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THE IMPACT OF ARMED CONFLICTS AND ANNEXATIONS ON THE APPLICABILITY OF THE BILATERAL INVESTMENT TREATY: PRECEDENT OF THE CRIMEAN CASES

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[13 June 2024]

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ABSTRACT

What is the first step that any investor would take in case he feels that his rights were violated by the host state? The natural answer to this question will be – to invoke the BIT granted protection since in most cases it is serving as a universal tool for guaranteeing investors` rights. However, what if the context for this situation is an international armed conflict between two states, how can this influence the ability of the investor to rely on safeguards granted under the BIT? In this thesis, I will address such issues in the context of the occupation of the Crimean Peninsula by the Russian Federation in 2014. I will specifically focus on the jurisdictional questions surrounding the applicability of the BIT between Ukraine and Russia to the relations between Ukrainian investors and the Russian Federation as a state exercising effective control over the Peninsula. In order to conduct a comprehensive analysis of this topic I will research such subsidiary issues as the context of the economic situation before the annexation of Crimea, the difficulties in the interpretation of the BIT provisions, the concept of the effective control which was exercised by Russia over the Peninsula, the pros and cons of the recognition of jurisdiction by the tribunals and temporal scope of the jurisdiction. While the main background for this topic is the situation that occurred in Ukraine after 2014 when Russia annexed Crimea, the interest of legal practitioners and academics in the Crimean issue especially spiced up in light of the Russian invasion in 2022. Since this case is still very fresh, my research will allow me to fill the gaps in understanding the investments` protection mechanisms in times of armed conflict and occupation as well as will help to address the challenges that Ukraine is facing in the course of its arbitral proceedings with Russia. In circumstances when the world has experienced a growth in the amount of international armed conflicts, the protection of the proprietary rights of the investors is a concern that cannot be left without due attention.

INTRODUCTION

The illegal occupation of Crimea by the Russian Federation in 2014 shocked and outraged the international community. It provoked emerging of numerous legal issues and concerns in particular issues regarding infringements of the Crimean Tatars` rights on the annexed territory, determination of the attribution in case of annexation, violation of the basic principles of international law and it significantly influenced the course of events in Ukraine leading to the full-scale invasion of Russia in 2022.

One of the vulnerable groups that became the first ones facing the consequences of the annexation were Ukrainian and foreign investors, who in a moment lost control over the lifetime business projects, which they financed with the expectation of stability, prosperity and development in the area. In their attempts to protect the remaining businesses, the investors were prompted to pursue justice through the international tribunals. Occupation of territories and seizure of investments raised important issues regarding the effectiveness of the safeguards provided for investors in times of international armed conflict.

While the tribunals were considering the claims of the investors the first issue to emerge was the question of jurisdiction. More specifically, whether investors can count on the guarantees and protections initially granted by the BIT between the Contracting Parties, now when the issue of sovereignty is sharper than ever. In the dimension of the so-called "*Crimean Cases*", jurisdictional concern was concentrated over the issue of the country that shall be held responsible for the infringements of the investors` proprietary rights granted under the relevant BIT in the case of the annexation. The claims submitted by the Ukrainian investors were way too novel and not explored enough before,[1] therefore the arbitrators faced a big challenge as

[1] Jure Zrilič, The Protection of Foreign Investment in Times of Armed Conflict (1st edn, Oxford University Press 2019), p. 3.

their decision was supposed to set a significant precedent for future cases, which would be of paramount importance for investors who wish to invoke the mechanisms for the protection of their rights before the investment tribunals. The decision rendered by the tribunals in the cases would touch upon the economic stability of the state which faced the consequences of armed conflict as well as impact the basic standards of proprietary rights protection. Moreover, such a problem can substantially influence the desire of potential investors to put their money into projects that can be unlawfully seized without any kind of compensation, putting investors in the "bubble" of uncertainty over the issue of whether justice would be established. As it appears, in the 21st century, it is an uneasy task to predict which country may become party to the armed conflict next and in this case, a certain level of protection and predictability shall be given to the investors while they are being one of the first victims of the unlawful actions of the other states.

While preparing this thesis the methodology that I used mostly comprised legal research and legal analysis methods. More specifically I used the method of doctrinal research in order to conduct a coherent legal analysis of the materials written by highly qualified academics in the fields of investment law and arbitration, humanitarian law and human rights law, I also provided their critical assessment and evaluation. The next method used by me was a method of collecting and summarising information from the arbitral awards, and judgments on the issues of jurisdiction as well as collecting information regarding the historical background of Crimea. In addition, I used the comparative legal analysis method for conducting an in-depth analysis of the mechanisms of the investors` protection available in times of armed conflict

My thesis covers a number of issues which as was mentioned are currently disputed among the professionals in the investment arbitration.

The first crucial point I will analyze in this work is the forced deterioration of Crimea as the center of investment and tourism in Ukraine after its annexation in 2014. As was already

outlined above, the jurisdictional issues surrounding the actions brought by Ukrainian investors will be the focus of this work. However, in order to understand the detrimental importance of the broader scope of the protection given to the investors, one shall also be acquainted with the role that Crimea played in the economic life of Ukraine.

The second issue that will be addressed in this work is the question of territorial jurisdiction analyzed by the tribunals in the Crimean Cases. The arbitrators in the majority of Crimean Cases already made their decisions regarding the jurisdiction over the dispute in favour of the Ukrainian investors, namely they recognized their jurisdiction as both *ratione loci* and *ratione temporis*. However, this decision got contrasting responses from the lawyers, academics and journalists. Nevertheless, most of them supported the recognition of the jurisdiction by the tribunals, some of them also criticized it for the lack of grounds, unclear reasoning provided by the tribunals and questionable precedent created for the future proceedings. In my thesis, I will analyze arguments presented by both sides, as well as come up with my reasonings to fill the gaps in the tribunals` argumentations.

Lastly, I will provide analysis to the issue of jurisdiction *ratione temporis* on the basis of tribunals` decisions in the Crimean Cases and academic discussions. In some of the decisions rendered by the tribunals, the time when the investments were made played a crucial role in the determination of the jurisdiction. The broad temporal scope of the BIT established by the tribunals in turn became a point that raised controversial opinions which will be discussed in this chapter.

In conclusion, I will evaluate the consequences of the tribunals` decisions regarding the recognition of the jurisdiction in the Crimean Cases and elaborate on the possibility of the BIT application for the protection of investors in times of armed conflict.

1 THE CRIMEAN CASES: TRACING THE HISTORICAL ROLE OF CRIMEA FROM THE CENTER OF INVESTMENTS TO THE CENTER OF THE CONFLICT

1.1 Overview of the History of Crimea as One of the Centers of Investing until Russian Invasion

In 2014 Russian Federation invaded Ukraine. This invasion subsequently led to the annexation of the Crimean Peninsula.[2] The importance of the Crimean Peninsula for Ukraine can hardly be overestimated. Historically, Crimea constituted a unique culture and trading center, where it amalgamated the rich tapestry of languages and customs, unique natural resources, and access to the sea. Since Ukraine gained its independence in 1991, a large fraction of the Ukrainian economy and resources have been transferred to Crimea in order to maintain its status as an autonomous republic.[3] Therefore, the Crimean Peninsula was indeed of paramount strategic importance for Ukraine.

Throughout the 2000s Ukrainian investors specifically got interest in the Peninsula, and for this reason, the number of investments put into Crimea also drastically increased to USD 134,5 million.[4] In 2012, two years before annexation, the number of investments constituted USD1.17 billion.[5] Nevertheless, the predominant number of investors (USD 322,1 million) were originally from the Russian Federation, other countries, namely Germany, Britain, and France also made prominent investments in the Peninsula.[6]

[2]NATO, 'Statement by the North Atlantic Council on Crimea' (*NATO*) <https://www.nato.int/cps/en/natohq/news_164656.htm> accessed 5 June 2024.
[3] 'Over 5 years, $135 million has been invested in Crimea's tourism infrastructure' (*Українська правда*) <https://www.pravda.com.ua/articles/2006/09/18/3157004/> accessed 25 March 2024.
[4] Ibid.
[5]'Investment Profile of the Autonomous Republic of Crimea <https://advocacy.calchamber.com/wp-content/uploads/international/portals/Invest_profile_en_min.pdf> accessed 25 March 2024; 'Head of Crimea Says Peninsula Had No Foreign Investors Prior to Russia's Annexation' (*POLYGRAPH.info*, 20 November 2017) <https://www.polygraph.info/a/crimea-actually-had-foreign-investors-prior-to-annexation/6741692.html> accessed 21 March 2024.
[6] Ibid.

