, the additional positive duties of an occupying power [under Article 43 of The Hague Regulations] may be negated".

[63] Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia, International Court of Justice (ICJ), 21 June 1971 https://www.refworld.org/cases,ICJ,4023a2531.html [accessed 18.06.2019].

the de jure sovereign.[64]

In conclusion, the survival of a BIT during occupation is dependent on (i) whether or not an occupant is obligated to comply with the BIT, and (ii) if the other contracting state is willing to acquiesce to the applicability of the BIT.[65] BITs incorporated into the domestic legal system of the occupied State are "laws in force" for the purposes of Article 43 of the Hague Regulations. Thus, the occupant must respect those BITs as a result of its obligation to ensure civil life and public order in the occupied territories.

This also means that the occupant has the right to suspend the application of BITs in force in occupied territories as any other domestic law or regulation. But the occupant may only exercise this power to guarantee the security of its forces and the legitimate military goals of the occupation.[66]

3. "WAR CLAUSES" IN INVESTMENT TREATIES

3.1. Obligation to pay compensation during an armed conflict in accordance with traditional standards of protection

For the purpose of this article, it is important to examine the so-called "war clauses". The latter's aim is to create various guarantees of protection for investors during armed conflicts, in particular regarding non-discrimination, and in so-called "extended war clauses" providing strict standards for restitution and compensation.

Investors have the right to claim damages as the result of armed conflict by way of "war clauses", as well as traditional standards of investment protection against expropriation, of fair and equitable treatment (FET), and of full protection and security (FPS).

Before discussing the definition of "war clauses", it is important to note some of the internationally agreed remedies of compensation for damages caused by internationally recognized wrongful acts. These are Restitution, Compensation and Satisfaction.[67] *Restitution* requires the re-establishment of the situation that had existed before the commission of an internationally wrongful act or the *status quo ante*. If there is no possibility of such recovery, or when it is disproportionate, it is advisable to pay monetary compensation to the victim.[68] *Satisfaction* may be obtained by way of a non-material action such as an apology that usually infers recognition of a breach, although this is less

[64] Ofilio J. Mayorga, Occupants, beware of BITs: applicability of investment treaties to occupied territories, Forthcoming, Palestine Yearbook of International Law, Volume XIX (2017): 15, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2890281 [accessed 28.05.2019].

[65] Philip Reznik, Survival of BITs and investor rights in Crimea- Russia's Trick or Treat(y) with investors, Stockholm, autumn term 2014: 53.

[66] Ofilio J. Mayorga, Occupants, beware of BITs: applicability of investment treaties to occupied territories, Forthcoming, Palestine Yearbook of International Law, Volume XIX (2017): 26, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2890281 [accessed 28.05.2019].

[67] ILC's Draft Articles on Responsibility of States for InternationallyWrongful Acts,A/RES/56/53, Yearbook of the International Law Commission (2001),vol.II (Part Two), Article 33.

[68] Ibid, Articles 36-37.

relevant in the context of investment law.[69]

While the predominant remedy of compensation in international law is restitution, investment tribunals rarely use it. This may be due to the fact that attempts by tribunals in decisions to request the party to restore the original conditions, were, in most cases, unsuccessful.[70] The reason for this may also be that investors are mainly interested in making a financial profit from their investment. Consequently, monetary compensation is more favorable for them.

There is no *lex specialis* regime in international law that defines the issue of compensation for damages caused during an armed conflict. However, it is important to review the relevant case law that has developed in investment law.

One of the key cases, "*AAPL v. Sri Lanka*[71]", is quite informative in this regard. The Hong Kong Company that owned shares in the Sri Lanka shrimp production and Export Company appealed to an arbitration tribunal for the following reasons: In 1987, the Sri Lankan Armed Forces had destroyed a shrimp farm during a military operation against the so-called "Tamil Tigers". The farm was located in an area controlled by the "Tamil Tigers". Consequently, the investor demanded the return of the total value of the destroyed property based on a "war condition clause" included in the bilateral investment treaty between the United Kingdom and Sri Lanka.

