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## **Protection of Foreign Investment According to the Case Law of the European Court of Human Rights**

*In current economic reality states compete with one another in attracting foreign investments. In this regard, it is crucial to identify all those legal mechanisms that allow foreign investors to protect their investments from the arbitrariness of the host state. In this vein, the article examines mechanisms of dispute resolution under the investment agreements executed by Georgia and, whenever judiciary or administrative system of the host country is chosen for resolving such disputes, additionally explores the options of the European Court of Human Rights to restore the violated rights of the foreign investors.*

**Key words:** *foreign investment, investment disputes, Georgian investment agreements, residence of a legal person, the European Court of Human Rights, the case law of the European Court of Human Rights, property right.*

### **1. Introduction**

In the modern world, when development of the states vastly depends on investments and specifically on foreign investments, there evolves a crucial issue of investment protection in the host states. Although, almost all states, including well-developed ones, have relevant legislation and bilateral investment agreements, the international community has developed number of multilateral international treaties<sup>1</sup> that aim to protect investments. Nevertheless, the participants of investment disputes still address the European Court of Human Rights. Therefore, in this article we will examine specific cases of the European Court of Human Rights considered from the perspective of foreign investment, will try to elaborate an answer to the questions – when do foreign investors have the right to apply to the European Court of Human Rights and what benefits or detriments does this mechanism have in comparison to such effective dispute resolution mechanism as international arbitration.

### **2. Foreign Investor as a Subject of Investment-Legal Relations**

Foreign investors are either individuals (natural persons) or companies (legal persons). However, in the majority of cases, investor is a commercial legal entity. The investor's nationality determines from which treaties it may benefit<sup>2</sup>. For natural persons, investment agreements generally base nationality exclusively on the law of the state of claimed nationality<sup>3</sup>. Some investment

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<sup>1</sup> The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958); the Energy Charter Treaty (1994); the North American Free Trade Agreement (1992), etc.

<sup>2</sup> Dolzer R., Schreuer C., Principles of International Investment Law, Oxford University Press, 2006, 46.

<sup>3</sup> OECD, International Investment Law: Understanding Concepts and Tracking Innovations, 2018, 8, <<https://www.oecd.org/investment/internationalinvestmentagreements/40471468.pdf>> [14.09.2021].

agreements also introduce alternative criteria, such as a requirement of residency or domicile<sup>4</sup>. According to the “Agreement between the Republic of Austria and Georgia for the Promotion and Protection of Investment”, dated 18 October 2001, Article 1.1. “a”, a natural person is a person “having the nationality of a Contracting Party in accordance with its applicable law”<sup>5</sup>.

In case of commercial legal entities, the most commonly used criteria are incorporation or the main seat of the business (*siege social*)<sup>6</sup>: “According to the international law and practice, there are different possible criteria to determine a juridical person’s nationality. The most widely used is the place of incorporation or registered office. Alternatively, the place of the central administration of effective seat may also be taken into consideration”<sup>7</sup>. It is noteworthy, that this approach is shared in Georgian legal literature<sup>8</sup>.

In some cases an entity that does not comply with the above mentioned requirements, can be considered an investing legal person, when it is controlled directly or indirectly by the nationals of one contracting party, or by legal persons having their head office in the territory of one contracting party and constituted or otherwise duly organized in accordance with the legislation of that contractor party<sup>9</sup>.

With respect of foreign investment, all the following can be considered as such: movable or immovable property, shares, claim, know-how, intellectual property and etc. Generally, a more detailed list is given in specific agreements – bilateral or multilateral agreements. For instance, under the agreement executed between the Kingdom of Sweden and Georgia: “investment” means any kind of property that is directly or indirectly owned or controlled by the investor of one contracting party on the territory of the other contracting party, provided the investment was made in accordance with the laws and regulations of the latter contracting party, and include in particular, but not exclusively:

- a) movable and immovable property, as well as any other property right, such as lease, mortgage, lien, pledge, usufruct and similar rights;
- b) company or entity, or shares, stocks or any other form of equity participation in a company;
- c) claims to money or any performance having an economic value;
- d) intellectual property rights, technical processes, trade names, know-how, goodwill and other similar rights;
- e) entrepreneurial concessions conferred by law, administrative decisions or agreements, including concessions for exploration, cultivation, extraction and exploitation of natural resources”<sup>10</sup>.

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<sup>4</sup> *OECD*, International Investment Law: Understanding Concepts and Tracking Innovations, 2018, 8, <<https://www.oecd.org/investment/internationalinvestmentagreements/40471468.pdf>> [14.09.2021].