Besides the foreign input, considerable investments were also made due to the Ukrainian investors. According to the statistics, the predominant number of investments were directed into construction, industry, real estate activities, healthcare and recreation, culture, and sport.[7]

1.2 Overview of the Impact That Annexation Had on the Situation with Investments on the Peninsula

Russian annexation put an end to the prosperity and development of Crimea not only as a touristic center but as an attractive investment destination as well. Nevertheless, Russian media claimed that only in 2016 the number of foreign investments in Crimea constituted over USD320 million, the real number of investments may be significantly lower.[8] Numerous factors come into play to influence this outcome, such as foreign sanctions, possible reputational damage to the investors, high level of corruption and red tape, obstacles placed by the government itself and growing uncertainty among investors that their investments will be illegally expropriated and seized by the Russian government.[9] The latter concerns are raised quite legitimately, since, according to the Ukrainian Justice Ministry, after the annexation of Crimea, only during the period of March-December 2014 4000 enterprises had their business expropriated for a total value of USD 2.3 billion.[10]

[7] Nataliya Blyakha, 'Investment Potential of the Crimea Region' <https://www.utu.fi/sites/default/files/media/Blyakha%201709%20web.pdf> accessed 25 March 2024.
[8] Alexander Alikin, 'Crimea Struggles to Attract Private Investment | Eurasianet' (10 March 2017) <https://eurasianet.org/crimea-struggles-to-attract-private-investment> accessed 21 March 2024.
[9] Ibid.
[10] 'OECD Investment Policy Reviews: Ukraine 2016 | READ Online' (*oecd-ilibrary.org*) <https://read.oecd-ilibrary.org/finance-and-investment/oecd-investment-policy-reviews-ukraine-2016_9789264257368-en> accessed 25 March 2024, p. 65; 'Head of Crimea Says Peninsula Had No Foreign Investors Prior to Russia's Annexation' (n 5).

1.3 Procedural History of the Cases Against Russia Brought by the Ukrainian Investors

Several arbitration proceedings were commenced on the claims of the Ukrainian investors as a result of the abovementioned expropriations.[11] According to the statistics provided by the UNCTAD, up to now the number of proceedings initiated against Russia reached 10 cases.[12] The Claimants are represented by the biggest Ukrainian companies, although it is worth mentioning that there is no information available regarding the claims brought by international investors against Russia.[13] The claims raised by the investors comprised allegations of illegal expropriations[14] which took the form of "nationalization"[15] when Russia seized a significant amount of the premises using threats and physical violence.[16] These actions of Russia led to the "destruction of Claimants` Crimean operations."[17] Investors also claimed violation of fair and equitable treatment standards, violation of the full protection and security standards and discrimination, prohibited under the Ukrainian-Russian Bilateral Investment Treaty 1998 **("BIT" or "Treaty")**.[18]

[11] 'Ukraine | Investment Dispute Settlement Navigator | UNCTAD Investment Policy Hub' <https://investmentpolicy.unctad.org/investment-dispute-settlement/country/219/ukraine/investor> accessed 25 March 2024; Appendix.
[12] Ibid.
[13] Ibid.
[14] Stabil LLC (Ukraine) and Others v. The Russian Federation [2019] PCA Case No. 2015-35, para. 205, *et seq* ["***Stabil Case***"]; NJSC Naftogaz of Ukraine (Ukraine) and Others v. The Russian Federation [2019] PCA Case No. 2017-16 para. 248 *et seq* ["***Naftogaz Case***"]; Jarrod Hepburn, 'Investigation: Full Jurisdictional Reasoning Comes to Light in Crimea-Related Bit Arbitration Vs. Russia' <https://icsid.worldbank.org/sites/default/files/parties_publications/C8394/Claimants%27%20documents/CL%20-%20Exhibits/CL-0210.pdf> accessed 24 March 2024; Maren Krimmer, 'Protection of Property Rights in Crimea: The Tools of International Investment Law compared to the Mechanism of the European Convention on Human Rights' [2021] 46(1) Review of Central and East European Law <https://doi.org/10.1163/15730352-bja10044> accessed 23 March 2024, p. 134.
[15] Stabil Case (n 14), para.205 *et seq*; Naftogaz Case (n 14), para. 248 *et seq*; 'The Crimean Precedent' (*Warsaw Institute*, 21 May 2018) <https://warsawinstitute.org/the-crimean-precedent/> accessed 24 March 2024.
[16] Stabil Case (n 14), para.205 *et seq*; Naftogaz Case (n 14), para. 248 *et seq*; Cameron A. Miles, 'Lawfare in Crimea: treaty, territory, and investor-state dispute settlement' [2022] 38(3) Arbitration International <https://www.kluwerarbitration.com/document/kli-ka-ai-2022-03-001?q=expropriation%20AND%20armed%20conflict%20AND%20crimea> accessed 24 March 2024.
[17] Stabil Case (n 14), para.205 *et seq*; Naftogaz Case (n 14), para. 248 *et seq*.
[18] Timur Bondarev 'How to recover damages from Russia in investment arbitration?' (*Економічна правда,* 4 October 2022) <https://www.epravda.com.ua/columns/2022/10/4/692211/> accessed 21 March 2024.

While certain cases were already decided in favour of the Claimants, some of them are still pending. Russia refused to participate in the proceedings while arguing that investments made in Crimea do not fall within the scope of the Treaty and thus the tribunals do not have jurisdiction over the claims.[19] Subsequently, after tribunals rendered awards despite Russian non-participation, the Respondent made fruitless attempts to appeal some of the decisions in the respective courts.[20] What also shall be noted is that the majority of the awards rendered by the Tribunals remain unpublished, and only awards in *the Stabil Case* and *Naftogaz Case* are available.

1.4 BIT Between Russia and Ukraine as the Main Instrument Used for the Protection of Investors

The main instrument that was invoked by the Ukrainian investors when they were developing the legal positions was the BIT, which served as the basis for the claims regarding the alleged violation of the rights and guarantees granted to the investors.[21]

The BIT between Russia and Ukraine entered into force in 2000 and despite the existence of the armed conflict between the parties will remain effective until 27 January 2025, with the caution that the investments made prior to this date will be protected until 27 January 2035.[22]

[19] Stabil Case (n 14), para.5; Naftogaz Case (n 14), para. 2; Cameron A. Miles (n 16).

[20] Maren Krimmer (n 14), p. 134; Lisa Bohmer, 'Dutch Appeals Court Dismisses Russia's Allegation That Four Treaty Tribunals Wrongly Upheld Jurisdiction over Ukrainian Investments in Crimea; Naftogaz v. Russia Decision Is Partially Set aside to Clarify That Ukraine-Russia BIT Does Not Apply to Investments Made before USSR's Downfall' (*Investment Arbitration Reporter*, 19 July 2022) <https://www.iareporter.com/articles/dutch-appeals-court-dismisses-russias-allegation-that-four-treaty-tribunals-wrongly-upheld-jurisdiction-over-ukrainian-investments-in-crimea-naftogaz-v-russia-decision-is-partially-set-asid/> accessed 8 June 2024.

[21] Ibid, Tobias Ackermann, Investments Under Occupation: The Application of Investment Treaties to Occupied Territory. in K. Fach Gómez *et al.* (eds), European Yearbook of International Economic Law (Springer Nature Switzerland AG 2019). p. 68.

[22] The Law of Ukraine "On The Termination of The Agreement Between The Government of The Russian Federation and The Cabinet Of Ministers of Ukraine on The Encouragement and Mutual Protection of Investments", No. 3329-IX (entered into force 10 August 2023) < https://zakon.rada.gov.ua/laws/show/3329-20#Text> accessed 4 June 2024; Eric Leikin, Noah Rubins KC, Sofia Svinkovskaya, 'Ukraine's Termination of Its Bilateral Investment Treaty with Russia: What Happened and What It Means for Potential Future Claims' (*Passle*, 3 October 2023) <https://riskandcompliance.freshfields.com//post/102ip3m/ukraines-termination-of-its-bilateral-investment-treaty-with-russia-what-happen> accessed 4 June 2024; Lisa Bohmer, 'Ukraine's Legislature Is Discussing Bill on Termination of the State's BIT with Russia, in Light of Russia's Invasion' (*Investment Arbitration Reporter*, 16 May 2023) <https://www.iareporter.com/articles/ukraines-legislature-is-discussing-bill-on-termination-of-the-states-bit-with-russia-in-light-of-russias-invasion/> accessed 4 June 2024.

Ukrainian investors filed claims against Russia as the host state under the BIT, even though their investments were made (1) on the territory of Crimea, which is *de jure* the Ukrainian territory annexed by Russia and with regard to the investments (2) made before the annexation. Therefore, the *prima facie* analysis of this situation allows to assume that tribunals would not have jurisdiction over the claims of domestic Ukrainian investors in cases where Russia could not *per se* be identified as the host state. The tribunals in the Crimean Cases faced the jurisdictional dilemma which mostly was solved through the recognition of jurisdiction over disputes brought by the Ukrainian investors and recognition of the investors` right to rely on the BIT between Ukraine and Russia as the basis of the protection.[23]

I will sequentially address concerns that emerged and evaluate the significance of precedents established by the tribunals for the future practice of handling cases related to the investments` protection in times of armed conflict and annexation.

[23] Stabil Case (n 14), para. 235; Maren Krimmer (n 14), p. 134; Mykhailo Soldatenko, 'Ongoing Territorial Challenges in Crimea Cases: Putting Everest v. Russia in Context - Kluwer Arbitration Blog' (*arbitrationblog.kluwerarbitration.com*, 5 November 2018) <https://arbitrationblog.kluwerarbitration.com/2018/11/05/territorial-challenges-expected-in-crimea-cases-putting-everest-v-russia-in-context/> accessed 2 June 2024; Luke Eric Peterson, 'Russia Held Liable in Confidential Award for Expropriation of Hotels, Apartments and Other Crimean Real Estate; Arbitrators Award Approximately $150 Million (plus Legal Costs) for Breach of Ukraine Bilateral Investment Treaty' (*Investment Arbitration Reporter*, 9 May 2018) <https://www.iareporter.com/articles/russia-held-liable-in-confidential-award-for-expropriation-of-hotels-apartments-and-other-crimean-real-estate-arbitrators-award-approximately-150-million-plus-legal-costs-for-breach-of-ukraine-bi/> accessed 28 May 2024; Luke Eric Peterson, 'In Jurisdiction Ruling, Arbitrators Rule That Russia Is Obliged under BIT to Protect Ukrainian Investors in Crimea Following Annexation' (*Investment Arbitration Reporter*, 9 March 2017) <https://www.iareporter.com/articles/in-jurisdiction-ruling-arbitrators-rule-that-russia-is-obliged-under-bit-to-protect-ukrainian-investors-in-crimea-following-annexation/> accessed 28 May 2024; Cameron A. Miles (n 16).

