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# POTENTIAL EFFECT OF THE LAW OF BELLIGERENT OCCUPATION ON THE APPLICABILITY OF INVESTMENT TREATIES IN OCCUPIED TERRITORIES[1]

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**Summary**: This article focuses on the applicability of bilateral investment treaties on the conduct of the occupying power towards foreign investments situated in the occupied territory. It examines the content of the obligation to respect the laws in force in the occupied territory as prescribed by Art. 43 of the Convention (IV) respecting the Laws and Customs of War on Land. Some authors proposed an idea that this obligation is a gateway provision for the applicability of international treaties which are in force in the occupied territory on the conduct of the occupier. They refer to the case-law dealing with the applicability of human rights treaties in occupied territories. However, after the interpretation of this provision and inquiry into the case-law, this paper reaches the conclusion that the obligation to respect the laws in force does not have this effect. Instead, it deals with the legislative powers of the occupying power.

**Keywords**: Foreign investments, belligerent occupation, international armed conflict, applicability of bilateral investment treaties, administration of occupied territory.

## 1. Introduction

The field and practice of international law of foreign investments have developed significantly during recent decades. Many foreign investments nowadays benefit from the existence of standards of protection guaranteed by the net of thousands of investment protection treaties (mostly bilateral, hereinafter referred to as ´BITs´). One of the most serious threats for a foreign investor (and any individual or company in general) is the emergence of violence in the host

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state. This not only leads to instability of national economy and legal order of the host state, but can also result in requisition, physical damage or destruction of the assets representing the investment. One of the most serious examples of forceful events for the foreign investment (and for the civilian population generally) is then the situation where the part of the host state´s territory where the investment is situated is forcibly taken over by another state. This is a situation one could already witness in some form in Northern Cyprus, Western Sahara, West Bank and Gaza or, most recently, in Crimea.[3] At the same time, there are very often foreign businesses situated in these areas.[4] And this, especially in the light of Ukrainian crisis, triggered rich discussions among experts about what is the level of protection of foreign investments in occupied territories.

Investments are typically represented by long term commitments. They are vulnerable to violence and impact of the armed conflict on them is dramatic.[5] Thus, during belligerent occupation or hostilities in general, foreign investments need assurances of protection against damaging acts of the parties to the conflict. This is primarily in the interest of foreign investors of whom the assets are at stake. On general level, it is also in the interest of those investors who are only considering where to invest before any violence emerges. On top of that, the author of this paper believes that the protection of the assets representing foreign investments can serve also the public interest when there is a potential role of foreign investments in maintaining economical and social stability of the host country[6] or in the process of post-conflict recovery.[7] And indeed, there are standards of protection envisaged by BITs which address violent situations. These are namely so called full protection and security clauses (guaranteeing physical and legal protection of foreign investment in the host state generally) and war clauses (dealing with compensation for losses incurred during armed conflict).[8] Also other clauses may be relevant in particular case, depending on

3 Acknowledged and condemned for example by the UN General Assembly Resolution n. A/RES/72/190 in December 2017.

4 Such as Heidelberg Cement or SodaStream (which was for some time situated in territories occupied by Israel).

5 SCHREURER, Christoph. War and Peace in International Investment Law. *Transnational Dispute Management*, 2017, vol. 15, no. 1. Available at <www.transnational-dispute-management.com/article.asp?key=2531> Accessed: 05.08.2018.

6 TADLOCK, Robert, D. Occupation Law and Foreign Investment in Iraq: How an Outdated Doctrine Has Become an Obstacle to Occupied Populations. *University of San Francisco Law Review*, 2005, vol. 39, no. 1, pp. 231, 251.

7 See for example quite detailed analysis of UNCTAD in Chapter IV: UNCTAD. *Best Practices in Investment for Development. How Post-Conflict Countries Can Attract and Benefit from FDI: Lessons from Croatia and Mozambique*. [online]. Investment Advisory Series B, 2009. Available at: <http://unctad.org/en/Docs/diaepcb200915_en.pdf> Accessed: 05.08.2018.

8 SCHREURER, Christoph. The Protection of Investments in Armed Conflicts. In BAETENS, Freya (ed). *Investment Law within International Law. Integrationist Perspectives*. Cambridge: Cambridge University Press, 2013, pp. 1–3. However, as described by Schreurer elsewhere, there are further issues regarding these substantive standards of protection,

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the nature of the conduct harming the investment. With regard to the case of Crimea, this is the clause dealing with protection against expropriation.[9] These standards are bolstered by typical feature of investment protection – dispute settlement mechanism – allowing foreign investors to raise claims against states on international level and seek compensation for losses. That makes the field of international investment law an important and effective source of protection for foreign investors.[10]

Protection of foreign investments in occupied territories has been intensively discussed recently.[11] Many discussions focused on the issue of applicability of BITs on the conduct of the occupying power outside its sovereign territory. Also this article deals with the topic of the applicability of investment treaties, particularly on the conduct of the occupying power. However, it is specifically focused on one specific issue which is very compelling but has been discussed only scarcely. The object of this paper is a norm belonging to the field of international humanitarian law (´IHL´) which addresses the conduct of the occupier – Art. 43 of the Convention (IV) respecting the Laws and Customs of War on Land from 1907 (´HagueReg´). Art. 43 HagueReg in its second part obliges the occupying state to respect the laws in force in the occupied territory. The author of this paper came across an idea suggested by some authors that this obligation has the effect that the occupying power has to obey standards of protection guaranteed by BITs which are in force in the occupied territory.[12] Interestingly, the proponents of this hypothesis refer to the case-law related to the applicability of human rights treaties in occupied territories.

