Protection of Property Rights in Crimea: The Tools of International Investment Law compared to the Mechanism of the European Convention on Human Rights

Maren Krimmer

PhD researcher, University of Tartu, Tartu, Estonia

maren.krimmer@ut.ee

Abstract

The Crimean conflict has been a challenge to the international community not only politically since the role of international law has now been questioned, especially concerning its interpretation and even applicability. As Crimea now falls into the category of an annexed/occupied territory, it is worth examining whether effective protection is afforded to property rights relating to foreign direct investments (FDI s) on Crimean territory. Foreign Direct Investments are usually protected by bilateral investment treaties (BIT s) and this paper examines whether the Russia-Ukraine BIT can guarantee an effective protection for property and also what other tools may exist for guarantee this protection. The article shows that there are two different “toolkits” which can protect investors’ property rights. Thus, not only the Russia-Ukraine BIT can guarantee effective protection of property protection but also another tool, which is the European Convention on Human Rights. Both tools, the Russia-Ukraine BIT and the ECHR protect the property rights and can co-exist.

Keywords

Crimea – Ukraine – Russia ECHR – international law – FDI – BIT – annexed territory – property rights – conflict

1 Introduction

The conflict in Crimea has been a challenge to the international community not only politically but also in a legal context. The role of international law has now been questioned, especially concerning its interpretation and even applicability. Due to the Ukrainian crisis,¹ the intervention of Russian troops and subsequently the “interstate treaty”² between Russia and the “Republic of Crimea”, legal conflicts emerged between the United States (USA) and the European Union (EU) and the Russian Federation.³ While Russia argues that its involvement in Crimea was necessary in order to protect the human rights of Russian ‘compatriots’ and citizens, especially due to anti-Russian groups seizing power in Kiev, the international community has been criticizing these actions as illegal.⁴ The EU and the USA in particular led legal and institutional opposition to Russia’s actions. As a basis for their claim they cited several international documents⁵ in order to prove their legal point.

Crimea has been considered as under illegal Russian occupation from the viewpoint of international law. The definition of “occupied territory” under International Humanitarian Law (IHL) is recorded in Article 42 of the 1907 Hague Regulations as a territory that has been placed under the rule of a hostile army which can exercise its authority over the occupied territory. When considering illegal annexation, this is generally considered as an unresolved

1 Tensions between the two countries following Russia’s annexation of the Crimean Peninsula in 2014; See, e.g.: Peter Hilpold. “Ukraine, Crimea and New International Law: Balancing International Law with Arguments Drawn from History.” 14(2) *Chinese Journal of International Law*, (2015), 237–271; for more see e.g.: Carolin Gorning. “Der Ukraine-Konflikt aus völkerrechtlicher Sicht.” Band 239 *Schriften zum Völkerrecht* (Duncker & Humblot, Berlin 2020).

2 Kremlin, “Interstate treaty” between the Russian Federation and the “Republic of Crimea”, (18 March) 2014, available at <<http://en.kremlin.ru/events/president/news/20604>>.

3 UN Doc. S/PV.7125, See Statement of Ukraine, (3 March 2014), available at <https://undocs.org/S/PV.7125>.

4 *Ibid.*

5 Preamble of UNGA’s Resolution 68/262 (Territorial Integrity of Ukraine) of 27 March 2014 recalling Article 2 of the UN Charter (obligating UN member states to refrain from threatening or using force against the territorial integrity and political independence of any state and to settle any dispute peacefully), UNGA’s Friendly Relations Declaration of 24 October 1970 (stipulating that the territory of a state shall not be subject to forceful acquisition by another state), the Helsinki Final Act (1975) (obligating signatories to respect the borders of other states in Europe, the Budapest Memorandum (1994), the Treaty of Friendship, Cooperation and Partnership between Russia and Ukraine (1997) and the Alma-Ata Declaration (1991) (in which Russia formally acknowledged the former Soviet boundaries of Ukraine, including Crimea).

conflict since control has been gained through non-consensual or otherwise illegal actions.⁶

As Crimea now falls into this category of an illegally annexed/occupied territory under international law, it must be examined whether effective protection is afforded to the property rights of investors (foreign direct investments - FDI s) on Crimean territory. This is particularly interesting at the moment since President Putin just announced that foreigners and foreign legal entities cannot own land in most areas of Crimea.⁷

Foreign Direct Investments are usually protected by Bilateral Investment Treaties (BIT s) and occasionally by relevant multilateral investment protection treaties such as the Energy Charter Treaty. In this paper I will examine whether the Russia-Ukraine BIT of 1998 can still guarantee effective protection for property and also what other legal avenues may exist for guaranteeing this protection. The European Convention on Human Rights (ECHR) protects property rights in the first Article of its first Protocol (P1-1), which also constitutes a tool for protecting property rights. The first part of this study discusses protection of property rights in the context of the Russia-Ukraine BIT. The second part will examine the protection of investments through the ECHR. In the third part, I will assess which protection tool is most suitable for the current situation in Crimean territory.