2 THE TERRITORIAL DIMENSION OF THE JURISDICTION AS THE CORNERSTONE ISSUE IN THE CRIMEAN CASES

2.1 Territorial Jurisdiction under the BIT. How to Interpret the Treaty

According to Article 1(1) of the BIT, the treaty shall be applicable to all the investments which were "*carried out by the investors of one Contracting Party on the territory of the other Contracting Party*."[24] This BIT also defines the territory in Article 1(4). According to this provision, "*territory*" means "*the territory of the Russian Federation or the territory of Ukraine and also their respective exclusive economic zone and the continental shelf, defined* ***in conformity with international law***." [emphasis added].[25] As was already mentioned, the tribunals decided that the investments were made on the territory which was under the "jurisdiction and *de facto* control" of Russia, which falls within the scope of the BIT.[26]

However, in the light of the novelty of the decision made by the tribunals, certain issues appeared that ought to be discussed, namely (1) the interpretation of the definition of "territory" under the BIT; and (2) which concept of the international law, more specifically sovereignty or jurisdiction, was made the basis for the territory identification under the BIT.

2.1.1 Dilemma of the Interpretation of the Definition of "Territory" under the BIT

The issue that provoked disputes among academics was the interpretation of Article 1(4) of the BIT. The question that arose was whether **the whole** "*territory*" of the state in this case shall be identified "*in conformity with international law*" which would strictly limit the scope of

[24] Agreement Between The Government of The Russian Federation and The Cabinet Of Ministers of Ukraine on The Encouragement and Mutual Protection of Investments (Russian Federation – Ukraine) (adopted 15 December 1999, entered into force 21 January 2000), Article 1 (1), ["***BIT***"].
[25] BIT (n 24), Article 1(4).
[26] Stabil Case (n 14), para. 146; Hepburn (n 14); Erik Brouwer, 'Analysis: UNCITRAL Tribunal in DTEK Krymenergo v. Russia Upholds Jurisdiction over Claim for Expropriation of Crimean Assets, Rejects Corruption Allegations, and Awards 200+ Million USD to the Ukrainian Investor' (*Investment Arbitration Reporter*, 9 November 2023) <https://www.iareporter.com/articles/analysis-uncitral-tribunal-in-dtek-krymenergo-v-russia-upholds-jurisdiction-over-claim-for-expropriation-of-crimean-assets-rejects-corruptions-allegations-and-awards-200-million-usd-to-the-ukrain/> accessed 4 June 2024.

territory only to those over which the state exercises legal title and sovereignty. In the other possible scenario, which was supported by the tribunal, the concept "*in accordance with international law*" is only referred to as the "*exclusive economic zone and the continental shelf*" and, thus, "*territory*" shall be interpreted in accordance with the ordinary meanings and consequently without narrow limitation.[27] Therefore, in the latter case, the "*territory*" for the purposes of the BIT will also include those over which the state exercises jurisdiction only, moreover, in the case of Crimea it doesn't require an assessment of the legality of its annexation by Russia for recognizing it "*territory*" within the meaning of the BIT.[28]

First of all, it shall be clarified why it is important to provide relevant identification. In this case, the task of the tribunal was to identify whether the territory where occurred change of effective control could be considered as one falling within the scope of "*territory*" under the BIT. The concept of "*territory*" within the ordinary meaning of international law does not exclude the territory where a change of control occurred, thus in case we identify "*territory*" in the present case through this concept, Crimea after its annexation by Russia will fall within the scope of "*territory*" established under the BIT.[29]

Although the tribunal concluded that the concept "*defined in conformity with international law*" shall only be applied to the exclusive economic zones and continental shelf it is evident from the available awards that there was no substantial argumentation to such conclusion.[30] Some of

[27] Stabil Case (n 14), paras. 150, 152.
[28] Stabil Case (n 14), para. 142; Peterson, 'In Jurisdiction Ruling, Arbitrators Rule That Russia Is Obliged under BIT to Protect Ukrainian Investors in Crimea Following Annexation' (n 23).
[29] Olga Kuchmiienko, 'Chapter V: Investment Arbitration, How does Change in Effective Control over Territory Influence the Application of the Ukraine-Russia and Other BITS? To BIT or NOT TO BIT?'. in Klausegger and Others (eds), Austrian Yearbook on International Arbitration 2020 (MANZ'sche Verlags- und Universitätsbuchhandlung Verlag CH Beck 2020), p. 541.
[30] Naftogaz Case (n 14), para. 170; Stabil Case (n 14), para. 141; Jarrod Hepburn and Ridhi Kabra, 'INVESTIGATION: Further Russia Investment Treaty Decisions Uncovered, Offering Broader Window into Arbitrators' Approaches to Crimea Controversy' (*Investment Arbitration Reporter*, 17 November 2017) <https://www.iareporter.com/articles/investigation-further-russia-investment-treaty-decisions-uncovered-offering-broader-window-into-arbitrators-approaches-to-crimea-controversy/> accessed 28 May 2024.

the authors criticized the lack of argumentation by the tribunal specifically in relation to the grammatical interpretation.[31] However, several important aspects shall be mentioned here:

Firstly, from the grammatical point of view the addition "*defined in conformity with international law*" constitutes a participial phrase, which specifically was joined to the part "*respective exclusive economic zone and the continental shelf*".

One of the examples which provides a clearer distinction between the two concepts is the definition of territory under the Ukraine-Israel BIT. In this BIT "*territory*" in respect of Ukraine is defined as "*territory of Ukraine* ***including*** *the territorial sea,* ***as well as*** *the continental shelf and the exclusive economic zone* ***over which*** *Ukraine exercises sovereignty, sovereign rights or jurisdiction*." [emphasis added].[32] This provision makes it abundantly clear that the "*territory of Ukraine*", which does not require a specific identification, includes separate territories of the exclusive economic zone and continental shelf, which are in turn identified in accordance with international law.

For the purposes of the Ukraine-Russia BIT, in case the parties wish to adjoin "*defined in conformity with international law*" to the whole sentence they would change "***and also***" joinder to "***or***". In conclusion, the whole provision would look like "*the territory of the Russian Federation or the territory of Ukraine* ***or*** *their respective exclusive economic zone and the continental shelf, defined in conformity with international law*." [emphasis added]. In this case, it is harder to estimate whether "*defined in conformity with international law*" referred only to the exclusive economic zone and continental shelf or other parts of the sentence as well.

[31] Cameron A. Miles, (n 16), Stabil Case (n 14), para. 141; Patrick Dumberry, 'Requiem for Crimea: Why Tribunals Should Have Declined Jurisdiction over the Claims of Ukrainian Investors against Russian under Ukraine–Russia BIT' (2018) 9 Journal of International Dispute Settlement 506 - 533, p.524 ; Ofilio J Mayorga, 'Occupants, Beware of BITs: Applicability of Investment Treaties to Occupied Territories' (2020) 19 The Palestine Yearbook of International Law Online 136, p. 524.

[32] Agreement Between The Government of The State of Israel and The Government of Ukraine for The Reciprocal Promotion and Protection Of Investments (Ukraine – Israel) (adopted 1 June 2011, entered into force 20 November 2012), Article 1 (5) (f) (2).

Secondly, according to Article 57 of the United Nations Convention on the Law of the Sea, "*the exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured*".[33] A similar provision was also established under Article 2 of the Law of Ukraine "On the Exclusive Economic Zone of Ukraine", where together with the definition of the exclusive economic zone, was provided that "[t]*he width of the exclusive (maritime) economic zone is up to 200 nautical miles, measured from the same baselines as the territorial sea of Ukraine*."[34] These provisions allow us to make a conclusion, that while the territory of Ukraine doesn't require specific measurements since it is already defined under international law following "*characteristic points and lines of relief or clearly visible landmarks*",[35] the delimitation of the exclusive economic zone is subject to the agreement between the states which share it.[36] Such a conclusion is also supported by Article 3 of the Law of Ukraine "On the Exclusive Economic Zone of Ukraine", which states "[t]*he delimitation of the exclusive (maritime) economic zone is carried out in accordance with the legislation of Ukraine by concluding agreements with states whose coasts are opposite or adjacent to the coast of Ukraine,* ***based on the principles and criteria generally recognized in international law,*** *in order to achieve a fair resolution of this issue*." [emphasis added].[37] Therefore, taking into account this position from the legislators of the Law of Ukraine, usage of the phrase "*defined in conformity with international law*" for the identification of the territory of exclusive economic zone and continental shelf seems reasonable and logical, while the meaning of territory doesn't need to be separately identified.