Indeed, the norms of the law of armed conflict are triggered during the situation of belligerent occupation and it is quite convenient to ask whether such an

for example the different types of war clauses, the rate of theirs inclusion into BITs or the effects of so called security clauses. See Schreurer (n. 5).

9 PETERSON, Luce E. Russia held liable in confidential award for expropriation of hotels, apartments and other Crimean real estate (..). [online]. Available at: <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: 24.05.2018.

10 SCHILL, Stephan W., *The Multilateralization of International Investment Law.* Cambridge: Cambridge University Press, 2009, p. 87.

11 For a good overveiw of the current legal discussions on the topic, see DUMBERRY, Patrick. Requiem for Crimea: Why Tribunals Should Have Declined Jurisdiction over the Claims of Ukraininan Investors against Russian under the Ukraine-Russia BIT. *Journal of International Dispute Settlement*, 2018, vol. 9, pp. 506–533.

12 CAPLAN, Lee. *Ukraine Crisis Raises Questions for Foreign Investors.* [online]. Available at: <https://www.law360.com/articles/575041/ukraine-crisis-raises-questions-for-foreign-investors> Accessed: 29.05.2017; MAYORGA, Ofilio. Occupants, Beware of BITs: Applicability of Investment Treaties to Occupied Territories. *Palestine Yearbook of International Law*, 2016, vol. 19, no. 1, p. 136; ACKERMANN, Tobias. *Investments Under Occupation: Belligerent Occupation and the Application of Investment Treaties*. International Investment Law & the Law of Armed Conflict conference, Athens, October 2017.

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important field of international law – besides prescribing substantive standards relating to private property and the rules governing the conduct of hostilities in general[13] – can inform the discussion about the applicability of BITs on the conduct of the occupying power. Yet, he author of this paper regards this issue as having wider relevance outside the context of BITs. The potential effect of Art. 43 HagueReg as subjecting the occupying power to the obligations stemming from international treaties in force in the occupied territory would be very significant for the legal position of the parties to the conflict and for the population in the occupied territory respectively. This is what makes the object of this paper quite unorthodox and deserving detailed analysis.

Therefore, the research question of this paper is whether the hypothesis that the obligation to respect the laws in force in the occupied territory can serve as a legal ground for the applicability of BITs of the occupied state as a part of these laws on the conduct of the occupying power is valid. If that is the case, the further question would be whether the occupying state is also subjected to the dispute settlement mechanism contained in BITs which are in force in the occupied territory. The precise meaning of the obligation to respect laws in force and its impact on the applicability of investment treaties to which the occupied state is a party therefore forms the object of the following analysis, together with the meaning of the case-law referred to by the proponents of the hypothesis. The goal of the paper is to contribute to the ongoing discussion relating to the protection of foreign investments by testing one of the suggested legal constructions. Regarding the structure, the paper will firstly introduce a hypothesis concerning Art. 43 HagueReg and its potential for the applicability of BITs in occupied territories, and will present its own argument. Then, it will focus on the interpretation of Art. 43 HagueReg, particularly the meaning of the clause "*…while respecting (…) the laws in force in the country.*" It will also comment on the relevance of the case-law relating to the applicability of human rights treaties. Following this, it will also briefly deal with an issue related to nationals of the occupied state and will eventually deal with the question of the applicability of dispute settlement mechanism included in BITs.

13 The norms governing the conduct of hostilities and treatment of private property as well as human rights law dimension of the protection of private property are not dealt with here. But these are actually also very relevant fields of law having tremendous influence on the legal status of foreign investments, as indicated for example by Schreurer (n. 5), p. 2. See also STEJSKAL, Petr. War: Foreign Investments in Danger, Can International Humanitarian Law or Full Protection and Security Clause Always Save It? *Czech Yearbook of Public & Private International Law*, 2017, vol. 8, p. 529.