2 Protection of Property Rights in Crimea through the Russia-Ukraine BIT

International Investment Law (IIL)⁸ aims to promote FDI s and thus can be characterized as economic law. The main objective of IIL is to protect property in conformity with host state's national law. BIT s constitute the main instrument for protecting property rights in IIL. Although every BIT is individual, common elements usually appear in most treaties. IIL is only available to foreign investors. The general object of a BIT closely relates to Foreign Direct Investments (FDI s) from which both the host state and the investor benefit, since the BIT provides stability and predictability. Ukraine has signed over

6 Rainer Hofmann, 'Annexation', Max Planck Encyclopedia of International Law, OUP, 2013, available at <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1376>.

7 Vedomosti, 'Putin zapretil inostrantsam vladet' uchastkami v prigranichnykh rayonakh Kryma', 23 March 2020, available at <https://www.vedomosti.ru/realty/news/2020/03/23/825964-krima>.

8 Rudolf Dolzer and Christoph Schreuer. *Principles of international investment law*. (Oxford University Press, 2012).

70 BITs with partner countries. Although expropriations have been rather rare, an increase has been observed in the Russian-occupied and – annexed Crimean Peninsula since 2014.⁹

Taking into account the concept of the effect of armed conflicts on international treaties, this concept depends largely on the concluding parties determining to what extent the conflict affects the contract.¹⁰ This raises the question of the Russia-Ukraine BIT and the question whether and how it still applies to the territory of Crimea.

2.1 *Applicability of the Russia-Ukraine BIT on Crimean Territory*

Concerning the applicability of this BIT, in its judgment of 16 October 2018¹¹ the Swiss Federal Court upheld an award regarding jurisdiction by an international arbitral tribunal concerning the case of *PJSC Ukrnafta v. the Russian Federation*.¹² The Court reasoned that the investments had been made by Ukrainian investors prior to Russian annexation of Crimea, which then consequently falls under the auspices of the Russia-Ukraine BIT of 1998. Following the annexation of Crimea in March 2014, Russia undertook various economic measures in Crimea. Due to measures taken in the energy sector, PJSC Ukrnafta claimed a violation of the Ukraine-Russia BIT since the Russian Federation had interfered with and then expropriated its investments in fuel stations in Crimea.¹³ On the basis of Article 9 (c) of the Russia-Ukraine BIT, the company PJSC sought payment of USD 50,314,336 from Russia as compensation for this abusive behavior under UNCITRAL Arbitration Rules. The Russian Federation did not recognize the jurisdiction of the Arbitral Tribunal as it claims that the concept of “territory” as mentioned in the Ukraine-Russia BIT does only refer

9 OECD report 2016 on Ukraine, available at https://read.oecd-ilibrary.org/finance-and-investment/oecd-investment-policy-reviews-ukraine-2016_g789264257368-en#18, 17.

10 Olga Butkevych, “The Operation of International Treaties and Contracts in the Event of Armed Conflict: Problems Reopened by Russian Aggression Against Ukraine” in Sergey Sayapin and Evhen Tsybulenko (eds.) *The Use of Force against Ukraine and International Law* (TMC Asser Press, The Hague, 2018) 185–213.

11 Swiss Supreme Court, (16 October 2018), available at https://www.bger.ch/ext/eurospider/live/de/php/aza/http/index.php?highlight_doid=aza%3A%2F%2F23-11-2017-4A_396-2017&lang=de&type=show_document&zoom=YES&.

12 Permanent Court of Arbitration, *PJSC Ukrnafta v. the Russian Federation*, (12 April 2019), App. No. 2015–34, available at <https://pca-cpa.org/en/cases/121/>.