[33] United Nations Convention on The Law of The Sea (adopted 10 December 1982, entered into force 16 November 1994) UNTS 397, Article 57.
[34] The Law of Ukraine "On the Exclusive Economic Zone of Ukraine", No. 162/95-BP (entered into force 16 May 1995, with changes from 23 March 2023) < https://zakon.rada.gov.ua/laws/show/162/95-%D0%B2%D1%80#Text> accessed 26 March 2024, ["***The Law of Ukraine "On the Exclusive Economic Zone of Ukraine***"].
[35] The Law of Ukraine "On the State Border", No. 1777-XII (entered into force 4 November 1991, in the edition of 23 September 2023) < https://zakon.rada.gov.ua/laws/show/1777-12#Text> accessed 8 June 2024.
[36] Stabil Case (n 14), para. 142.
[37] The Law of Ukraine "On the Exclusive Economic Zone of Ukraine" (n 34), Article 3.

Thirdly, as was specified by the tribunal, in the BITs concluded by Russia with the states sharing sea border with Russia the phrase "*defined in conformity with international law*" was used (*e.g.* Singapore[38]), and, on the other hand, the BITs concluded with states which do not have such borders (*e.g.* Slovakia[39]) this phrase was not used. Therefore, the tribunal concluded that for Russia usage of "*defined in conformity with international law*" is only applicable for the identification of exclusive economic zones and continental shelf.[40]

The tribunal in *Stabil Case* cited numerous authorities supporting the notion of the broad interpretation to be given to "territory", therefore, including "occupied territories" and territories of the State which are not necessarily recognized under international law.[41]

Consequently, the usage of the phrase "*defined in conformity with international law*" shall only be interpreted in relation to the exclusive economic zone and continental shelf, while territory shall be defined in accordance with ordinary means given to words without the necessity to establish its legality.

[38] Agreement Between The Government of The Republic of Singapore and The Government of The Russian Federation on The Promotion and Reciprocal Protection of Investments (Russian Federation-Singapore) (adopted on September 27, 2010), Article 1 (5) reads as follows: "*The term "territory" means, in respect of each Contracting Party, the territory of the Russian Federation and the Republic of Singapore respectively, as well as its exclusive economic zones and the continental shelf over which that Contracting Party exercises sovereign rights or jurisdiction in accordance with the United Nations Convention on the Law of the Sea (1982), for the purposes, inter alia, of exploration and exploitation of the natural resources within such areas*."

[39] Agreement On Encouragement and Mutual Protection of Investments Between Russian Federation and Republic of Slovakia (Russian Federation - Slovakia) (adopted on 29 September 1993), Article 1(4) reads as follows: "*The term 'territory' means the territory of the Russian Federation and the Slovak Republic, and, in respect of the Russian Federation, also the exclusive economic zone and the continental shelf over which the Russian Federation exercises, in accordance with international law sovereign rights and jurisdiction for the purpose of exploration, and conservation of natural resources*".

[40] Stabil Case (n 14), para. 141; Jarrod Hepburn and Ridhi Kabra (n 30); Olga Kuchmiienko, 'Chapter V: Investment Arbitration, How does the Change in Effective Control over Territory Influence the Application of the UkraineRussia and Other BITS? To BIT or NOT TO BIT?' (n 29), p. 541.

[41] Stabil Case (n 14), paras. 147, 148; Naftogaz Case (n 14), para.169.

2.1.2 Whether the Territory of the Host State for the Purpose of the BIT Is Identified through the Concept of Sovereignty or Jurisdiction

When the tribunal considered the issue of jurisdiction *ratione loci,* arbitrators faced a dilemma of whether the host country under the BIT shall be one which has sovereignty over the Peninsula or is only required to exercise jurisdiction.[42] Jurisdiction is deemed to be the concept of public international law that "provides the link" between the government and the territory, which shows the authority of the government to rule and legislate over certain territory.[43] Sovereignty in turn defines the independence of the state, its power of monopoly over the territory.[44]

The tribunals in the *Stabil Case* and *Naftogaz Case* came to the conclusion that the BIT between Russia and Ukraine does not limit the definition of "*territory*" to sovereign territory, and that is clear from the plain reading of the BIT.[45] In addition, the tribunal provided arguments with reference to the respective work of Judge Crawford and definitions of territory provided in English, Ukrainian and Russian dictionaries, where is stated that territory in the first place shall be connected with the notion of jurisdiction *i.e.* administration of the territory, legal authorities of the state rather than with sovereignty, which can be omitted in such a definition and, in fact, substituted with "administration".[46] A similar approach was also suggested by Professor Ian Brownlie when he stated that territory shall be "equated" to the effective exercising of the jurisdiction in the first place.[47]

[42] Richard Happ and Sebastian Wuschka, 'Horror Vacui: Or Why Investment Treaties Should Apply to Illegally Annexed Territories' [2016] 33(3) Journal of International Arbitration 245 - 268, p. 245.
[43] Julia Hörnle, "Head in the Clouds": The Clash between Territorial Sovereignty, Jurisdiction, and the Territorial Detachment of the Internet, Internet Jurisdiction Law and Practice (Oxford University Press 2021), p. 5.
[44] Ibid, p.8.
[45] Stabil Case (n 14), para. 143; Naftogaz Case (n 14), paras. 150, 172; G. Matteo Vaccaro-Incisa, 'Crimea Investment Disputes: Are Jurisdictional Hurdles Being Overcome Too Easily?' (*EJIL: Talk!*, 9 May 2018) <https://www.ejiltalk.org/crimea-investment-disputes-are-jurisdictional-hurdles-being-overcome-too-easily/> accessed 24 March 2024.
[46] Stabil Case (n 14), para. 140; James R. Crawford, Part III Territorial Sovereignty, 8 Forms of Governmental Authority over Territory, Brownlie's Principles of Public International Law (8th Edition) (Oxford University Press 2012), p. 206-208.
[47] Ian Brownlie, Principles of Public International Law (7 edn, Oxford University Press 2008), p. 112.

The relevance of this issue is prominent, since in case the parties are meant to connect territory to sovereignty, Ukraine can be identified as a country which has its sovereign rights over Crimea, thus potentially Ukraine can be held liable for the violation of the investors` rights. On the other hand, the jurisdiction exercised by Russia through effective control is hardly disputable, since, after the annexation of Crimea, Ukraine didn't have any real authority in the Peninsula.

The abovementioned conclusion of the tribunal raised certain confusion among academics since some of them argued, that the concept of "*territory*" shall not be equalized to the "*jurisdiction*", thus they rather claim that territory is inevitably connected with the concept of "*sovereignty*".[48] The proponents of this approach point out that it is very unlikely that Ukraine and Russia while negotiating BIT tied the definition of territory to the jurisdiction.[49]

First of all, the critics of the tribunals` decision mentioned, that from the international law perspective, territory shall be defined as a geographical space over which the fullness of sovereignty is exercised by the state, therefore the concepts of territory and sovereignty *cannot be considered separately*. [50]

Secondly, they argue, that mentioning of "*exclusive economic zone and the continental shelf*" in the text of the BIT also gives a hint that parties to the BIT considered geographical principles for the identification of territory in the first place.[51]

Finally, the authors argue that technically both Ukraine and Russia exercise jurisdiction over Crimea, the former legally and the latter via occupation and thus both countries shall be responsible for the protection of investments.[52] Critics of the recognition of jurisdiction tried to

[48] Cameron A. Miles (n 16).
[49] Ibid.
[50] Ibid.
[51] Ibid.
[52] Ibid.

prove that Ukraine shall be held equally responsible for the violation of the investors` rights via this practical argument.

All these points give rise to valid concerns as to the interpretation provided by the tribunal, however, at this point, it is important to provide the counterarguments of why identification of the host state as one that exercises jurisdiction over the territory of Crimea is more accurate in the present case. Thus, the following arguments can be mentioned:

Firstly, from the plain language of the BIT, it is clear that countries while drafting the Treaty and providing definitions to the territory considered concepts of jurisdiction and sovereignty not as cumulative, but as separate categories either of which can be used for the analysis. Such an argument is supported by the texts of the BITs concluded by Ukraine with the other countries. For instance, in the BIT between Ukraine and Hungary, the parties prescribed that the territory shall mean the territory over which the Contracting Party "*exercises, in conformity with international law, sovereignty, sovereign rights* ***or*** *jurisdiction*." [emphasis added].[53] The same works for the BITs between Bosnia and Herzegovina and Ukraine,[54] Japan and Ukraine,[55] Ukraine and Israel, where specifically stated that territory is one "over which Ukraine exercises sovereignty **or** jurisdiction". [emphasis added].[56]

[53] Agreement Between The Republic of Hungary and Ukraine for The Promotion and Reciprocal Protection of Investments (Hungary - Ukraine) (adopted 11 October 1994, entered into force 3 December 1996), Article 1 (4).

[54] Agreement Between Bosnia and Herzegovina and Ukraine on The Promotion and Reciprocal Protection of Investments (Bosnia and Herzegovina – Ukraine) (adopted 18 November 2003, entered into force 22 January 2004), Article 1 (4) (b) reads as follows: "*In respect of Ukraine: the territory under the sovereignty of Ukraine and the sea and submarine areas over which Ukraine exercises, in conformity with international law, sovereignty, sovereign rights or jurisdiction.*"

[55] Agreement Between Japan and Ukraine for The Promotion and Protection of Investment (Japan-Ukraine) (adopted 5 February 2015, entered into force 26 November 2015), Article 1 (5) (b), reads as follows: "*With respect to Ukraine: the land territory, internal waters and territorial sea of Ukraine and the airspace above them as well as the maritime zones beyond the territorial sea including the seabed and subsoil, over which Ukraine exercises sovereign rights or jurisdiction in accordance with its national laws in force and international law*."