The tribunal found that because Sri Lanka had not taken all the necessary measures to prevent the destruction of the farm, it had violated the "full protection and security standard". According to the tribunal, it did not matter whether the destruction of the foreign investor's property was caused by the actions of government armed forces or the terrorists themselves. The tribunal, therefore, ordered Sri Lanka to pay compensation in accordance with the "*full value of the lost investment*" standard.[72]

In the case of "*AMT v. Zaire* "[73], the ICSID tribunal focused on the damage to property and not on the reduction of stock value. Unlike the case discussed in the previous paragraph, the tribunal used the so-called *"standard of real value"* or *"real market value standard"*, although the case did not include complaints related to expropriation. In calculating the amount of compensation, the tribunal ruled that the situation in Zaire had to be taken into account.

Tribunals addressed the issue of compensation in a number of cases concerning the Middle East and North Africa Countries (MENA) in 2010, following the revolutionary wave of

[69] Europe Cement Investment &Trade S.A.v.Republic of Turkey, ICSID Case No. ARB(AF)/07/2,Award (13August 2009), para. 146–8.

[70] Antoine Goetz et consorts v. République du Burundi, ICSID Case No. ARB/95/3, Award Embodying the Parties' Settlement Agreement (10 February 1999): 456,518.

[71] Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka ICSID Case No. ARB/87/3, https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/1/aapl-v-sri-lanka [accessed 09.06.2020].

[72] Asian Agricultural Products Ltd. v. Republic of Sri Lanka, ICSID Case No. ARB/87/3, Final Award (27 June 1990), paras. 50,67.

[73] American Manufacturing & Trading, Inc. v. Republic of Zaire, ICSID Case No. ARB/93/1, Award (21 February 1997), paras. 6.04–6.1.

the *"Arab Spring"*. In the "*Ampal-American v. Egypt case"*, investors complained that a number of armed attacks on gas pipelines operated by a company of American-Ampal Israel Corp. had taken place and that Egypt was responsible for paying compensation for violating the *standards of full protection and security* and on *expropriation*. The ICSID tribunal observed that the "full protection and security standard" should be considered only in the context of armed conflict. However, it unanimously determined that during the thirteen attacks on the gas pipeline the government had failed to respond effectively and thus had failed in fulfilling its obligations. It should have taken the first attack as a warning,

The tribunal held that the damages, including those that were not directly related to the attack on the gas pipeline, would be calculated on the basis of the *"real market value"* of the plaintiff's shares. The tribunal did not comment on any additional damages caused by a breach of the "full protection and security standard".[74]

3.2. War Clauses

Many BITs contain clauses providing for non-discrimination in case of losses due to war, state of emergency, revolution, insurrection, civil disturbance, or similar events. The "war clauses" can be divided into two categories: one clause that is broader with strict standards and called "*extended war clause*"; another one that is limited to the obligation to ensure nondiscrimination. Clauses prohibiting discrimination require that standards of Fair and Equitable Treatment, National Treatment, and Most-Favoured Nation treatment apply to investors when determining compensation for any damage caused by war, insurgency, or other types of armed conflict.[75]

According to article 7 of the "*Libya-Portugal BIT*", each Party shall provide to investors of the other Party, whose investments suffer losses in the territory of the first Party owing to war or armed conflict, revolution, a state of national emergency, disobedience or disturbances or any other event considered as such, treatment that restitutes the conditions for those investments that existed before the damage had occurred, or compensation, or any other settlement that is no less favourable than the one that the Party accords to the investments of its own investors, or of any third State, whichever is more favourable.[76]

Such a provision was invoked by the tribunal in the *"AMT case"* [77] in order to assist it in establishing Zaire's responsibility for acts of looting perpetrated by members of the armed forces. The tribunal applied the "war clause", finding that identifying the author of the damage caused to the investment, was not necessary since the State in either case was deemed responsible by virtue of the clause itself.[78] Thus, the application of the clause was

[74] Ampal-American Israel Corporation and others v. Arab Republic of Egypt, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss (21 February 2017), paras. 283–90.
[75] Christoph H. Schreuer, The ICSID Convention a Commentary, (New Yprk: Cambridge University Press, August 2009): 9.
[76] Libya-Portugal BIT, Article 7.
[77] AMT - American Manufacturing & Trading, Inc.
[78] American Manufacturing & Trading, Inc. v. Republic of Zaire, ICSID Case No. ARB/93/1, para.6.13.

independent of whether the damages were caused by a member of the Zairian armed forces or anyone else.