13 Simon Bianchi, “The Applicability of the Ukraine-Russia BIT to Investment Claims in Crimea: A Swiss perspective,” *Kluwer Arbitration Blog* (16 March 2018), available at <http://arbitrationblog.kluwerarbitration.com/2019/03/16/the-applicability-of-the-ukraine-russia-bit-to-investment-claims-in-crimea-a-swiss-perspective/>.

to territories that were part of the contracting state at the time of the initial contracting and thus did not take part in the arbitration proceedings.¹⁴

The Arbitral Tribunal then concluded on 26 June 2017 that it has jurisdiction over the case and stated that “territory” as defined in Article 1 (4) of the BIT comprises regions in which the Russian Federation exercises *de facto* control as is currently the case in Crimea. Consequently, in the case of applying the BIT, it makes no fundamental difference whether the annexation was lawful or not. Additionally, according to the BIT the “investments” did not need to be made initially in the territory of the Russian Federation in order to fall under the protection of the BIT. Changes to the borders and national boundaries in this case did not change the validity of the BIT. Concerning PJSC, as it is a company fully incorporated under Ukrainian law, it qualifies as an “investor” under Article 1 (2) (b) of the Ukraine-Russia BIT.¹⁵

2.2 *The Case of the Swiss Federal Court against the Russian Federation*

The Russian Federation lodged an appeal against the decision at the Swiss Federal Court, as it did not recognize the arbitral Court’s jurisdiction. The main argument was that the concept of “territory” had been misinterpreted since according to the Russian opinion, “territory” would concern only the territory at the moment of concluding the treaty, and Crimea at that time had been part of Ukraine. And so, business transactions by PJSC would not encompass the term “investment” since these did not concern any cross-border activities. Thus, PJSC could not be an “investor” according to the BIT.¹⁶ The Swiss Federal Court responded to this by relying on Article 29 of the Vienna Convention on the Law of Treaties (VCLT)¹⁷ and stating that “(...) a treaty is binding upon each party in respect of its entire territory.”¹⁸ Since Russia exercises *de facto* control of Crimea since 2014, in this regard Crimea is under the jurisdiction of the Russian Federation and thus the BIT is considered applicable with regard to Article 1(4).

Furthermore, the Swiss Federal Court recalled that the general wording of the Ukrainian-Russian BIT, especially of Article 1 (1), does not promote a restrictive position on interpretation of “territory” or “investment”, especially since the list of “investments” has been found to be non-exhaustive. Additionally, the

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ Vienna Convention on the Law of Treaties (23 May 1969), available at https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en.

¹⁸ *Ibid.*

Swiss Supreme Court pointed out that the BIT supports two main purposes, namely promotion and protection of investments. Thus, the time of providing protection should be considered at the exact time of the violation and consequently should not be the time when the contract was concluded. A systemic interpretation of the principle of good faith could not limit protection *ab initio* to the territory of the Russian Federation as the Swiss Federal Court stated, since this would then even exclude protection of investments, which would then be contrary to the purpose of the BIT.

Some critics argue that the Ukraine-Russia BIT should not be applied, since this would mean indirectly recognizing Crimea as part of the territory of the Russian Federation.¹⁹ None the less, the BIT would still be a logical tool to protect investments by Ukrainian investors, since we cannot expect to leave them in a “lawless” void as a solid legal basis is needed to protect property rights. The bigger picture is also important in this context. The BIT should be held as a guarantor for protection of the property rights of Ukrainian investors in the Crimean Peninsula so that many companies who invested money in Crimea would not lose their assets without compensation. In this regard, it makes sense to adopt a “pragmatic approach” which provides additional protection to investors. The downside is that this could also entail political signals which might not be intended. As seen in the “Swiss case”, extending the reach of a BIT could slow down or even endanger implementation of the BIT. Nevertheless, as seen with judgments of the ECtHR,²⁰ the territorial question can be left on the side for the moment, in order to guarantee effective protection of property rights.

2.2.1 Other Investment Disputes in Crimea

International disputes concerning investments in Crimea are complicated and in the main have not been resolved so far. *Ukrnafta and Stabil*²¹ argued that they lost their filling stations. In another case, arbitral proceedings were commenced by Aeroport Belbek LLC and Igor Kolomoisky against the Russian

19 See, e.g.: Patrick Dumberry, “Requiem for Crimea: Why Tribunals Should Have Declined Jurisdiction over the Claims of Ukrainian Investors against Russia under the Ukraine–Russia BIT,” 9(3) *Journal of International Dispute Settlement*, (2018), 506–533.

20 ECtHR, *Loizidou v. Turkey*, ECtHR Judgment, (18 December 1996) Appl. No.15318/89; ECtHR, *Ilaşcu and others v. Moldova and Russia*, ECtHR Judgment, (08 July 2004) Appl. No. 48787/99.

21 Permanent Court of Arbitration, *PJSC Ukrnafta v. The Russian Federation and Stabil LLC et al. v. The Russian Federation* (12 April 2019), App. No. 2015–34, available at <https://pca-cpa.org/en/news/pca-press-release-pjsc-ukrnafta-v-the-russian-federation-and-stabil-llc-et-al-v-the-russian-federation-5/>.