[56] Agreement Between The Government of The State of Israel and The Government of Ukraine for The Reciprocal Promotion and Protection Of Investments (Ukraine – Israel) (adopted 1 June 2011, entered into force 20 November 2012), Article 1 (5) (f) (2) reads as follows: "*With respect to Ukraine: the territory of Ukraine including the territorial sea, as well as the continental shelf and the exclusive economic zone over which Ukraine exercises sovereign rights or jurisdiction in conformity with international law*."

Secondly, from the BIT, it is visible that parties put more emphasis on the legislative and executive authorities of the state over the territory, thus implying jurisdiction criterion for the identification of the host state. For instance, as was rightly pointed out by Olga Kuchmiienko, in Article 2,3,4,5,7 of the BIT the parties put more emphasis on the protections granted to the investors in the legislation of the state, stressing out the legal force of the laws governing the legal regime on the territory where the investments were made.[57] Therefore, after the Russian annexation of Crimea all of these powers were solely exercised by Russia, and Ukraine didn't have a real feasible authority over the territory of Crimea. The tribunal rightly brought up the issue of the "effective control" exercised by Russia over the territory of Crimea, which will be considered in more detail below.

Moreover, the tribunals specified that they didn't have the intention to overlimit the applicability of the Treaty in the cases when the parties themselves did not mean to impose such limitations.[58] Therefore, as was specified by the tribunals, even the plain language of the BIT didn't limit the category of "territory" and did not exclude the concept of "change of control" from its scope.[59] Consequently, the concept of the territory of the host state in the present case shall be interpreted relying on the jurisdiction that the state exercises over the territory where investments were made, and not sovereignty as was argued by some critics.

2.2 The Issue of Effective Control

After the interpretation of the "*territory*" under the BIT was provided, the next issue that shall be addressed is the "effective control", which was exercised by Russia over Crimea and how its introduction set up a new precedent in the history of investment arbitration.

[57] Olga Kuchmiienko, 'Chapter V: Investment Arbitration, How does the Change in Effective Control over Territory Influence the Application of the Ukraine-Russia and Other BITS? To BIT or NOT TO BIT?'(n 29), p. 541.
[58] Stabil Case (n 14), para. 143, Naftogaz Case (n 14), para. 150.
[59] Maren Krimmer (n 14), p. 135.

2.2.1 The Concept of "Effective Control"

It is clear from the texts of the published awards that one of the main arguments expressed by the tribunal was that Russia has "*de facto control*" or "*effective control*" over the territory of Crimea.[60] According to ECtHR, effective control is established in case of the military presence of the state on the disputed territory together with the control established through political and economic influence.[61]

The tribunals in *the Stabil Case*, *Naftogaz Case* and *Everest Case* recognized that Russia "established effective control over Crimea" via available means including both physical control and implementation of legal measures.[62] Therefore, the tribunals tied the category of effective control, in particular, to the ability of the state to legislate within the area.[63] Russia used this possibility and since the occupation of Crimea actively exercised the administrative and legislative authorities in Crimea by issuing new laws, introducing re-registration procedures for Ukrainian companies, conducting judiciary proceedings relying on Russian law, imposing new regulations for the Crimean Tatars, which significantly limited their rights and freedoms.[64] The

[60] Maren Krimmer (n 14), p. 134; Mykhailo Soldatenko, 'Ongoing Territorial Challenges in Crimea Cases: Putting Everest v. Russia in Context - Kluwer Arbitration Blog' (n 23); Erik Brouwer (n 26).

[61] Ukraine and The Netherlands v. Russia [2022] Applications nos. 8019/16, 43800/14 and 28525/20, para. 578 ["***Ukraine and The Netherlands v. Russia***"]; Richard Manfredi, 'Russia in the European Court of Human Rights – Recent Decisions May Impact Rights of Investors' (*Gibson Dunn*, 30 May 2023) <https://www.gibsondunn.com/russia-in-the-european-court-of-human-rights-recent-decisions-may-impact-rights-of-investors/> accessed 17 May 2024.

[62] Stabil Case (n 14), para. 132, Naftogaz Case (n 14), para. 180; Hepburn (n 14); Jarrod Hepburn and Ridhi Kabra (n 30); Mykhailo Soldatenko, 'Ongoing Territorial Challenges in Crimea Cases: Putting Everest v. Russia in Context - Kluwer Arbitration Blog' (n 23).

[63] Stabil Case (n 14), para. 150.

[64] Michael R. Carpenter, 'The Russian Federation's Ongoing Aggression Against Ukraine' (*U.S. Mission to the OSCE*, 7 March 2024) <https://osce.usmission.gov/the-russian-federations-ongoing-aggression-against-ukraine-79/> accessed 5 June 2024; Olga Guyvan, 'В Росії опублікували текст конституції, куди включили 4 українські області' (*Суспільне | Новини*, 6 October 2022) <https://suspilne.media/289726-v-rosii-opublikuvali-novij-tekst-konstitucii-kudi-vklucili-ukrainski-teritorii/> accessed 5 June 2024; Liudmyla Korotkykh, Eskender Bariiev 'Submission to Study on "Treaties, agreements and other constructive arrangements, between indigenous peoples and States, including peace accords and reconciliation initiatives, and their constitutional recognition"' (CTRC, 2022) <https://www.ohchr.org/sites/default/files/2022-06/ctrc-tatarcrimea-EMRIP-seminar-treaties-EMRIP-seminar-treaties.docx > accessed 5 June 2024.

tribunals stress that currently Russia is also **the only** state to exercise control over the territory of Crimea and Eastern Parts of Ukraine.[65]

The existence of the "effective control" of Russia over the territory of Crimea was not only recognized by the tribunals but also in the recent decision of the ECtHR in the case of *Ukraine and Netherlands v. Russia*.[66] The Court in this case carefully evaluated all the factors mentioned above, including the military presence of the Russian troops, economic and political support given to the separatists, and the level of control and influence that Russia exercised over the territories, and came to a conclusion that presented evidence was sufficient to prove effective control of Russia over Eastern Ukrainian territories as well as Crimea.[67]

According to the decisions of the tribunals, the emphasis was put on the fact that Russia itself considers Crimea a part of its sovereign territory.[68] This argument allows to show that Russia acknowledges that it has certain obligations towards investors in Crimea, even though its annexation was not recognized by the majority of the civilized countries.

2.2.2 Obligation to Protect Inhabitants When the Host State Exercises Effective Control

The tribunals rightly analyzed that investment law cannot be considered in a nutshell when dealing with a situation that deviates from the regular investment dispute. Thus, the tribunals applied the law of armed conflict, which allowed them to come to the conclusion that occupation entails certain consequences for the occupying state, for instance, such a state

[65] Stabil Case (n 14), para. 150, Naftogaz Case (n 14), para. 180.
[66] Ukraine and The Netherlands v. Russia (n 61), paras. 563, 695.
[67] Ukraine and The Netherlands v. Russia (n 61), paras. 695 *et seq*; Olga Kuchmiienko, 'The ECHR Findings in the Case Ukraine and The Netherlands v. Russia Dated January 25, 2023 and Investment Arbitration "Crimean Cases": Any Positive News for Ukrainian Investors? - Kluwer Arbitration Blog' (13 March 2023) <https://arbitrationblog.kluwerarbitration.com/2023/03/13/the-echr-findings-in-the-case-ukraine-and-the-netherlands-v-russia-dated-january-25-2023-and-investment-arbitration-crimean-cases-any-positive-news-for-ukrainian-investors/> accessed 17 May 2024; Ukraine v. Russia (*RE* Crimea) [2020] Application Nos. 20958/14 and 38334/18, para. 349.
[68] Stabil Case (n 14), para. 144.

undertakes a commitment to protect inhabitants of the occupied territory.[69] From this follows the obligation of the occupying state to protect investments in the territory which was occupied. In case the existence of such an obligation is not recognized, the investors will be left without any guarantees granted by the relevant BIT since they will be unable to invoke safeguards enshrined in it as the legal basis for the protection of their rights.[70] Such omission to protect the Ukrainian investors also in turn leads to their discrimination.[71] Therefore, effective protection of the investors` property rights shall be the primary concern.[72]

The second argument in support of the obligation of Russia to protect investors can be an interpretation of the BIT in the light of its object and purpose and in good faith.[73] According, to the preamble to the BIT, the parties agreed to conclude the BIT in order to create "*favourable conditions for mutual investments*" and in order to expand economic cooperation.[74] Thus, the tribunals in *the Stabil Case, Naftogaz Case* and *Krymenergo Case* established that the protection of the investors is one of the primary aims of the BIT, and, thus disagreement over the legal status of Crimea cannot have a possible effect on the object of the BIT meaning on the obligation to protect investments of the investors.[75]

Lastly, taking into account "good faith" under Article 31(1) of the VCLT as an important factor for the interpretation of the BIT, the tribunal decided that Russia cannot both claim that Crimea belongs to its territory and, on the other hand, reject its obligation to protect investors.[76] Such

[69] Maren Krimmer (n 14), p. 135; Hepburn (n 14); Jarrod Hepburn and Ridhi Kabra (n 30).
[70] Maren Krimmer (n 14), p. 136.
[71] G. Matteo Vaccaro-Incisa, 'Crimea Investment Disputes: Are Jurisdictional Hurdles Being Overcome Too Easily?' (*EJIL: Talk!*, 9 May 2018) <https://www.ejiltalk.org/crimea-investment-disputes-are-jurisdictional-hurdles-being-overcome-too-easily/> accessed 24 March 2024.
[72] Ibid; Stabil case (n 14), para. 174; Maren Krimmer (n 14), p. 136.
[73] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, Article 31(1), ["***VCLT***"].
[74] BIT (n 24), preamble.
[75] Stabil Case (n 14), paras. 158, 159; Naftogaz Case (n 14), paras. 154, 176 *et seq*; Mykhailo Soldatenko, 'Ongoing Territorial Challenges in Crimea Cases: Putting Everest v. Russia in Context - Kluwer Arbitration Blog' (n 23); Erik Brouwer (n 26).
[76] Stabil Case (n 14), para. 170.

an action, according to the tribunal, will be contrary to the good faith and consistency principle.[77]

Hence, the recognition by the courts of Russia as the state that exercises effective control over the territory of Crimea leads to the conclusion that it is also bound by the obligations to protect investors. This fact is an implication of Russia being a state that occupied the Crimean Peninsula.