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## 2. Issues And Legal Argument

### *2.1 Factual and Legal Problem regarding the Applicability of Investment Treaties*

This paper focuses on the applicability of investment protection standards on the conduct of the occupying power. This makes sense since the Art. 43 HagueReg regulates the conduct of the occupier. But from the perspective of foreign investor, it can be even necessary to seek compensation from the occupying power. The host state which could theoretically be held responsible for breaching full protection and security clause in situation of armed conflict[14] can in fact evade responsibility for the damages caused to foreign[15] investments situated in the occupied territory due to the forcible loss of control over that territory. In legal terms, this situation can result in not frustrating host state's due diligence obligations to fulfil substantive standards of protection, in the application of non-precluded measures clauses or, on general level, in the plead of *force majeure* as a circumstance precluding wrongfulness.[16]

From the perspective of the law of foreign investments (which is not dealt with here), the legal problem in the situation of belligerent occupation is the problematic applicability of the investment treaty to which the occupying state is a party to its conduct over foreign investments in the territories under its mere *de facto* control. These treaties are designed to protect the investors of one contracting party realizing investments in the *territory of the other contracting party*.[17] The term territory plays a crucial role in the construction of BITs because the text of a typical BIT refers to that term in the gateway provisions, in the definitions of protected investments or in the formulation of substantive obligations.[18] At the same time, it is a well known principle that the occupied territory formally remains under the sovereignty of the occupied state.[19] Several authors therefore engaged in detailed analysis of the issue from different perspectives.[20] Neverthe-

14 Schreurer (n. 8), pp. 4–8.

15 There is no need to remind the reader that nationals of the host state do not enjoy protection from BITs to which it is a party at all.

16 For an interesting overview of the case-law relating to the responsibility of an occupied state for its human rights obligations over part of territory over which it had lost control, see GRANT, Thomas. *Aggression against Ukraine. Territory, Responsibility, and International Law.* New York: Palgrave Macmillan, 2015, pp. 83–87.

17 REPOUSIS, Odysseas G. Why Russian investment treaties could apply to Crimea and what would this mean for the ongoing Russo–Ukrainian territorial conflict. *Arbitration International*, 2016, vol. 32, no. 3, p. 462.

18 DOUGLAS, Zachary. Property, Investment and the Scope of Investment Protection Obligations. In DOUGLAS, Zachary and others (eds). *The Foundations of International Investment Law: Bringing Theory into Practice*. Oxford: Oxford University Press, 2014, p. 373.

19 See for example Grant (n. 16), p. 127–128.

20 COSTELLOE, Daniel. Treaty Succession in Annexed Territory. *International & Comparative Law Quaterly*, 2016, vol. 65, no. 2, p. 366; HAPP, Richard, WUSCHKA, Sebastian. Horror Vacui: Or Why Investment Treaties Should Apply to Illegally Annexed Territories.

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less, the law of armed conflict and its Art. 43 HagueReg as a potential (parallel) ground for the application of BITs in occupied territories deserves attention too.

*2.2 Argument: Engage in Interpretation of Art. 43 HagueReg*

According to Art. 43 HagueReg, a provision belonging to the field of humanitarian law and particularly the law of belligerent occupation, the occupying state shall take "*measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country*." As indicated above, several authors expressed an opinion that obligation to respect the laws in force in the occupied territory means that the occupying state is obliged to respect investment protection standards guaranteed by BITs which are in force in the occupied territory.[21] Mayorga speaks about Art. 43 HagueReg as of "the entry point for BITs during occupation."[22] He even maintains that foreign investors have the right to submit investment claims against the occupying power on the basis of Art. 43 HagueReg.[23]

First of all, this hypothesis is dependent on the applicability of the rules of belligerent occupation. This situation is defined in Art. 42 HagueReg. A territory is considered occupied when it is actually placed under the authority of the hostile army without the consent of the sovereign. Important with regard to the example of Crimea is the fact that the law of belligerent occupation applies also in the case where the occupation meets with no resistance, as indicated by Art. 2 par. 2 of fourth Geneva Convention of 1949 (´GCIV´). With regard to the situation in Crimea, it seems to be settled that these requirements have been met and that the situation is considered a belligerent occupation.[24] Another thing which seems to be settled in literature is the fact that international treaties are considered to be part of "*the laws in force in the country*" in the sense of Art. 43 HagueReg,[25] including BITs.[26] This conclusion seems to be valid primarily with

*Journal of International Arbitration*, 2016, vol. 33, p. 253; WAIBEL, Michael. International Investment Law and Treaty Interpretation. In HOFMANN, Rainer, TAMS, Christian J. (eds). *International investment law and general international law : from clinical isolation to systemic integration?* Baden-Baden: Nomos, 2011, p. 51.

21 Caplan (n. 12); Ackermann (n. 12); Mayorga (n. 12), p. 136.

22 Mayorga (n. 12), p. 171.

23 Mayorga (n. 12), pp. 161, 176.

24 See for example Office of the United Nations High Commissioner for Human Rights. Situation of human rights in the temporarily occupied Autonomous Republic of Crimea and the city of Sevastopol (Ukraine). [online]. 2017, par. 7; or International Criminal Court, The Office of the Prosecutor. *Report on Preliminary Examination Activities*. November 2016, par. 158.

25 BENVENISTI, Eyal. *Occupation, Belligerent*. [online] . The Max Planck Encyclopedia of Public International Law, 2009. Available at: <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e359?prd=EPIL> Accessed: 11.11.2017.