Federation. The claimants had claimed compensation concerning the loss of *Belbek International Airport* in Crimea on the basis of the Ukrainian-Russian BIT under the UNCITRAL Arbitration.²² In line with these allegations, the private bank and finance company, *PJSC CB PrivatBank* and *Finilon LLC* brought charges against the alleged confiscation of approximately \$200 million of investments in Crimea.²³

The arbitral tribunal had to decide whether the Russia-Ukraine BIT applies or not. Application of the BIT would lead to a controversy regarding the territorial dispute with Russia concerning the Crimean Peninsula. The actions brought by Ukrainian companies could be viewed in this regard as recognition of Crimea's new status by Ukraine. Nevertheless, the Russian Federation decided not to participate in the proceedings, claiming that the arbitral court had no jurisdiction over the matter since they had not annexed Crimea yet to Russian territory.

If we merely examine international investment law, the focus concerns the relationship between the investor and the state. From this "business" perspective, the BIT should cover Ukrainian investors if they follow the re-registration process in accordance with Russian law, which would then mean that applicability would depend directly on the investor and its individual relationship with the state. Consequently, the BIT would apply, as Ukrainian investors who have re-registered their property according to Russian Law would then need to be protected by the Russian state. However, again, this may be in some contexts politically interpreted as pragmatic recognition of the Russian *fait accompli*, especially if we are dealing with the Ukrainian state companies or that have close ties with the government.

3 Protection of Property Rights in Crimea through the ECHR

As a second option for the protection of property rights, we can now examine the system of the ECtHR which provides protection of human rights to individuals under the jurisdiction of the Council of Europe member states.

22 Permanent Court of Arbitration, *Aeroport Belbek LLC and Mr. Igor Valerievich Kolomoisky v. The Russian Federation*, (4 February 2019), App. No. 2015-07, available at <https://pca-cpa.org/en/news/pca-press-release-aeroport-belbek-llc-and-mr-igor-valerievich-kolomoisky-v-the-russian-federation-4/>.

23 Permanent Court of Arbitration, *SC CB PrivatBank and Finance Company Finilon LLC v. The Russian Federation*, (date: ongoing), App. No. 2015-21, available at <https://pca-cpa.org/en/news/pca-press-release-jsc-cb-privatbank-and-finance-company-finilon-llc-v-the-russian-federation/>.

3.1 *Protection of Investments through Article 1 P-1 ECHR*

The ECHR protects property in Article 1 of the first Protocol to the ECHR.²⁴ In order to do so, the Article mentions the terms “possessions” and “property” but does not define them. The case-law of the ECHR draws a broad concept of “property” in order to fill this gap.²⁵ The claimant’s nationality is not of importance to the Court as long as it is that of one of its member states. In contrast to International Investment Law (IIL), national remedies must first have been exhausted before approaching the European Court of Human Rights (ECtHR).

The ECtHR has defined three rules to protect property rights: the principle of respecting property, the possibility of deprivation of property under specific conditions, and recognition of the State’s right to regulate the use of property.²⁶ Nevertheless, P1-1 does not contain an explicit definition of the term *property* itself. Consequently, it is relevant to have a quick overview of how the definition of “property” has developed and what this entails. The protection is very broad and “economic interests” fall under the scope of protection of property rights provided by P1-1 as well.²⁷

ECtHR case-law shows that legitimate expectations²⁸ are also protected if they fulfill certain conditions. The ECtHR confirmed in *Tre Traktörer*

24 ECHR, Art. 1 P-1 reads: 1. Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. 2. The preceding provisions shall not, however, in any way impair the right of the State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure payment of taxes or other contributions or penalties.

25 ECtHR, Guide on Article 1 of Protocol No.1 to the European Convention of Human Rights, Updated 31 August 2019, https://www.echr.coe.int/Documents/Guide_Art_1_Protocol_1_ENG.pdf; Vincent Berger, *Jurisprudence de la Court Européenne des Droits de l'Homme* (Editions Dalloz, Paris, 2009), 703–776.

26 ECtHR, *Sporrong and Lönnroth v. Sweden*, ECtHR Judgment, (23 September 1982) Appl. No. 7151/75.

27 ECtHR, *Tre Traktörer Aktiebolag v. Sweden*, ECtHR Judgment, (7 July 1989) Appl. No. 10873/84; ECtHR, *Iatridis v. Greece*, ECtHR Judgment, (25 March 1999) App. No. 31107/96.

28 ECtHR defines “legitimate expectations” in several judgments as “(...) For an “expectation” to be “legitimate”, it must be of a nature more concrete than a mere hope and be based on a legal provision or a legal act such as a judicial decision, bearing on the property interest in question (...)” in ECtHR, Guide on Article 1 of Protocol No.1 to the European Convention of Human Rights, Updated 31 August 2019, https://www.echr.coe.int/Documents/Guide_Art_1_Protocol_1_ENG.pdf; Isabelle Wildhaber and Luzius Wildhaber, “Recent case law on the protection of property in the European Convention on Human Rights” in Christina Binder and Christoph Schreuer. *International investment law for the 21st century: essays in honour of Christoph Schreuer* (Oxford University Press, Oxford 2009) 657–677.