2.3 The Issue of Non-recognition

One of the raising concerns of the recognition of jurisdiction by the tribunals is the issue of whether the recognition of BIT`s applicability to the case and, thus, an acknowledgement that investments were made on the Russian territory leads to the recognition by the tribunal of Crimea as legally being the Russian territory.[78] Moreover, this issue becomes even more sharp if we take into account the fact that Russia can use such a position in proceedings before other international courts and tribunals on a *res judicata* basis. In this case, there appears a high risk of overlap between conflicting interests, for instance investor`s interest in protecting his rights in accordance with guaranties provided by the instruments of investment law and the interest of the international community in the "sanctioning" the acts of the state violating main principles of international law.[79]

The proponents of the theory that the tribunal shall not recognize its jurisdiction in such a case because it will lead to the recognition of annexation often make reference to the Resolution adopted by the UN General Assembly, where was specifically mentioned that "*states, international organizations and other specialized agencies*" shall not recognize annexation of the Autonomous Republic of Crimea as well as shall abstain from any action that can be

[77] Ibid.
[78] Patrick Dumberry (n 31), p. 529; Sebastian Wuschka, Procedural Aspects of the Obligation of Non-Recognition Before International Investment Tribunals. in K. Fach Gómez *et al.* (eds), European Yearbook of International Economic Law (Springer Nature Switzerland AG 2019), p. 150.
[79] Richard Happ and Sebastian Wuschka (n 42), p. 245.

interpreted as recognizing the legality of the annexation.[80] Moreover, the obligation of non-recognition also forms part of customary international law.[81] What is also mentioned by the opponents of the acknowledgement of jurisdiction approach is that tribunals in the *Stabil Case* and *Naftogaz Case* specifically estimated the legality of the incorporation of Crimea into the Russian territory.[82]

Contrary to what was pointed out by the critics, the tribunals in the Crimean Cases, in my opinion, found a very diplomatic solution to avoid possible violation of the provisions of the Resolution and recognition of the legality of the Crimean annexation. For instance, in the *Stabil Case* and *Naftogaz case,* the Tribunal refrained from using the term "*annexation of Crimea*" and used "*incorporation*" in the sense of incorporation of Crimea into the Russian Federation.[83] The tribunal via such unusual choice of terminology tried to convey that it only elaborates on the questions raised before it and absolutely doesn't make any allegations as to the legitimacy of the annexation of Crimea and recognition of its status, leaving those decisions to be addressed by other institutions.[84] Furthermore, the tribunals specified that investors didn't ask them to ascertain the illegality of Crimea annexation but rather to find out whether they could invoke the protection granted to them under the BIT.[85]

In *the Naftogaz Case* and *Krymenergo Case*, the tribunals specifically mentioned that the issue of the legality of joining Crimean territory to Russia is not relevant in the proceeding determining the applicability of the BIT.[86] As was already mentioned, the tribunal by its decision specifically stressed the importance of the protection of investors under the BIT and that *irrespective of the legality of the occupation*, the occupying state is bound by the obligations

[80] UNGA Res 68/262 (27 March 2014) UN Doc A/RES/68/262, para. 6; Thomas D Grant, 'Annexation of Crimea' (2015) 109 American Journal of International Law 68, p. 91.
[81] Patrick Dumberry (n 31), p. 512.
[82] Patrick Dumberry (n 31), p. 522.
[83] Stabil Case (n 14), para. 54, Naftogaz Case (n 14), para. 163.
[84] Ibid.
[85] Stabil Case (n 14), para. 103, Naftogaz Case (n 14), para. 149; Hepburn and Kabra (n 30).
[86] Naftogaz Case (n 14), paras. 148, 160; Erik Brouwer (n 26).

to protect the investors.[87] Especially, this is the case when the states due to exercising effective control over the annexed territory are able to fulfil their obligations concerning the protection of the investors.[88] Moreover, in the case of the opposite, Russia will have a double advantage in the form of the profit from the investments made on the territory of Crimea as well as from the illegal conduct since it wouldn't be held liable for the violation of the investors` rights.[89]

Authors, arguing declining jurisdiction in this case, also mention that even if it could be assumed that Ukraine does not exercise any control over the territory of Crimea, Russia still cannot be considered liable under the respective BIT since it didn't succeed in obligations imposed on Ukraine as a previous sovereign state.[90] In my opinion, this argument is not relevant in the context of the present case for the following reasons:

Firstly, BIT between Ukraine and the Russian Federation comprises a set of mutual obligations of **both** states with regard to the protection of investors on their territories. Therefore, since any of the states made no effort to terminate this bilateral agreement (at least until 2025) it is still effective and binds Russia to act in accordance with its obligations in the first place.

Secondly, as was already mentioned, what happened in Crimea was an effective shift of control that precluded Ukraine from exercising its jurisdiction over the territory of Crimea, while Russia in the meantime officially acknowledged that Crimea was "returned" to its possession.[91] Therefore, regardless of the worldwide recognition, it shall be held liable for the protection of the investors in Crimea since it possessed the means to ensure such protection.

Lastly, according to Article 18 of the VCLT, the state-contracting party to a treaty shall not act in a form that can "*defeat the purpose and object of the Treaty*".[92] As was explained above the

[87] 'Ukraine Conflict: Investment Protection and Armed Conflict' (*Morgan Lewis*, 24 February 2022) <https://www.morganlewis.com/pubs/2022/02/ukraine-conflict-investment-protection-and-armed-conflict> accessed 24 March 2024.
[88] Richard Happ and Sebastian Wuschka (n 42), p. 263.
[89] Hepburn (n 14); Richard Happ and Sebastian Wuschka (n 42), p. 263.
[90] Patrick Dumberry (n 31), p. 517.
[91] Stabil Case (n 14), para. 144, Naftogaz Case (n 14), para. 179.
[92] VCLT (n 73), Article 18.

main aim of the BIT is to foster development of the investments, and to provide safeguards necessary to protect investors. Therefore, Russia is precluded from action that may frustrate its obligation under the BIT in accordance with the VCLT as well.

For the reasons mentioned above, Russia shall be found responsible for the protection of investors on the territory of Crimea in accordance with the provisions of the BIT.

Moreover, it is important to stress that in this case, the Ukrainian side recognized the vital importance for the investors to protect their proprietary rights, while the issue of the legal status of the Peninsula shall be determined by the different kinds of institutions.[93] Therefore, Ukraine even made non-disputing party submissions to support the investors and prevent Russia from speculating of being not responsible for the investors` protection.[94]

It is also worth noting that in case the tribunal decides to interpret the prohibition imposed by the Resolution literally, this in turn would mean that investors will be unable to invoke the guarantees under any bilateral treaty.[95] Therefore, investors might find themselves being left without any practical viable way of legal recourse.[96]

Therefore, recognition of jurisdiction does not entail recognition of Crimea as Russian territory under international law. Contrary to that, recognition of jurisdiction acts solely for the purposes of the BIT and in order to extend guarantees and safeguards granted to the investors under the respective BIT. Hence, with regard to the issue of the territory where the investments were made, the tribunals decided that the investments were made on the territory, which was under Russian effective control, and thus it falls within the definition provided under the BIT.[97]

Consequently, in order to sum up the findings of the tribunals and additional arguments presented above, while establishing territorial jurisdiction in the Crimean Cases due

[93] 'The Crimean Precedent' (n 15); Peterson, 'In Jurisdiction Ruling, Arbitrators Rule That Russia Is Obliged under BIT to Protect Ukrainian Investors in Crimea Following Annexation' (n 23).
[94] Stabil Case (n 14), para. 145; Cameron A. Miles (n 16).
[95] Richard Happ and Sebastian Wuschka (n 42), p. 255.
[96] Richard Happ and Sebastian Wuschka (n 42), p. 245.
[97] Hepburn (n 14).

consideration shall be given to the interpretation of the territory, identification of the host state, effective control issue and finally obligation to protect the inhabitants of the occupied territory. After a comprehensive analysis of these factors, it can be stated that tribunals come to a reasonable and legitimate conclusion that they have jurisdiction *ratione loci* over the claims of Ukrainian investors against Russia.