26 Caplan (n. 12).

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regard to states with the monist system of national law and those states with dualist approach which incorporated BITs into the national law.[27]

Nevertheless, the author of this paper claims that the wording of Art. 43 HagueReg is unclear on the exact meaning of the verb "to respect." Particularly, it is necessary to clarify whether the obligation *to respect the laws in force in the occupied territory* really has the effect that acts of the occupying power are subject to the local law at similar extent as those of the territorial sovereign.[28] In other words, one needs to examine whether the obligation to respect laws of the occupied state means that the occupying power is subject to the obligations stemming from the laws in force in occupied territory and, as a consequence, whether BITs in force in this territory govern its conduct (as they normally do with regard to the conduct of the host state).[29] In contrast to the issue of the meaning of the term territory as used to delineate the scope of application of the occupier´s BITs, Art. 43 HagueReg would address BITs to which the *occupied* state is a party. The further question would be whether the occupying state is also subjected to the dispute settlement mechanism contained in BITs which are in force in the occupied territory. This secondary question is quite important because the possibility of foreign investor to raise a claim against the state that violated investment protection standards is one of the main features making the investment protection effective.[30] At the same time, this question is quite controversial since the occupying state is not party to BITs concluded by the occupied state and did not consent to the jurisdiction of arbitral tribunals established under these BITs[31] (provided that belligerent occupation and annexation do not trigger relevant rules of state succession into international treaties).[32]

The argument of this paper is that in order to determine whether Art. 43 HagueReg can represent a legal basis for the applicability of, one needs to interpret the obligation *to respect the laws in force* in accordance with the rules of treaty interpretation recognised by international law.[33] Applying a typical BIT with its scope limited to the *territory* of a state party on the conduct of another sovereign without its explicit consent to be bound by the treaty seems to be problematic and requires legal analysis in a form of proper interpretation of relevant key provision – the obligation to respect the laws in force in the sense of Art. 43 HagueReg. The rules for interpretation of international treaties are contained

27 See GIACCA, Gilles. Economic, Social, and Cultural Rights in Occupied Territories. In CLAPHAM, Andrew and others (eds). *The 1949 Geneva Conventions: A Commentary.* Oxford: Oxford University Press, 2015, pp. 1491–1492.

28 SCHWARZENBERGER, Georg. *International Law as Applied by International Courts and Tribunals, Volume II*. London: Sweet & Maxwell, 1969, p. 183.

29 Mayorga (n. 12), p. 163.

30 GAZZINI, Tarcisio. *Interpretation of International Investment Treaties*. Portland: Hart Publishing, 2016, p. 46; Schill (n. 10), p. 180.

31 Mayorga (n. 12), p. 161.

32 See Costelloe (n. 20).

33 Mayorga (n. 12), p. 165.

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in Articles 31–33 of the Vienna Convention on the Law of Treaties from 1969 (´VCLT´). To great extent, these articles are considered as reflecting customary norms.[34] According to Art. 31 par. 1 VCLT, which forms a general rule, "*A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*" It follows that the wording of particular term used in a treaty, its context together with object and purpose are the main elements constituting integral parts of the general interpretation rule.[35]

## 3. Interpreting the Obligation to Respect the Laws in Force in Occupied Territory

International investment activities were not envisaged when Art. 43 HagueReg was drafted[36] and, until recently with regard to the annexation of Crimea, investment disputes had not arisen in connection with belligerent occupation.[37] However, international practice has already witnessed cases brought in front of the International Court of Justice (´ICJ´) or the European Court of Human Rights (´ECtHR´) where human rights treaties were applied on the conduct of the occupying power in relation to occupied territories.[38] The following analysis will therefore focus on the interpretation of Art. 43 HagueReg generally, but also in the light of the literature and case-law related to the application of human rights treaties in occupied territories. Conclusions from this legal analysis can then be applied to international treaties generally, including BITs respectively.

### *3.1 The Meaning of the Obligation "to respect"*

The plain grammatical meaning of the verb "to respect" as defined in language dictionary does not determine one concrete meaning of this obligation. But at the same time, it does not rule out the meaning that the occupying power has to obey the laws in force in the occupied territory.[39] But in any case, and in accordance with Art. 31 VCLT, the process of interpretation continues with the inquiry into the context of Art. 43 and its object and purpose.[40]

34 DÖRR, Oliver, SCHMALENBACH, Kirsten (eds). *Vienna Convention on the Law of Treaties*. Berlin: Springer, 2012, p. 525.

35 Ibid, p. 523.

36 Happ (n. 20), p. 251.

37 At least to the knowledge of the author of this paper.

38 *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, ICJ, Judgement (2005), par. 216; *Loizidou v. Turkey*, Application no. 15318/89, ECtHR, Judgement (1996); *Cyprus v. Turkey*, Application no. 25781/94, ECtHR, Judgement (2001).

39 HORNBY, A. S. *Oxford Advanced Learner´s Dictionary (7th ed.)*. Oxford: Oxford University Press, 2005, p. 1245.

40 Mayorga (n. 12), p. 165. Nevertheless, as will be shown later, Mayorga reaches different conclusion in his process of interpretation.