*Aktiobag v. Sweden*²⁹ that all economic interests with an actual value within a company management structure should be considered “possessions” under P1-1.³⁰ In this case, the applicants objected that the Swedish government did not consider a liquor license to be a “possession/property” according to P1-1. The ECtHR decided that economic interests which are linked to the management of a company are “possessions,” as protected under P1-1. Thus, a liquor license is one of the main conditions for working in this chosen profession so that withdrawing the license would have a negative impact on the business activities and value of a restaurant. Consequently, withdrawing the license violates the “respect for property” of the applicant.³¹ The ECtHR determined that withdrawing the license amounted to regulation of use of property, requiring examination under the second subparagraph of P1-1.

In addition, the ECHR protects corporate stocks and shares,³² arbitral awards,³³ pending claims,³⁴ commercial and industrial interests,³⁵ and goodwill.³⁶

It is also of particular interest that ECtHR case-law has extended the protection of property to “legitimate expectations”, which can lead to the application of ECHR principles to investment disputes. In *Pine Valley Developments Ltd v. Ireland*,³⁷ the ECtHR explained that P1-1 could also protect a legitimate expectation based on a piece of land acquired, established by a building permit as a prerequisite for an industrial construction project. Once the Irish Supreme Court had overturned the validity of this permit on account of its exceeding its powers and incompatibility with current legislation, the applicants complained that the decision was contrary to protection of property guaranteed under P1-1. Thus, the ECtHR decided that the applicant had a legitimate expectation that he could construct his development project on the plot of land.

29 ECtHR, *Tre Traktörer Aktiebolag v. Sweden*, ECtHR Judgment, (7 July 1989) Appl. No. 10873/84.

30 *Ibid.*

31 *Ibid.*

32 ECtHR, *Bramelid and Malmström v. Sweden*, ECtHR Judgment, (12 October 1982) Appl. No. 8588/79.

33 ECtHR, *Greek refineries Stran and Stratis Andreadis v. Greece*, ECtHR Judgment, (9 December 1994) Appl. No. 13427/87.

34 ECtHR, *Pressos Compania Naviera SA v. Belgium*, ECtHR Judgment, (20 November 1995) Appl. No. 17849/91.

35 ECtHR, *Iatridis v. Greece*, ECtHR Judgment, (25 March 1999) Appl. No. 31107/96.

36 ECtHR, *Van Marle and others v. Netherlands*, ECtHR Judgment, (26 June 1986) Appl. No. 8543/79.

37 ECtHR, *Pine Valley Developments Ltd v. Ireland*, ECtHR Judgment, (29 November 2001) Appl. No. 12742/87.

Consequently, the legitimate expectation resulting from the applicant's permit or certificate could be viewed as a "possession" within the meaning of P1-1. ECHR case-law then extended its protection to "claims" in *Burdov v. Russia*³⁸ also to social welfare benefits.³⁹

After this general overview of protection of property rights by P1-1, we will now examine its effect on FDI s. The case of *Bimer S.A. v. Moldova*⁴⁰ is interesting in this regard, since the ECtHR, having decided that "licenses" constitute property under P1-1, thus examined whether interference by the State constituted simply "control of property" by the State and, if so, if this was "proportionate". In *Marini v. Albania*,⁴¹ the ECtHR regarded P1-1 in connection with a "company share". In this case, the holder possessed company shares together with the corresponding rights. According to the claimant, the State had failed to comply with agreed obligations under a joint venture agreement, and so the applicant could no longer exercise effective control according to the letter of the law, which in turn led to unlawful resolutions being adopted with negative effects for the company or corporation. After examining this violation with regard to P1-1, the ECtHR proclaimed "(...) that States are under an obligation to afford judicial procedures that offer the necessary procedural guarantees and therefore enable the domestic courts and tribunals to adjudicate effectively and fairly any disputes between private persons (...)"⁴². Hence, the ECtHR in a case involving a joint venture agreement ruled that company shares fall under the protection of P1-1.