3 TEMPORAL JURISIDICTION. WHEN THE BIT CAN BE USED FOR THE PROTECTION OF INVESTORS

As the issues surrounding territorial scope of jurisdiction were discussed in detail, it is equally important to further elaborate on the question of temporal jurisdiction of the BIT.[98] The issue before the tribunals was whether the BIT could be applicable to the relations between the Ukrainian investors and Russia even though these investments were made prior to the annexation of Crimea. As in the case of the territorial jurisdiction, the tribunals confirmed the applicability of the BIT to the investments made in Crimea by the Claimants.[99]

Arbitrators conducted extensive analysis of Article 12 of the BIT, where was stated that BIT shall be applied to the investments "***carried out*** *by the investors of one Contracting Party on the territory of the other Contracting Party, as of January 1, 1992*". [emphasis added].[100] The proponents of the non-recognition of the temporal jurisdiction might argue that using past tense in Article 12 of the BIT means that investments shall be made on the territory of Russia *ab initio*, and for the purposes of this argument Crimea was not the territory of Russia before 2014.[101] Contrary to such a conclusion, the tribunals in *the Stabil Case* and *Krymenergo case* interpreted this provision in the broad sense, namely as the rule aimed to protect investments made after the dissolution of the Soviet Union regardless of whether the Treaty was already effective.[102] The tribunal in *Nafrogaz Case* and *Everest Case* established that the using of past tense in such words as "*made*" referring to investments is merely showing the description of the state of affairs in the sense that if the investments would not be **made** (past tense) there

[98] G. Matteo Vaccaro-Incisa, 'Crimea Investment Disputes: Are Jurisdictional Hurdles Being Overcome Too Easily?' (*EJIL: Talk!*, 9 May 2018) <https://www.ejiltalk.org/crimea-investment-disputes-are-jurisdictional-hurdles-being-overcome-too-easily/> accessed 24 March 2024.
[99] Stabil Case (n 14), para. 192.
[100] BIT (n 24), Article 12.
[101] Mykhailo Soldatenko, 'Ongoing Territorial Challenges in Crimea Cases: Putting Everest v. Russia in Context - Kluwer Arbitration Blog' (n 23); Jarrod Hepburn and Ridhi Kabra (n 30).
[102] Stabil Case (n 14), para. 185 *et seq*; Erik Brouwer (n 26).

would be no reason for complaint.[103] Therefore, using of past tense doesn't impact interpretation.

Another concern raised in the dissenting opinion to the *Naftogaz Case* was that initially the investments were incorporated before 1992 in the times of the USSR, and after 1992 the Claimants became owners of the investments as a result of the reorganization.[104] This fact in the opinion of dissenters shall preclude the applicability of the BIT to the relations between Claimants and Russia since investments were not "made" by the investors as required under the BIT, but rather were initially state-owned property.[105] The tribunal in the *Naftogaz Case*, addressed such concern relying on the facts that Claimants companies were established in 1998 and afterwards they paid for the property which was in the state ownership before, therefore, they made an investments in compliance with the BIT.[106] To make a different conclusion, in this case, would, in the opinion of the tribunal, "*contradict the basic theory of incorporation and would destroy most of the advantages of incorporation*."[107]

One of the other important provisions from the Treaty which served as the basis for the tribunal arguments on recognition of jurisdiction *ratione temporis* was Article 1(1) of the BIT, where is stated that for the purposes of the BIT, the investments mean "*all kinds of property and intellectual values, which are put in by the investor of one Contracting Party on the territory of the other Contracting Party*".[108] The tribunals confirmed that no time limitation is contained in

[103] Naftogaz Case (n 14), para. 191; Mykhailo Soldatenko, 'Ongoing Territorial Challenges in Crimea Cases: Putting Everest v. Russia in Context - Kluwer Arbitration Blog' (n 23).
[104] Damien Charlotin, 'Analysis: Naftogaz Tribunal Majority Finds That All Investments Fall within the Temporal Scope of the Ukraine-Russia BIT, and Orders Russia to Pay 4.2 Billion USD on Account of an Expropriation of the Claimant's Crimean Assets' (*Investment Arbitration Reporter*, 26 June 2023) <https://www.iareporter.com/articles/analysis-naftogaz-tribunal-majority-finds-that-all-investments-fall-within-the-temporal-scope-of-the-ukraine-russia-bit-and-orders-respondent-to-pay-4-2-billion-usd-on-account-of-an-expropriation-of/> accessed 11 June 2024.
[105] Ibid.
[106] Ibid.
[107] Ibid; NJSC Naftogaz of Ukraine (Ukraine) and Others v. The Russian Federation [2023] PCA Case No. 2017-16, para.312.
[108] BIT (n 24), Article 1(1).

this provision either.[109] A similar conclusion was also reached by the tribunal in the *Everest Case*, where it was stated that BIT shall be applicable in the case of seizure of the Crimean investments after Russia established its control over the territory of the Peninsula since otherwise a number of investors will be left without protection contrary to the object and purpose of the BIT.[110]

Moreover, the conclusions of the tribunals regarding the recognition of the jurisdiction are also justified by the fact, that Russian authority required re-registration of the companies belonging to the Ukrainian investors in accordance with Russian law considering them to be "foreign".[111] In this context, the tribunals also emphasized that because of Russian actions the Ukrainian investors in Crimea became particularly vulnerable, for this reason, interpretation of the BIT in good faith would not allow to make a conclusion that Russia shall not be held responsible for the investors.[112]

As was already mentioned the Russian side refused to participate in the proceedings, however, it did not stop it from appealing decisions of the tribunals in the courts. The first case where the Russian appeal was successful is the case of *Oshadbank v. the Russian Federation*. Oshadbank is a Ukrainian Bank which had its premises in Crimea as well. After annexation, it claimed a violation of the BIT because of allegedly unlawful expropriation committed by the Russian side. The ad hoc tribunal seated in Paris rendered an award in favour of the Claimant.[113] However, Russia filed an appeal to the Paris Court of Appeal pursuant to the provisions from

[109] Stabil Case (n 14), para. 192; Naftogaz Case (n 14), para. 191; Olga Kuchmiienko, 'Chapter V: Investment Arbitration, How does Change in Effective Control over Territory Influence the Application of the Ukraine-Russia and Other BITS? To BIT or NOT TO BIT? (n 29), p. 553.

[110] Mykhailo Soldatenko, 'Ongoing Territorial Challenges in Crimea Cases: Putting Everest v. Russia in Context - Kluwer Arbitration Blog' (n 23).

[111] G. Matteo Vaccaro-Incisa, 'Crimea Investment Disputes: Are Jurisdictional Hurdles Being Overcome Too Easily?' (*EJIL: Talk!*, 9 May 2018) <https://www.ejiltalk.org/crimea-investment-disputes-are-jurisdictional-hurdles-being-overcome-too-easily/> accessed 24 March 2024; Naftogaz Case, para. 195; Erik Brouwer (n 26).

[112] Naftogaz Case (n 14), para. 202.

[113] Damien Charlotin, 'Russia Asks Tribunal to Revise Earlier Findings, Citing New Evidence That Supposedly Casts Doubt on Tribunal's Jurisdiction (and Thus Its $1.3 Billion Award)' (*Investment Arbitration Reporter*, 22 August 2019) <https://www.iareporter.com/articles/russia-asks-tribunal-to-revise-earlier-findings-citing-new-evidence-that-supposedly-casts-doubt-on-tribunals-jurisdiction-and-thus-its-1-3-billion-award/> accessed 12 June 2024.

the French Code of Civil Procedure on the grounds of lack of jurisdiction.[114] According to Russian side, the investments were made by Oshadbank before 1 January 1992, so before it was specified under Article 12 of the BIT.[115] The court of the second instance granted Russian appeal.[116] After this victory Russian side claimed that all other Crimean Cases would be crushed in appeal on the same ground of lack of jurisdiction.[117] However, this is not likely to happen in the light of the new proceeding before the French Court of Cassation, which overturned the decision of the Court of Appeal. Grounds provided by the third instance court are also of great importance for the understanding of the temporal jurisdiction in Crimean Cases.[118] The French court of the third instance decided that Article 12 of the BIT is not jurisdictional in nature, and in general, it only refers to the merits.[119] The court in turn analyzed Article 9 of the BIT, which provides for an agreement of the parties to arbitrate, as well as already mentioned Article 1 of the BIT and as a result came to a conclusion that neither of them established any time restriction.[120]

Lastly, the tribunals in the Crimean Cases faced another important issue regarding the temporal scope of the BIT, namely the date which shall be considered the beginning of the effective control. The date which was suggested by the Ukrainian side was 27 February 2014, the date when the Peninsula was occupied by the Russian troops, the opposition suggested 21 March 2014 when Russia officially recognized Crimea as a part of its territory.[121] The proponents of