3.3 Fair and equitable treatment (FET)

Most Bilateral Investment Treaties and other Investment Agreements provide for *Fair and Equitable Treatment* for foreign investments (FET). This concept, which is most often used in investment disputes today, has a long history. The success of lawsuits in international arbitration is largely due to finding a violation of the FET standard. It should be noted that the definition of that standard was fully clarified in 2000 by a tribunal in connection with the cases of 'Metalclad Corporation v. The United Mexican States '[79] *and 'Emilio Agustín Maffezini v. The Kingdom of Spain*'[80].

The North American Free Trade Agreement (NAFTA) provided for the principle of FET in its Article 1105 (1), as follows: *"Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security".*[81]

The FET sets a fairly broad standard, and therefore its meaning in each particular case depends on the actual circumstances. In the case of "*Mondev v. The United States*", the tribunal noted, as follows: "It is absolutely impossible to define the notion of fair treatment and equality. It must be based on the facts of a particular case".[82] Similar reasoning was developed by the tribunal in the "*Waste Management v Mexico case*".[83]

As a result of the study of the case law, several principles that are brought together within the standard of fair and equal treatment can be identified, in particular *transparency, stability, and protection of the legal expectations of the investor.*

Investor expectations and transparency are closely related concepts. The legal expectations of the investor are conditioned by the existing legal framework and the government's statements. The legal framework on which the investor relies usually incorporates the state's national normative acts and treaties; thus, disregarding or changing these guarantees would violate the principle of fair and equitable treatment.[84]

In the "*Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States" case*, the tribunal held that *"fair and equitable treatment requires the parties to treat international investment in a way that does not affect the main expectations of foreign investors."* [85]

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[79] Metalclad Corporation v. The United Mexican States, ICSID Case No. ARB (AF)/97/1.
[80] Emilio Agustín Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7.
[81] NAFTA, The North American Free Trade Agreement: a Guide to Customs Procedures. Washington, DC, 1994.
[82] Mondev International Ltd. v.United States of America, ICSID Case No. ARB (AF)/99/2.
[83] Waste Management, Inc. v. United Mexican States ("Number 2"), ICSID Case No. ARB (AF)/00/3.
[84] Rudolf Dolzer and Christoph Schreuer, Principles of International Investment Law, Oxford 2008, pp. 119-133, seen in: Irina Aghapishvili, (2013), "Protection Standards"' Handout 5, for the course "Investment Law", School of Law, Ilia State University.
[85] Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB (AF)/00/2.

It can be said that fair and equal treatment is the most promising standard of protection for the investor, because in an investment dispute it is much easier to prove a violation of FET than, for example, expropriation.[86]

3.4 National Treatment

The principle of "national treatment" , namely avoiding discrimination based on nationality, underpins many types of international agreements. They all recognize that foreign entities, whether goods, corporations, or people, might be subject to less favourable treatment due to their status as outsiders.

A "national treatment" analysis usually requires identification of the appropriate indicator against which to measure the allegedly less favourable treatment. If the claimant is not *in like circumstances* with the more favourably treated entity, the national treatment claim will fail. If the claimant is in fact *in like circumstances* with the more favourably treated entity, an arbitral tribunal seized with the dispute will determine whether the host State had legitimate, non-nationality-based reasons for the difference in treatment.[87]

The scope of the national treatment obligation varies by treaty. Some treaties accord protection only post-establishment – e.g. only after the investment is permitted to enter the country - while others extend it to the right of pre-establishment as well. Some treaties extend protection only to investments, others protect both investments and investors. *NAFTA Chapter 11*, the *2004 US Model BIT*, and the *2004 Canadian Model FIPA* (Foreign Investment Promotion and Protection Agreement) contain broad pre-entry protections. The *UK Prototype*, on the other hand, provides that a State is only required to permit the investment of capital. If a treaty accords rights post-establishment, its obligation likely extends only to the investment itself, rather than to the investor.[88]

3.5 Most Favoured Nation (MFN)

Since the decision rendered in the "*Emilio Agustín Maffezini v. The Kingdom of Spain*" *case*, the scope and application of "Most Favoured Nation" clauses (MFN) in investment treaty arbitration have become regular topics of academic debate and arbitral case law.[89]

When we speak of an MFN clause, we normally refer to a provision in a treaty under which a State agrees to accord to the other Contracting party treatment that is no less favourable than that which it accords to other or third States. MFN treatment is a particular form of non-discrimination [90]

[86] Rumana Islam, Interplay Between Fair and Equitable Treatment (FET) Standard and other investment protection standards, https://www.researchgate.net/publication/315788269_Interplay_between_Fair_and_Equitable_Treatment_FET_Standard_and_other_Investment_Protection_Standards [accessed 09.06.2020].