Concerning corporate stock and shares, the ECtHR also ruled in the famous case of *OAo Neftyanaya Kompaniya Yukos v. Russia*⁴³ in which the applicant complained about the "unlawful, arbitrary and disproportionate imposition and enforcement of the 2000–2003 tax assessment"⁴⁴ and alleged violations under P1-1. The Yukos shareholders claimed in a series of international court and arbitration cases compensation from the Russian government since they claimed that the expropriation by the government did not happen in good faith. Furthermore, the shareholders argued that YUKOS had been singled

38 ECtHR, *Burdov v. Russia*, ECtHR Judgment, (7 May 2002) Appl. No.59498/00.

39 ECtHR, *Mellacher and others v. Austria*, ECtHR Judgment, (19 December 1989) Appl. No.10522/83.

40 ECtHR, *Bimer S.A. v. Moldova*, ECtHR Judgment, (10 July 2007) Appl. No.15084/03.

41 ECtHR, *Marini v. Albania*, ECtHR Judgment, (7 July 2008), Appl. No.3738/02.

42 *Ibid.*

43 ECtHR, *OAo Neftyanaya Kompaniya Yukos v. Russia*, ECtHR Judgment, (8 March 2012), Appl. No.14902/04.

44 *Ibid.*

out and suffered discriminatory treatment. After considering all the facts, the ECtHR found a breach of P1-1 concerning calculation of the tax assessment, failure to take alternative options into account which would not have had such negative effects for the company, and a disproportionate flat-rate fee imposed in addition to the company's tax burden.⁴⁵

This shows that the ECtHR passes judgment in "investment" cases and is thus capable of tackling complex economic legal issues, in part also because of the previously created case law. Despite the competence in "investment" cases, the crucial point remains implementation of the decision and reparations, as these have exposed difficulties and problems regarding compliance in the YUKOS case.⁴⁶ This had been already an issue concerning the decision of the Russian Constitutional Court (RCC) not to let prisoners vote in the Parliamentary elections (the *Anchugov and Gladkov* case⁴⁷). The RCC ruled⁴⁸ that the execution of the ECtHR decision⁴⁹ would not have been in line with the Russian Constitution and refused to implement the Strasbourg judgment.

3.2 *Applicability of the ECHR on Crimean Territory*

Ratione materiae, the ECHR is applicable where disputes concern provisions of the Convention or its additional Protocols. The general aim of the ECHR is to protect individuals' human rights, but it does not focus on territorial disputes over state sovereignty. Thus, the ECtHR would not have jurisdiction over the question of Russia's annexation of Crimean territory and its (il)legality. However, the ECtHR does have jurisdiction over protection of property rights as outlined in Article 1 P-1. This implies that it can also rule on disputes concerning investments, as they fall under the wider scope of "property" as already determined by ECtHR case-law.

45 *Ibid.*

46 *Ibid.* See also: Russian Constitutional Court's ruling on the execution of the ECtHR's judgment *Anchugov and Gladkov v. Russia*, (19 April 2016), http://www.ksrf.ru/en/Decision/Judgments/Documents/2016_April_19_12-P.pdf and Lauri Mälksoo, "Russia's Constitutional Court defies the European Court of Human Rights" in *European Constitutional Law Review*, 12, (2/2016), 383–384.

47 Russian Constitutional Court's ruling on the execution of the ECtHR's judgment *Anchugov and Gladkov v. Russia*, (19 April 2016), http://www.ksrf.ru/en/Decision/Judgments/Documents/2016_April_19_12-P.pdf.

48 Russian Constitutional Court's ruling on the execution of the ECtHR's judgment *Anchugov and Gladkov v. Russia*, (19 April 2016), http://www.ksrf.ru/en/Decision/Judgments/Documents/2016_April_19_12-P.pdf.

49 ECtHR, *Anchugov and Gladkov v. Russia*, ECtHR Judgment, (4 July 2013), Appl. Nos.11157/04 and 15162/05.

It is important in this case as to under which jurisdiction the parties fall. Thus, a parallel can be drawn with the ECtHR case of *Loizidou v. Turkey*,⁵⁰ where the Court decided that Turkey was responsible for human rights violations in the territory of Northern Cyprus. This was so even though Turkey had invaded Northern Cyprus without valid legal ground. Further, the ECtHR elucidated that the concept of “jurisdiction” was not just limited to national territory but also to an area in which effective control was being exercised due to military operations. In this case the claimant, Mrs. Loizidou, a Cypriot citizen, had lost control over her property due to Turkish troops occupying the northern part of the island and the consequent establishment of the “Turkish Republic of Northern Cyprus”. The ECtHR awarded the claimant pecuniary damages, since the claimant had suffered unjustified interference with her property rights. Furthermore, in this judgment, the ECtHR clarified that the concept of “jurisdiction” was not just limited to national territory, but also to an area in which effective control is being exercised due to military involvement. The claimant in this case, Mrs. Loizidou, a citizen of Cyprus, had lost control of her property due to occupation of the Northern part of the island by Turkish troops and the consequent establishment of the “Turkish Republic of Northern Cyprus”.