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With regard to the context, the verb "respect" is preceded by the stipulation of an obligation for the occupying power to take all measures to restore and ensure public order and safety. The conjunction "while" interconnects this obligation with the duty to respect the laws in force. That is probably why the article could have been rephrased by one commentator as that the occupying power is vested with regulatory power if it is absolutely prevented to respect pre-existing legal order in the occupied territory.[41] Moreover, in the broader context, it is necessary to take into consideration also Art. 64 GCIV which in its second paragraph reiterates the obligation to respect existing laws and concretizes situations in which the occupying state can introduce legislative measures in occupied territory.[42] Also the negotiation history of the text of Art. 64 GCIV (serving here still as the contextual element) shows that the discussions have been held about the extent of the right of the occupying power to change the laws in force in occupied territory.[43] These elements strongly speak in favour of the argument that the article is in its second part dealing with legislative powers of the occupying state.[44]

With regard to object and purpose of the interpreted term, one of the key purposes of international humanitarian law, to which Art. 43 HagueReg belongs, is the protection of local population. The norms relating to the law of belligerent occupation primarily regulate how the occupied territory and its population have to be treated and administered.[45] With regard to Art. 43, its main purpose is to oblige the occupying state to restore and maintain public order and civil life in the occupied territory.[46] At the same time, it seems that it was designed also to limit the legislative power of the military occupant to do only what is necessary to meet this goal.[47] This would indeed correspond with the systematic structure of the Article 43 mentioned in previous paragraph. Moreover, occupation is understood only as a temporary situation and as such it "*requires the Occupying Power to leave the pre-existing law and institutions of the occupied territory essentially unchanged.*"[48]

41 BOTHE, Michael. Administration of Occupied Territory. In CLAPHAM, Andrew and others (eds). *The 1949 Geneva Conventions: A Commentary.* Oxford: Oxford University Press, 2015, p. 1468.

42 BURKE, Naomi. A Change in Perspective: Looking at Occupation through the Lens of the Law of Treaties. *n. Y.U.J. Int'l L. & Pol.*, 2008, vol. 41, no. 1, p. 111.

43 ROBERTS, Adam. Transformative Military Occupation: Applying the Laws of War and Human Rights. *American Journal of International Law*, 2017, vol. 100, no. 3, p. 588.

44 However, the argument that the term "respect" is used in other provisions of the HagueReg to oblige the occupying power not to breach certain rights of population is also quite compelling. See Mayorga (n. 12), p. 165.

45 Burke (n. 42), p. 109, 114–115.

46 Happ (n. 20), p. 250–251.

47 SCHWENK, Edmund H. Legislative Power of the Military Occupant under Article 43 Hague Regulations. *Yale Law Journal*, 1945, vol. 54, p. 393.

48 Bothe (n. 41), p. 1461.

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Schwarzenberger dealt with the present issue in his famous classical work on international law already 50 years ago. Citing *Milaire v. Germany*, the case of Belgo-German Mixed Arbitral Tribunal from 1923, he noted that the object of Art. 43 HagueReg was not to privilege the occupying power but rather to impose legal obligations and restraints on it.[49] However, and quite importantly, he also added that the duty to respect the laws in force was not necessarily identical with submission of the occupying state to the legal order of its "*enemy.*"[50] The occupying power is not a surrogate for the territorial sovereign and its rights and obligations are determined by the law of belligerent occupation.[51] With regard to the object and purpose of Art. 43 HagueReg, it is suitable to make reference to Schwarzenberger´s statement that "*the ratio* of the rule is to forestall temptations on the part of the Occupying Power to abuse its discretionary and legislative powers."[52] He finally pointed to the fact that mixed tribunals had subjected the occupying power to the local law with regard to *acta jure gestionis* but not with regard to *acta jure imperii*, and concluded that the case-law at the time left room for disagreement and controversy on the question whether Art. 43 covered acts of the occupying state itself.[53] Also Dinstein characterizes the obligation to respect the laws in force as addressing the legislative branch of the military government, in contrast to the obligation to restore and ensure public order addressing executive and judicial branch. Interestingly, he also develops that the latter obligation relates to the acts of commission whereas the obligation to respect local law "*calls for acts of omission.*"[54] Therefore, the ratio behind Art. 43 HagueReg could be described as that the occupying power is not sovereign and its legislative powers are limited with regard to occupied territories, but the aim to protect occupying power´s security and to maintain public order and security for local population legitimizes it´s power to legislate where necessary to fulfil these aims.[55] Notably, Schwarzenberger and Dinstein are not the only authors who treat the obligation to respect the laws in force in Art. 43 HagueReg as dealing with prescriptive powers of the occupying power.[56] Naomi Burke even speaks about the creation of a duty on the side of the occupier to administer obligations of the occupied state on its behalf as "*now merely a potential effect of occupation.*"[57]