[114] Joint Stock Company "State Savings Bank of Ukraine" (JSC Oschadbank) v. Federation De Russie [2021] N° RG 19/04161 - N° Portalis 35L7-V-B7D-B7MGP, paras. 10, 11.
[115] Lisa Bohmer, 'French Cour de Cassation Resurrects Billion-Dollar Crimea Award against Russia' (*Investment Arbitration Reporter*, 7 December 2022) <https://www.iareporter.com/articles/french-cour-de-cassation-resurrects-billion-dollar-crimea-award-against-russia/> accessed 28 May 2024.
[116] Joint Stock Company "State Savings Bank of Ukraine" (JSC Oschadbank) v. Federation De Russie [2021] N° RG 19/04161 - N° Portalis 35L7-V-B7D-B7MGP, para. 102.
[117] Dmytro Soldatenko, Nikolay Yurlov, 'Поразка, але не катастрофа для України: чому Росія виграла арбітраж щодо Криму' (*Європейська правда*, 2 April 2021) <https://www.eurointegration.com.ua/articles/2021/04/2/7121659/> accessed 2 June 2024.
[118] Lisa Bohmer (n 115).
[119] Ibid.
[120] Ibid.
[121] Olga Kuchmiienko, 'Chapter V: Investment Arbitration, How does Change in Effective Control over Territory Influence the Application of the Ukraine-Russia and Other BITS? To BIT or NOT TO BIT? (n 29), p. 556; Ten Years of Occupation by the Russian Federation in Crimea (28 February 2024)

choosing the earlier date as the turning point in the investors` protection name a number of reasonable arguments. One of the most crucial is that Russian side started its devastating activity in Crimea before the announcing it as a part of their territory.[122] Therefore, in case we take the later date for the purposes the effective control establishment we deliberately exclude certain groups of investors from the protection prescribed under the BIT. Arbitrators in the *Naftogaz Case* decided that an earlier date shall be chosen as the date of the start of effective control, and thus the date when the protection of investors shall be invoked.[123] In this specific case, the crucial role was played by the fact that Naftogaz facilities were expropriated before March 21, which would leave investors without protection if tribunals would choose this date as a turning point.[124]

Consequently, the tribunal established that the requirement of the jurisdiction *ratione temporis* was met. Predominantly this conclusion was based on the findings of the tribunals that articles of the BIT that were related to the establishment of the temporal scope of the BIT, did not contain any time limitation that would prevent its applicability to the investments made prior to the incorporation of Crimea into the Russian territory.

<https://www.un.org/sexualviolenceinconflict/wp-content/uploads/2024/02/report/ten-years-of-crimea-occupation-by-the-russian-federation-human-rights-by-the-autonomous-republic-of-crimea-and-the-city-of-sevastopol-ukraine/Crimea.pdf > accessed 11 June 2024, p. 2.

[122] Ibid; 'Crimea Announced "Chornomornaftogaz" Its Property' (*LB.ua*, 17 March 2014) <https://lb.ua/economics/2014/03/17/259676_krim_obyavil_chernomorneftegaz.html> accessed 11 June 2024.

[123] Naftogaz Case (n 14), para. 192.

[124] 'Crimea Announced "Chornomornaftogaz" Its Property' (*LB.ua*, 17 March 2014) <https://lb.ua/economics/2014/03/17/259676_krim_obyavil_chernomorneftegaz.html> accessed 11 June 2024.

CONCLUSION

The decisions of the arbitral tribunals in the Crimean Cases where they recognized the jurisdiction and applicability of the BIT to the relations between the Ukrainian investors and Russia as a host state, will undoubtedly have a significant impact on the practice of conducting investment arbitration during instabilities in the states - parties to the BITs.

The tribunals went into a comprehensive analysis of all the aspects of jurisdiction embedded in the text of the BIT. However, they tried to address all the issues raised by the Russian side, in a precise and logical manner, the succinct nature of the award could not allow them to cover every issue with sufficient precision, which in turn created a gap in the argumentation and opened the awards for the critics of the tribunals` approach.

The proponents of the theory that jurisdiction should not have been recognized in the Crimean Cases presented a lot of arguments, that could also be deemed as reasonable and substantive concerns regarding the interpretation of the BIT and the coexistence of the decisions in the awards with the rules dictated by the public international law. For instance, what if the acknowledgement of jurisdiction will lead to the implied recognition of Crimea as a Russian territory, what is the probability that while concluding the BIT the parties made a distinction between the sovereignty and jurisdiction over the territory for the purposes of the identification of the host state, or whether investors can be protected under the BIT if the investments were made prior to the incorporation of Crimea to the Russian territory. However, reasonable and legitimate these concerns may sound, the tribunals conducted the greatest balancing test, the outcome of which is quite hard to argue. On the one hand, they had investors who lost their businesses due to the illegal actions of Russia, on the other hand, the government that annexed territories of Crimea, publicly announced that these territories belonged to it from that moment on and then refused to take responsibility for the protection of its inhabitants. Arbitrators decided to choose the investors` side and were not mistaken in such a conclusion, since it is the

investors who are one of the most vulnerable groups that also bear a lot of the negative economic consequences in case of annexation. In all the decisions which were published by the tribunals so far what can be easily traced is the aspiration of the arbitrators to extend the scope of protection granted to the investors, and their intention to omit leaving investors in the "bubble" of unknown.

In this case, the important concept that was considered is the change of effective control that happened in Crimea. The tribunals effectively applied it in their decisions, while replying to the simple questions: "Was it physically possible for Ukraine to influence the unlawful seizure of investors` property and whether it was able to protect investors?" The short answer to these questions is obviously, no. However important the protection of investors is, Ukraine, as a country, lost much more in 2014, it lost sovereignty on the part of its territories which might not be restored in quite some time, moreover, Ukraine showed that it is vulnerable and not prepared for the Russian aggression. This shift of control left Ukraine completely unable to protect investors` rights on the territories of Crimea, on the other hand, Russia which denied the existence of such obligations under the BIT had the physical ability, moral duty and obligations under international public law to protect inhabitants of Crimea, including the investors. Therefore, unlike what was argued by the critics, the tribunals` recognition of jurisdiction became one more step closer to the establishment of the global responsibility for the occupying state as well as provided a clear international response to the actions of Russia towards Ukraine.

The decisions in the Crimean Cases were never only about the protection of Ukrainian investors` companies in Crimea. Contrary, while the tribunals were making these decisions more territories of Ukraine were occupied and destroyed by Russia, and more of the successful and economically important investments were damaged and erased. And now with the decisions of the tribunals in the Crimean Cases, the investors actually got an opportunity to redeem their

violated proprietary rights through effective means. The statement made by the tribunals allowed to provide a viable opportunity for the investors to protect their rights under the effective and accessible instrument, BIT, as well as showed that any actions have implications for the aggressor country. For this reason, the interpretation of the BIT provided by the tribunals might come at hand for the investors raising their claims with regard to Donetsk and Luhansk regions, and other parts of Ukraine as well as to the other states experiencing armed conflicts and annexations.

Consequently, despite the controversial opinions surrounding the tribunals` decisions in the Crimean Cases, the BIT was recognized to be a viable and important tool for the protection of investors in times of international armed conflicts. It is hard to argue that there are other possible ways for the investors to redeem their rights, like filing claims to the European Court of Human Rights, or to other international organizations, however, in this case, the primary instrument that is supposed to guarantee the safety of the investors, the BIT can be and should be used as the primary document preserving the obligation once undertaken by the states - parties, which can be effectively enforced in the arbitration.

APPENDIX[125]

Year	Claimant/ Respondent	Description	Outcome	Award
2015	Ukrnafta v. Russia	The claims in this case were arising out of the alleged expropriation of petrol stations belonging to the Claimant in 2014 after the Russian annexation of Crimea.	Decided in favour of the investor.	Confidential.
2015	Stabil and Others v. Russia	The claims in this case were arising out of the alleged expropriation of petrol stations belonging to the Claimant in 2014 after the Russian annexation of Crimea.	Decided in favour of the investor.	Published.
2015	Privatbank and Finilon v. Russia	The claims in this case were arising out of the alleged expropriation of claimants` investments including confiscations in the amount of nearly USD200 million in 2014 after the Russian annexation of Crimea.	Pending. The parties are in the stage of post-hearing briefs and cost submissions.	Confidential.
2015	Lugzor and Others v. Russia	The claims in this case were arising out of the alleged expropriation of the real estate investments belonging to the Claimant in 2014 after the Russian annexation of Crimea.	Decided in favour of the investor.	Confidential.
2015	Everest and Others v. Russia	The claims in this case were arising out of the alleged expropriation of the properties belonging to the Claimant in 2014 after the Russian annexation of Crimea.	Decided in favour of the investor.	Confidential.
2015	Aeroport Belbek and Kolomoisky v. Russia	The claims in this case were arising out of the alleged expropriation of "the commercial passenger	Pending. The parties are in the stage of costs submission.	Confidential.

[125] 'Ukraine | Investment Dispute Settlement Navigator | UNCTAD Investment Policy Hub' (n 11).

		terminal operated by the Claimant" in 2014 after the Russian annexation of Crimea.		
2016	Oschadbank v. Russia	The claims in this case were arising out of the alleged seizure of the bank branch of the Claimant in 2014 after the Russian annexation of Crimea.	Decided in favour of the investor.	Confidential.
2016	Naftogaz and Others v. Russia	The claims in this case were arising out of the alleged expropriation of oil and gas assets belonging to the Claimant in 2014 after the Russian annexation of Crimea.	Decided in favour of the investor.	Published.
2018	DTEK v. Russia	The claims in this case were arising out of the alleged expropriation of the Claimant`s electricity distribution business in 2014 after the Russian annexation of Crimea.	Decided in favour of the investor.	Confidential.
2019	Ukrenergo v. Russia	The claims in this case were arising out of the alleged expropriation of the Claimant`s electricity infrastructure facilities and transmission line in 2014 after the Russian annexation of Crimea.	Pending.	Confidential.

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