[87] Andrea K. Bjorklund, "National Treatment", Standards of Investment Protection, (Oxford Scholarship Online: 12.03.2018): 3.

[88] Ibid, p.4.

[89] Guido Santiago Tawil, "Most Favoured Nation Claluses and Jurisdictional Clauses in Investment Treaty Arbitration", International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer, (Oxford Scholarship Online: Sep-09): 1.

[90] Andreas R. Ziegler, Most-Favoured-Nation (MFN) Treatment, Standards of Investment Protection, (Oxford Scholarship Online: 12.03.2018): 2.

The intention of the *Most-Favoured Nation clauses* is to establish and maintain at all times equality without discrimination between the countries concerned.[91] A similar idea was reaffirmed in the BIT context by the "*Telefónica v Argentina* " tribunal in the following terms: In respect of trade in goods, establishment, services, and investments, the purpose of an MFN clause is to guarantee equal competitive conditions to businessmen of the countries concerned in the contracting States' territories. Specifically, as to foreign investors, "*it appears correct to state that the basic purpose of MFN is to guarantee equality of competitive opportunities for foreign investors in the host state "*.[92]

There is no internationally recognized, unified approach to the interpretation of the MFN principle. It depends on the specific wording of the contract, the broad context, and the purpose of the contract.[93]

4. APPLICATION OF THE "FULL PROTECTION AND SECURITY STANDARD" DURING ARMED CONFLICTS

The inflow of capital into a state is essential for its economic growth and development. This is equally relevant in both peace and wartime. As already mentioned, the outbreak of armed conflict does not automatically lead to the cancellation or termination of investment agreements, which means that the standards set by the agreements remain in force during the war. This further means that in addition to the obligations set out in international humanitarian law, States parties to the conflict shall also obey the existing and usual rules of investment protection.

Compliance with the *Full Protection and Security standard* is one of these obligations. It was created to "protect investors and businesses from illegal activities."[94] In the case of *"Houben v. Burundi"*, the tribunal clarified that respect for the status quo in the state, a priori, would not lead to the neglect of the *full protection and security standard*.[95] The tribunal found that Burundi had breached that standard because it did not use the resources at its disposal properly and thus could not protect a real estate investment by Belgian businessman Huben from illegal residents. [96]

When discussing the use of a *full protection and security standard in armed conflict*, one of the important issues is the interrelationship between the norms of international humanitarian law and the above-mentioned standard. In this regard, the case of *Ampal v Egypt* is noteworthy, where from February 2011 to April 2012 a gas pipeline owned by the Ampal-American Israel Corp. had fallen victim to terrorist attacks thirteen times. The tribunal did not take into account the specific circumstances in Egypt at that time, its limited resources and capabilities, or the particular strength of the terrorists in the Sinai

[91] Case Concerning Rights of Nationals of the United States of America in Morocco (France v United States of America), Judgment, 27 August 1952, ICJ Reports (1952): 176.
[92] Telefónica SA v Argentine Republic, ICSID Case No. ARB/03/20, Decision of the Tribunal on Objections to Jurisdiction, 25 May 2006, para. 98.
[93] Noah D. Rubins," Investment Treaty Arbitration and International Law" - Volume 1, (August, 2008): 9.
[94] Christoph H. Schreuer, The protection of investments in armed conflicts. In Baetens F (ed) Investment Law within International Law: Integrative Perspectives. (Cambridge University Press, Cambridge): 6 .
[95] Joseph Houben v. Republic of Burundi, ICSID Case No. ARB/13/7 (Award), para. 160-64.
[96] Ibid., Para. 164, 170-79.

region, and found that Egypt had violated the *standard of full protection and security* by failing to protect the investment from terrorist attacks..[97]