49 Schwarzenberger (n. 28), p. 182.
50 Ibid, p. 185.
51 Ibid, p. 343.
52 Schwarzenberger (n. 28), p. 201.
53 Ibid, pp. 190–192.
54 DINSTEIN, Yoram. *The International Law of Belligerent Occupation*. New York: Cambridge University Press, 2009, p. 91.
55 SASSÒLI, Marco. Legislation and Maintenance of Public Order and Civil Life by Occupying Powers. *The European Journal of International Law*, 2005, vol. 16, no. 4, pp. 664, 678.
56 See for example Sassòli (ibid) at p. 663. According to him, "*legislative history and current practice show that the article constitutes a general rule about the legislative powers of an occupying power*." See also BENVENISTI, Eyal. *The International Law of Occupation*. Oxford: Oxford University Press, 2012, p. 83.
57 Burke (n. 42), p. 116.

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Consequently, the object and purpose of Art. 43 in light of its context seem to be the limitation of the occupier in modification of local law. The author of this paper does not see any support in any of these elements for the conclusion that Art. 43 HagueReg is subjecting the occupying power to the law in force in occupied territory. But in order to confirm the interpretation resulting from the application of Art. 31 VCLT and to resolve the ambiguity of the textual meaning of the obligation to respect the laws in force, recourse may be done to supplementary means of interpretation which are publicly available with regard to the Hague Conventions, in accordance with Art. 32 VCLT. Particularly, when one looks back to the circumstances of the conclusion of Art. 43 HagueReg, he can see that the discussions during the drafting process of this provision focused intensively on the question of (the extent of) the limitations of the occupier´s legislative power in the occupied territory.[58] The same pattern is obvious with regard to Art. 64 GCIV.[59] To use supplementary material related to Art. 64 GCIV to interpret object and purpose of Art. 43 HagueReg is possible because Art. 64 (especially its second paragraph) reiterates the obligation to respect existing law and concretizes Art. 43 HagueReg, as already mentioned.[60]

### *3.2 Human Rights Treaties Argument for Dynamic Interpretation*

Interestingly, however, Giacca suggests a dynamic interpretation of Art. 43 HagueReg. According to him, the occupying state would be bound to respect ratified human rights conventions in occupied territory as a part of the laws in force in the country.[61] He argues that there is an area of convergence between the legal basis derived from Art. 43 HagueReg and the extraterritoriality as a ground for application of human rights treaties in occupied territories. He mentions the case *Armed Activities on the Territory of Congo* to support this argument.[62] Also Mayorga cites the same case as an evidence of the fact that Art. 43 HagueReg serves as the basis for the applicability of human rights treaties in occupied territories.[63] Because the ECtHR and the ICJ dealt with situations of occupation and their decisions are often referred to by commentators, it is necessary to analyze findings of these courts which might be relevant for the present issue, even though these courts did not deal with BITs in particular.

The ECtHR has indeed on several occasions applied ECHR as an international treaty on the conduct of the occupying power in occupied territory. However, it is important to note that the ECtHR in these cases construed the application of ECHR on the ground of its extraterritorial applicability and not on the basis

58 See for example Schwenk (n. 46).
59 Roberts (n. 42), p. 588.
60 Burke (n. 42), p. 111.
61 Giacca (n. 27), p. 1491.
62 Ibid, p. 1492.
63 Mayorga (n. 12), p. 156.

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of Art. 43 HagueReg.[64] Similarly, the ICJ in the famous *Wall Case* did not refer explicitly to Art. 43 HagueReg when developing the extraterritorial applicability of ICCPR (even though it mentioned the article as part of the law applicable to the case).[65] In its argumentation, the ICJ engaged in the interpretation of Art. 2 par. 1 ICCPR and allowed for its applicability "*in respect of acts done by a State in the exercise of its jurisdiction outside its own territory.*"[66] Even with regard to ICESCR containing, in contrast to ICCPR, no provision on its scope of application, the ICJ did not mention Art. 43 HagueReg when explaining why this convention had been applicable to the occupied territory.[67] The approach developed in *Wall Case* was followed in the case of *Armed Activities on the Territory of Congo* in saying that international human rights instruments are applicable in respect of acts done by a state in the exercise of its *jurisdiction* outside its own territory.[68] The ICJ in this case reiterated the obligation to take all possible measures to restore and ensure public order and safety in the occupied area, while respecting, unless absolutely prevented, the laws in force in Congo. Then, it added that "*This obligation comprised the duty to secure respect for the applicable rules of international human rights law...*" However, and quite importantly, the latter sentence probably relates to the obligation to secure public order and safety and not to the part "*while respecting (..) the laws in force.*"[69] The reason is that the obligation to respect human rights could be understood as a part of the public order and safety requirement. As Bothe pointed out, "*In modern understanding, ´public order and safety´ means a guarantee of the rule of law, and therefore of human rights.*"[70]

This means that the relevant case-law cannot be understood in the way that it applied obligations stemming from human rights treaties on the conduct of the occupier on the basis of the obligation to respect the laws in force in the sense of Art. 43 HagueReg. Tribunals in these cases rather applied human rights standards as a part of public order and safety or on the basis of their extraterritorial applicability. This means that their conclusions do not support the hypothesis that Art. 43 HagueReg could be interpreted as a "chassis" for subordination of the occupying power to the obligations stemming from BITs (or any other international treaties) to which the occupied state is a party (unless any of these obligations form a part of the public order and safety).