A similar approach was adopted by the ECtHR in the case of *Ilaşcu and others v. Moldova and Russia*.⁵¹ In this case the interference occurred in the territory of Transdniestria, a self-proclaimed state inside Moldovan territory which has been supported by Russia. Assuming that Transdniestria is still supported by Russia economically, militarily, and financially, the ECtHR presumes a continuous link between those two, which consequently indicates that Russia has assumed responsibility. It should be pointed out that the ECtHR does not assume that the territories in question were part of either Turkey or Russia but were merely under its consolidated influence.

These cases indicate that the ECtHR has found a way to deliver judgments without becoming entangled in the question of sovereign title to territory and delving into the political problems related to the illegality of the annexation. This has led to the assumption that the ECtHR can deliver judgments on questions regarding the Russia-Ukraine BIT and its protection of property rights in Crimea if such a case or cases would be initiated in Russian courts first by Ukrainian subjects. The exhaustion of domestic remedies is a central rule for the ECtHR. Nevertheless, we must also take into account that the ECtHR is unable to render a judgment as quickly as an arbitration tribunal can.

⁵⁰ ECtHR, *Loizidou v. Turkey*, ECtHR Judgment, (18 December 1996) Appl. No.15318/89.

⁵¹ ECtHR, *Ilaşcu and others v. Moldova and Russia*, ECtHR Judgment, (08 July 2004) Appl. No.48787/99.

4 Pros and Cons of Protection of Property Rights through the ECHR and the BIT

When establishing the ECHR, the objective was to protect human rights of individuals but not to resolve investment disputes. Nevertheless, this is a function which the ECtHR can perform as indeed has been demonstrated in previous cases and thus shows that it is relevant for IIL, too. After all, the right to property is a human right recognized under the ECHR. Although the ECHR and IIL each have a different focus and historical origins, there are certain parallels in the protection that they guarantee. Nevertheless, the two systems continue to have different features. The ECHR aims to maintain a fair balance between individual rights and general interests, whereas IIL focuses on investors' rights and the associated duties of the host state.⁵²

The main objective of IIL has been enabling FDI s while the objective is to develop international economic activities not only for the host state but also for investors. In contrast to this, the main objective of the ECHR is protection of human rights: economic activities are not the main focus but nevertheless, the ECtHR has shown its capability to decide in investment law cases.⁵³ The ECHR is a set text, to which additional Protocols will be occasionally added by the member states and decisions/interpretations constantly added by the ECtHR itself. Nevertheless, the case-law of the ECtHR can sometimes be regarded as inconsistent. This might be due to the fact each tribunal has a different composition. Still, as being considered as a "living instrument" the ECtHR does not preclude international law.⁵⁴ Still, the same can also be said of arbitral tribunals.

BIT s are more individual than multilateral treaties since they are concluded only between two states. Thus, the content may vary from BIT to BIT. Disputes will be resolved under the terms of the BIT and international law and are usually settled before an arbitral tribunal. Parties usually nominate arbitrators, and these must issue a final award, usually within six months.⁵⁵

52 Maria Fanou and Vassilis Tzevelekos, "The shared territory of the ECHR and international investment law", in Yannik Radi (ed.), *Research Handbook on Human Rights and Investment* (Edward Elgar, Cheltenham, UK, 2018) 93–136.

53 For example: ECtHR, *Bramelid and Malmström v. Sweden*, ECtHR Judgment, (12 October 1982); Appl. Nos.8588/79, 8589/79; *Lithgow and Others v. United Kingdom*, ECtHR Judgment, (8 July 1986), Appl. Nos.9006/80, 9262/81, 9265/81, 9266/81, 9313/81, 9405/81, ECtHR, *Sovtransavto Holding v. Ukraine*, ECtHR Judgment, (25 July 2002), Appl. No.48553/99.

54 Stefan Theil, "Is the 'Living Instrument' Approach of the European Court of Human Rights Compatible with the ECHR and International Law?" 23 (3) *European Public Law* (2007), 587–614.

55 International Chamber of Commerce, Time Limit for the Final Award, available at https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/#article_30.

Turning to the aspect of timing, the decision-making process is much longer for the ECtHR, especially since all domestic remedies must first be exhausted.⁵⁶ Thus, obtaining a decision from the ECtHR within six months is highly unlikely and in fact impossible, because of the volume of complaints it receives from all of its member states, not only from two state parties, in comparison to the BIT.