Differences between the approaches of the tribunals and the views of international lawyers exist as to what the notion of a standard of full protection and security includes, whether it applies exclusively to physical security or guarantees legal protection too.[98] In recent years, also tribunals have developed several different and inconsistent interpretations of this standard. For example, tribunals in cases "*Rumeli v. Kazakhstan*" and "*Saluka v. The Czech Republic*" have developed an approach under which the standard will only apply to physical protection. In the case of "*Rumeli v. Kazakhstan*" the tribunal said, "*Arbitration agrees with the defendant that the full protection and security standard obliges the state to provide some level of protection to protect foreign investment from physical harm.*".[99] Similarly, in the case of "*Saluka Investments*", the tribunal ruled that: "*The full protection and security standard is used when foreign investment is harmed by civil strife, physical violence... The full protection and safety standard does not protect the investment from any harm, but its purpose is to protect it from physical harm and the use of force.*"[100] The tribunal in the case of "*BG Group v. Argentina*" also established that a full protection and safety standard is limited to protecting against physical violence and harm.[101]

A different approach was developed by the tribunal in the case of "*Azurix v. Argentina*", stating that "a breach of the standard of full protection and security may occur even without physical damage".[102] In the case of "*Siemens v. The Argentina*" the tribunal stated that as far as investment in bilateral investment treaties includes not only tangible but also intangible assets, the full protection, and security standard goes beyond physical protection.[103] In 2009, in the case of "*Siag v. Egypt*", the tribunal ruled that Egypt violated the full standard of protection and security because it was amiss in enforcing the judgment of the Egyptian court. Thus, the tribunal determined that full protection and security obligations include ensuring appropriate legal protection for investors.[104]

It is also important to consider the issue of liability of the State for damages caused by a third party. The Tribunal had no doubt that Egypt violated its obligation to accord full protection and security. It found that, despite the fact that government officials did not participate in the forcible seizure of assets, the police and other authorities took no effective measures to prevent or redress the seizure. Nor did the police and the competent ministry take any immediate action to restore the hotels to the investor, and that no substantial sanctions had been imposed on the perpetrators. [105] A similar approach was

[97] Ampal-American Israel Corp. and others v. Arab Republic of Egypt, ICSID Case No. ARB/12/11.
[98] Kenneth J. Vandevelde, Bilateral Investment Treaties: History, Policy, and Interpretation, (2010): 244.
[99] Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan, ICSID Case No. ARB/05/16 (2008) , para 668.
[100] Saluka Investments B.V. v. The Czech Republic, UNCITRAL (2006), para. 483,484.
[101] BG Group Plc. v. The Republic of Argentina, UNCITRAL, (2007), para. 324.
[102] Azurix Corp. v. The Argentine Republic, ICSID Case No. ARB/01/12 (2006), para. 406.
[103] Siemens A.G. v. The Argentine Republic, ICSID Case No. ARB/02/8 (2007) , para.286, 308.
[104] Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt, ICSID Case No. ARB/05/15 (2009) , para. 448.
[105] Wena Hotels Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/98/4 (2002), para. 84.

later developed in the case of *Eastern Sugar v. the Czech Republic*, when the tribunal stated that the standard also protects investors from third-party illegal activities.[106]

The analysis of the rulings in the abovementioned cases shows that *the full protection and security standard* obliges the States involved in the conflict to protect foreign investments from illegal attacks, whether these attacks are carried out by the state or a third party; and that, although there are different approaches, the standard should be applied to physical or legal protection. According to the author, the inclusion of the *full protection and security standard* in investment agreements is an important guarantee particularly for the investor, as demonstrated in the examples referred to above.

5. CIRCUMSTANCES PRECLUDING THE WRONGFULNESS OF THE HOST STATE FOR THE DAMAGE CAUSED TO THE INVESTOR DURING ARMED CONFLICT

5.1. *Force majeure*

Force majeure [107] is recognised by general international law in relation to the non-performance of international obligations and is also recognised as a defence in relation to contractual non-performance in many legal systems. According to Article 23(1) of the ASR[108], *force majeure* is understood as the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform an obligation. Under Article 23(2), the exception of *force majeure* does not apply if the situation is due, either alone or in combination with other factors, to the State invoking it or if the State has assumed the risk of that situation.