64 Ibid, p. 156 (reference in the text n. 82).

65 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* ICJ, Advisory Opinion (2004), par. 124.

66 Ibid, par. 108–111.

67 Ibid, par. 112.

68 *Armed Activities* (38), par. 216. Interestingly, in the conclusions of the judgement, violations of IHL and IHRL are mentioned separately next to the violation of Art. 43 HagueReg (par. 219 of the judgement).

69 Ibid, p. 178.

70 Bothe (n. 41), p. 1469.

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### 4. Additional Issues – Nationals of the Occupied State; Dispute Settlement Mechanism

Despite the fact that Art. 43 HagueReg does not subject the occupier to guarantee standards of protection from BITs of the occupied state, there are two additional issues which would have to be dealt with in the opposite case. First issue concerns the nationals of the occupied state. With regard to the example of Ukraine, a country of which the laws in force is applicable in Crimea, the problem is that Ukrainian investors cannot be qualified as foreign investors.[71] The laws in force in the sense of Art. 43 should not burden the occupying power with obligations that the occupied country itself did not bear. Ukrainian investors did not enjoy the protection from BITs within their home state prior to the occupation (they were not foreign with regard to Ukraine).[72] Treating originally domestic investors as foreign seems to conflict with the good faith interpretation of design and purpose of BITs.[73] That means that even if the Art. 43 HagueReg had the effect that Russia would have to follow the substantive standards guaranteed by Ukrainian BITs, this effect would not cover investors with Ukrainian nationality. This fact leaves the construction of the applicability of BITs through Art. 43 HagueReg – if valid – relevant only for foreign investors and not nationals of the occupied state (in the case of Crimea – non-Ukrainian).[74] This is a significant difference to the construction based on the interpretation of the term territory which, if interpreted as covering also occupied territory, could address also national investors of the occupied state because they could be foreign investors (depending on the definition in particular BIT) in relation to the occupying power on the basis of BITs to which the *occupying power* is a party.

Second issue relates to the dispute settlement mechanism, an important element of investment protection. As indicated above, there is a proposition that Art. 43 HagueReg not only obliges the occupying state to comply with BITs in force in the occupied territory, but that it also subjects the occupier to the jurisdiction of arbitral tribunals constituted on the basis of these BITs.[75] The consent of the occupying state with arbitration would be indirectly "*given through*" or substituted by the application of the Art. 43 HagueReg.[76] Mayorga cites the case *Armed Activities* as a basis for his argument. But the ICJ used Art. 2 par. 1 ICCPR as the basis of its applicability on occupied territory and this is in the end what

71 This is actually what Mayorga admits. See Mayorga (n. 12), p. 140.

72 As stated by NAFTA tribunal, "territory of the Party" do not refer to the territory of state party of whom investors are nationals. *Bayview v. Mexico*, ICSID Case no. ARB(AF)/05/1, Award (2007), par. 105.

73 VACCARO-INCISA, Malteo G. *Crimea Investment Disputes: are jurisdictional hurdles being overcome too easily?* [online] Available at: <https://www.ejiltalk.org/crimea-investment-disputes-are-jurisdictional-hurdles-being-overcome-too-easily/ > Accessed: 01.06.2018.

74 Caplan (n. 12).

75 Mayorga (n. 12), pp. 141–142, 161.

76 Ibid, p. 161.

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Mayorga acknowledges.[77] It is true that with regard to human rights treaties, Bothe claims that not only substantial standards but also remedies which exist under these treaties apply in case of occupation. However, he makes references to the cases of *Loizidou* and *Al Skeini* where the ECtHR applied human rights instruments on the occupied territories on the basis of extraterritoriality and did not explicitly deal with Art. 43 HagueReg in this regard.[78] Similarly, when dealing with the recourse to human rights bodies, also Giacca refers to the case-law of the ECtHR which is based on extraterritorial application (and silent on the application of Art. 43 HagueReg).[79] Therefore, there is no support for the submission of the occupier to the jurisdiction of arbitral tribunals constituted on the basis of BITs in force in occupied territories. The consent is a fundamental condition of the arbitral jurisdiction and unless it is affirmatively expressed by the means recognized in international law, it cannot easily be presumed or derived indirectly without solid legal basis.

But, as has been deduced in previous chapter, the occupying power is not subject to the laws in force in the occupied territory at all and discussions concerning these two issues are already rebutted and would have been relevant only if one had reached different interpretation of Art. 43 HagueReg.