There are two essential differences when looking at the BIT and the ECHR. The first one the claimant's nationality, which makes no difference to the ECtHR, as long as the claimant is citizen of one of its member states. In contrast, a BIT only allows investors in each of the contracting parties to file claims. Moreover, it is linked to the territory of the parties to the treaty. The other point regards the scope of protection of property rights, in which a BIT usually defines the term "investment" in one of its first Articles; similarly, the ECHR has adopted a broad definition of "possessions" and "property" which are afforded protection under P1-1.

However, final judgments of the ECtHR do not automatically mean that violations will be interrupted or will stop. According to Article 41 ECHR, the ECtHR has the power to adjudicate over just satisfaction. Allocation of compensation must be just, which does not necessarily mean that it will be constituted in full.⁵⁷ Final judgments from the ECtHR have a wider reach, requiring states to tackle the general measures which caused the breach. Nevertheless, those judgments do not have direct effect on the national legal order of the state under the principle of subsidiarity. This principle of subsidiarity and state sovereignty mean that the defaulting member state is able to decide if it will comply with the decision or not.⁵⁸ This shows that both the ECHR and BIT offer effective options for protecting property rights. It becomes evident, however, that these are two different "toolkits" not only regarding their timing, but also through a less burdensome bureaucratic process.

⁵⁶ ECHR, Case processing, available at https://www.echr.coe.int/Documents/Case_processing_ENG.pdf; Cesare PR. Romano, "The rule of prior exhaustion of domestic remedies: theory and practice in international human rights procedures." in Nerina Bosciero (ed.), *International Courts and the Development of International Law* (TMC Asser Press, The Hague, The Netherlands, 2013) 561-57; ECtHR, *Laurus Invest Hungary KFT and Others v. Hungary*, ECtHR Judgment (8 September 2015) Appl. No.23265/13, para. 32-33.

⁵⁷ ECHR, Practice directions, Rules of Court, *Just satisfaction claims*, available at https://www.echr.coe.int/Documents/PD_satisfaction_claims_ENG.pdf; ECtHR, *Papamichalopoulos and Others v. Greece*, ECtHR Judgment (24 June 1993) Appl. No.14556/89; ECtHR, *Aksoy v. Turkey*, ECtHR Judgment (18 December 1996) Appl. No.21987/93.

⁵⁸ *Op.cit.* note 48.

5 Conclusion

When examining whether there is effective protection of investors' property rights and thus of FDI s in Crimean territory, the article shows that two different "toolkits" are available to protect investors' property rights. Thus, not only can the Russia-Ukraine BIT guarantee effective protection of property protection but another tool is available in the form of the European Convention on Human Rights.

Since applicability of both the BIT and the ECHR are of importance, we have briefly discussed them in this paper. Critics assert that it is debatable whether the Russia-Ukraine BIT should even be applied in the context of Crimea, since the Crimean Peninsula would then *de facto* need to be "recognized" as Russian, in order for Ukrainian investors to make claims under the BIT. This aspect is perhaps what the Russian government would even like. Of course, it remains a fact that Crimea has been illegally annexed by Russia and thus under international law Crimea is still part of Ukraine. Nevertheless, the BIT might be a valid option for Ukrainian investors to assert claims for "lost" property and to obtain damages from Russia, even though Russia has denied the jurisdiction of arbitral tribunals in such cases.

As indicated in this paper, the ECtHR is also a competent institution for dealing with investment law matters. Choosing the ECtHR as a competent 'track' for investment dispute resolution would mean not having to debate over the territorial issues which Crimea currently faces, since all nationals of the state parties to the Convention may use this tool. As explained already above, a parallel can be drawn to the case of *Loizidou v. Turkey*,⁵⁹ in which the ECtHR clarified that the concept of "jurisdiction" was not just limited to national territory, but also to an area in which effective control is being exercised due to military involvement. A similar approach was taken by the ECtHR in the case of *Ilascu and others v. Moldova and Russia*⁶⁰ which is even closer to the Crimean situation. The Court did not 'recognize' illegality when making the human rights violator pay.

Both tools – the Russia-Ukraine BIT and the ECHR – protect property rights and can co-exist usefully. This of course can lead to further litigations in similar disputes, such as in the Donbas region of Ukraine, which at present is under the Russian control but, unlike Crimea, not annexed by Russia. In both

59 *Op.cit.* note 25.

60 *Op.cit.* note 26.

tracks, the implementation of arbitral awards and judgments of the ECtHR will remain a problem as Russia is currently preparing a constitutional turn in terms of its adherence to international treaties and judgments of international tribunals. If a conflict is constructed with the Constitution – like it already was in the context of the ECtHR's Yukos case by the Russian Constitutional Court – then the implementation will be denied. This leaves the perspectives of the implementation uncertain at best as the Constitution can be used as reason (or rather pretext) for non-implementation.

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