Force majeure is often invoked as a ground for precluding the wrongfulness of an act of a State and involves a situation where the State in question is in effect compelled to act in a manner not in conformity with the requirements of an international obligation incumbent upon it.[109] However, a circumstance rendering said performance more difficult or burdensome does not qualify as a case of force majeure, which requests absolute and material impossibility.[110]

If the circumstances are such that *force majeure* precludes contractual obligations, then the same circumstances must absolve State responsibility under the investment treaty as well.[111]

What is important with regard to our present examination is that material impossibility

[106] Eastern Sugar B.V.(Netherlands) v. The Czech Republic, Partial Award (2007), para. 203.
[107] Force majeure - Force Majeure clause is a provision in a contract that excuses a party from not performing its contractual obligations that becomes impossible or impracticable, due to an event or effect that the parties could not have anticipated or controlled.
[108] ASR - Articles on the Responsibility of States for Internationally Wrongful Acts , adopted by A/RES/56/83 (2001).
[109] Ibid, Article 23.
[110] Rainbow Warrior (New Zealand v. France), (1990), 20 RIAA 217: 253.
[111] Muthucumaraswamy Sornarajah, The International Law on Foreign Investment, 2017, Cambridge University Press: 65.

of performance giving rise to force majeure may be due, apart from natural or physical events, even to human intervention such as the loss of control of the State's territory as a result of insurrection or devastation of an area by military operations carried out by a third State.[112]

The State is not, *prima facie*, responsible for the fact of an uprising, revolt, civil war or international war, or for the fact that these events provoke damages within its territory.[113] Rebels are not agents of the government and a natural responsibility does not exist.[114] This was also confirmed by the jurisprudence of the *Iran-US Claims* tribunal.[115]

In the case of "*Autopista v. Venezuela*" [116], the investor was authorized to construct and maintain one of the country's main highway systems on the basis of a concession. Due to the ongoing riots and civil strife in Venezuela, the investor was unable to undertake the above activities. Venezuela argued that it was unable to act accordingly due to riots, which were an event of force majeure and therefore provided an excuse for Venezuela not to comply with its contractual obligation. The tribunal assumed that the following three conditions had to be met for a force majeure excuse to hold: firstly, the force majeure event made performance impossible to achieve, secondly, the force majeure event was unforeseeable, and thirdly, the force majeure event was not attributable to the winning party. The tribunal decided that Venezuela failed to show convincingly that the event was unforeseeable and thus could not be excused of its contractual obligation because of force majeure. [117]

In any case, the cessation of profit, the diminution of business and economic perturbations are corollaries of war extending both to nationals and foreigners and injuring both belligerents and neutrals. [118] Therefore, they do not entail an obligation to indemnity. The taking or destroying of property on the battbattlefield in the invaded territory, is often excused in pleading extreme emergency.[119]'

5.2. Necessity

Article 25 of the ASR recognises "necessity" as a plea for a circumstance precluding wrongfulness. This term denotes those exceptional circumstances where the only way a State can safeguard an essential interest threatened by grave and imminent peril is, for the time being, not to perform other international obligations of lesser weight or urgency.[120] It

[112] Articles on the Responsibility of States for Internationally Wrongful Acts (ASR), adopted by A/RES/56/83 (2001), Article 23; Bishop, Crawford & Reisman, Foreign Investment Disputes, Kluwer Law International (July 8, 2005): 70.
[113] Morocco Claims case, 66: 642.
[114] Sambiaggio case, 119: 513.
[115] Iran-US Claims Tribunal: Sylvania Technical Systems, Inc. v. Iran, 1985, 8 Iran-US CTR 298, p.310; Starrett Housing Corp. v. Iran, 1983, 16 Iran-US CLT 112, para.257; Mobil Oil case, para.114.
[116] Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/00/5.
[117] Ibid, para. 119.
[118] Lisboa Case (Brazil v. Bolivia), as cited in: J.H. Ralston, The Law and Procedure of International Tribunals, Stanford University Press 1926: 244.
[119] PCA: Norwegian Shipowners' Claims (Norway v. USA), (1922), 1 RIAA 307, para. 337.
[120] Article 25 ASR; Bishop, Bishop, Crawford & Reisman, Foreign Investment Disputes, Kluwer Law International (July 8, 2005): 178.

is distinct from *force majeure*, in that in case of necessity, a State is said deliberately to take measures to deal with a respective situation.[121] Article 25 of the ASR restricts necessity only to cases in which the State's conduct is the only way for the State to safeguard an essential interest and so long as it does not impair another essential interest.[122]

However, the invocation of necessity by a State may be modified by the rule establishing the obligation. This is relevant here because military necessity invoked during hostilities where international humanitarian law applies, is somewhat different from the general rule of necessity in peacetime.