## 5. Conclusion

In present world, there are many armed conflicts and several situations of belligerent occupation. There is also a lot of businesses crossing borders on a massive scale with certain significance for population and arguably also for the prevention of tensions and hostilities as well as post-conflict recovery. The body of international law of foreign investments forms a substantial layer of legal protection of investments abroad. Nevertheless, since the protection standards are mostly based on particular bilateral investment treaty,[80] the situation of belligerent occupation raises questions concerning the applicability of these treaties on the conduct of the parties to the conflict. Since the occupying power is by definition the one who exercises effective control over occupied territory (and in the example of Crimea the one who allegedly did the harm to the businesses situated there), it is particularly important to focus on the applicability of investment treaties on the conduct of the occupying power.

Several authors discuss possible legal constructions of the applicability of BITs on the conduct of the occupying power. One of them, not discussed a lot so far, is the potential role of the obligation of the occupying power to respect the laws in force in the occupied territory, as prescribed by Art. 43 HagueReg. There are some authors who, in the context of the applicability of BITs in occupied ter-

77 Ibid, p. 155.
78 Bothe (n. 40), p. 1483.
79 Giacca (n. 27), p. 1510.
80 With certain exceptions such as NAFTA or ECT.

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ritories, developed interesting legal construction that the obligation to respect the laws in force in occupied territory means that the occupier is itself bound by that law. This paper therefore engaged in the process of interpretation in order to cast light on the meaning of that obligation which had been drafted many decades before the international law of foreign investments (or contemporary human rights law)[81] came into the existence. While the plain textual meaning of the verb *to respect* is quite unclear, the context and object and purpose of Art. 43 HagueReg strongly speak in favour of the interpretation that the duty to respect the laws in force in occupied territory does not subject the occupying power to the obligations stemming from the laws in force in occupied territories in place of the superseded sovereign. Quite to the contrary, it serves as a limitation of legislative powers of the occupying state with respect to the occupied territory, while leaving him space (and an obligation) for changes necessary for maintaining public order and safety in the territory it occupies. This conclusion is supported by the fact that many authors treat Art. 43 HagueReg in this way. The case-law dealing with the applicability of human rights treaties to occupied territories referred to by the proponents of the opposite interpretation of Art. 43 HagueReg does not really develop Art. 43 HagueReg as the basis of this applicability. Therefore, the ratio behind Art. 43 HagueReg could be described as that the occupying power is not sovereign and its legislative powers are limited with regard to occupied territories, but the aim to protect occupying power´s security and to maintain public order and security for local population legitimizes it´s power to legislate where necessary to fulfil these aims.

Nevertheless, the paper did not stop its inquiry into the potential effect of Art. 43 HagueReg after finding this conclusion. It briefly focused on two related issues which would be very relevant in the case that the process of interpretation of Art. 43 led to different conclusion. Firstly, with regard to the situation in Crimea and claims raised by Ukrainians, the applicability of R-U BIT on the basis of Art. 43 HagueReg is inconceivable. Because they are not foreign investors with regard to Ukraine in the sense of R-U BIT and Ukraine did not have to treat them as foreign investors before it lost control over the Crimea, neither the occupying power should be obliged to do so on the basis of Art. 43 HagueReg. In other words, if there is no obligation in Ukrainian law to treat Ukrainian nationals (who are not fitting the definition of a foreign investor in the sense of R-U BIT) as foreign investors and provide them standards stipulated by this BIT, it is not possible to automatically say that it would be part of the laws in force to offer them these standards. This means that even if the interpretation of art. 43 HagueReg would be different and subjected Russia to obligations from the R-U BIT, Ukrainian investors would most probably not enjoy any protection offered by these BITs on the basis of art. 43 HagueReg. Secondly, the author of this paper is not aware of any legal basis for the conclusion that in the case that Art. 43 HagueReg could serve as a basis for the applicability of BITs, it would cover also

81 Sassòli (n. 54), p. 676.

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the dispute settlement mechanisms contained in them. Consent is a cornerstone of the jurisdiction of international tribunals over sovereign states and unless it is expressed in the form recognized by international law, it is very difficult to develop it by pure application of Art. 43 HagueReg. Nevertheless, these two conclusions have quite limited importance due to the fact that Art. 43 HagueReg does not subject the occupying power to occupied state´s BITs at all.

The fact is that several authors advocate for different understanding of Art. 43 HagueReg and the duty to respect the laws in force in occupied territory.[82] Interestingly, this paper focused on the interpretation of the obligation to respect the laws in force in occupied territory as Mayorga did, but reached completely opposite conclusion. Nevertheless, for either of the varying interpretations, the author of this paper would like to remind the wider relevance of the potential effect of Art. 43 HagueReg on parties to the conflict and on affected populations with regard to international commitments which are in force in occupied territories. Naturally, the relevance of the conclusions of the research question dealt with in this paper might not be limited only to the realm of BITS, but hypothetically for any applicable international commitments which are in force in the occupied territory. The author of this paper would therefore like to encourage experts in the field of public international law (and especially those focused on IHL) to contribute to the discussion and spread its findings among relevant stakeholders.

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82 For example Giacca (n. 27), p. 1491 or, in the context of BITs, Ackermann (n. 12) and Mayorga (n. 12).

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