International Humanitarian Law is a law that was created to apply in armed conflicts that are by definition emergency situations."'Grave and imminent peril" which epitomises necessity in times of peace is an ordinary occurrence during war.[123] According to International Humanitarean Law only conduct conducive to damage or suffering which is not necessary to obtain a military advantage is prohibited.[124]

The destruction or seizure of property within the host state is prohibited unless required by imperative military necessity. Therefore, in order for the host state to avoid responsibility, it has to prove that the property, destroyed or seized, served an imperative military necessity.[125]

Furthermore, the host state has to prove that according to the proportionality principle, the attack destroying the property of the investor or the seizure thereof was not excessive in relation to the concrete and direct military advantage anticipated.[126]

CONCLUSION

Protecting foreign investment in armed conflict, as discussed in this article, is a complex issue in terms of International Humanitarian Law and International Investment Law. Ensuring proper protection of investments during armed conflicts is of interest not only to investors but also to states, because of the importance of investments for the economic development of a country .

General International law recognizes the priority of the rules of international humanitarian law over international investment law. This means that in the case of contradiction, a rule of international humanitarian law prevails over a provision of a Bilateral Investment Treaty (BIT), unless the latter has been construed, by the embodiment in its text of a special clause, to operate in a time of armed conflict. This is important with regard to the

[121] Muthucumaraswamy Sornarajah, The International Law on Foreign Investment, 2017, Cambridge University Press: 465.

[122] M. Sassòli, State Responsibility for violations of international humanitarian law, (84 IRRC 2002): 401-434, 415.

[123] ILC: The Internationally wrongful act of the State, source of international responsibility, Eighth Report on State Responsibility, (R. Ago, Sp. Rapporteur), Addendum, A/CN.4/318/Add.5-7(1980): 35.

[124] 1899 Hague Convention (II) with Respect to the Laws and Customs of War on Land, 32 Stat. 1803, 187 Consol. T.S. 429, Article 23(1)(e) & (g); Article 35(2), AP I.

[125] G. Blum, The Laws of War and the "Lesser Evil", 35 YJIL 2010: 1-69.

[126] International Committee of the Red Cross (ICRC), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3, Articles 51(5)(b) & 57(2)(a)(iii).

principle of prohibition of discrimination on the one hand, which is found in almost all BITs, and the standard of treatment of property of a warring party, on the other hand. Of considerable significance is also the correlation of norms to determine the rules of confiscation and privatization of private property during an armed conflict.

Under international humanitarian law, several regimes are based on the presumption that private property cannot be subject to confiscation by the state. One of them is the occupation regime, which authorizes states to seize only certain categories of public and private property. Under Article 43 of theHague Regulations, bilateral investment treaties in the occupied territories are part of *the laws in force*, and the occupying power, therefore, is obliged to respect the obligations under the agreements to ensure public order and safety.

Based on the review of the cases cited in this article, it can be stated that the outbreak of armed conflict does not automatically lead to the cancellation or termination of investment agreements. Moreover, a number of bilateral investment agreements contain so-called "war clauses", which establish various guarantees of protection for investors during an armed conflict, in particular, to ensure non-discrimination and full protection and security standards. Anti-discrimination norms entail compensation to some extent and oblige the Contracting States to adhere to the standards of national treatment and most favoured nation treatment. "Extended war clauses" determine the compensation for cases that may not generally be covered by a BIT. Taking the different countries discussed in this Article as examples, it is obvious that contractual provisions are beneficial both for states and investors and for the international economic system in general.

Investment law, as well as humanitarian law, provide standards of protection for the investors and the states. In this context, the article also focuses on the circumstances that preclude the wrongfulness of the state for actions caused by force majeure and necessity.

Content and practice regarding the international law of foreign investments have developed exponentially in recent decades. However, despite a number of positive developments, the treatment of foreign investments during armed conflicts still presents a complex issue and must be construed through the conjunction of international humanitarian law and the international law on foreign investments.