<sup>5</sup> “Agreement between the Republic of Austria and Georgia for the Promotion and Protection of Investment”, adopted: 18/10/2001, entrance into force: 01/03/2004.

<sup>6</sup> *Dolzer R., Schreuer C.*, Principles of International Investment Law, Oxford University Press, 2006, 49.

<sup>7</sup> *Autopista v. Venezuela*, Decision on Jurisdiction, [2001], (ICSID Reports 419, para. 107), cited in: *Dolzer R., Schreuer C.*, Principles of International Investment Law, Oxford University Press, 2006, 49.

<sup>8</sup> *Ioseliani Al.*, Conflict of Contract Law, Tbilisi, 2011, 157-158 (in Georgian); *Gabisonia Z.*, Georgian Private International Law, Tbilisi, 2011, 138-156 (in Georgian).

<sup>9</sup> “Agreement Between the Government of the Italian Republic and the Government of the Georgia on the Promotion and Reciprocal Protection of Investment”, adopted: 15/05/1997, entrance into force: 26/07/1999.

<sup>10</sup> “Agreement between the Government of the Kingdom of Sweden and the Government of Georgia on the Promotion and Reciprocal Protection of Investment”, adopted: 30/08/2008, entrance into force: 01/04/2009.

However, according to the “Agreement between the Republic of Austria and Georgia for the Promotion and Protection of Investment”, Article 1.1.“h”, “commercial transactions designed exclusively for the sale of goods or services and credits to finance commercial transactions with a duration of less than three years, other credits with a duration of less than three years, as well as credits granted to the State or to a State enterprise are not considered an investment”<sup>11</sup>.

Therefore, we can conclude that, although the states can define the meaning of the term “investment” themselves, the concept of such terms is similar, as the content of the investment agreements is vastly derived from the standard investment treaties. However, it is undisputable that investment includes numerous components.

### **3. Bodies Resolving Disputes with Foreign Investors**

Both, bilateral investment agreements, and multilateral treaties regulating investments, envisage different ways for settling and resolving disputes arising from the foreign investment. As a rule, bilateral investment treaties provide several alternatives (will be discussed in details later in this article) for the dispute participant to choose (*The Fork in the Road* provision). According to this principle “the investor must choose between the litigation of its claims in the host state’s domestic courts or through international arbitration and that the choice, once it has been made, is final”<sup>12</sup>. For instance, as is stated in the “Agreement between the Czech Republic and Georgia for the Promotion and Reciprocal protection of investment” (signed on 29 August, 2009) Article 8<sup>13</sup>, “If any dispute between an investor and of the contracting party cannot be thus settled within the period of six months of the date when the written request for the settlement has been submitted, the investor shall be entitled to submit the case, at his choice, for settlement to:

a) the competent court and administrative tribunal of the Contracting Party which is the party to the dispute; or

b) the International Centre for Settlement of Investment Disputes (ICSID) having regard to the applicable provisions of the Convention on the Settlement of Investment Disputes between States and Nationals of other States opened for signature at Washington D.C. on 18 March 1965, in the event both Contracting Parties shall have become a party to this Convention; or

c) an arbitrator or international ad hoc arbitral tribunal establishment under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL). The parties to the dispute may agree in writing to modify these Rules”.

Other bilateral investment treaties executed by Georgia also provide similar provisions for dispute settlement with additional reservations or without it. For instance, the “Agreement between the Republic of Austria and Georgia for the Promotion and Protection of Investment” in addition to all

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<sup>11</sup> “Agreement between the Republic of Austria and Georgia for the Promotion and Protection of Investment”, Agreement between the Republic of Austria and Georgia for the Promotion and Protection of Investment, adopted: 18/10/2001, entrance into force: 01/03/2004.

<sup>12</sup> *Dolzer R., Schreuer C.*, Principles of International Investment Law, Oxford University Press, 2006, 216.

<sup>13</sup> “Agreement between the Czech Republic and Georgia for the Promotion and Reciprocal protection of investment”, adopted: 29/08/2009, entrance into force:13/03/2011.

three above-mentioned measures, also provides one more – forth option, namely, the International Chamber of Commerce, where a dispute is resolved by a sole arbitrator, or an ad hoc tribunal under its rules of arbitration<sup>14</sup>. While the “Agreement on Reciprocal Promotion and Protection of Investment between the Government of the Republic of Georgia and the Government of the Islamic Republic of Iran” (dated 26 September 1995) Article 11, provides for only one way of resolving disputes – an arbitral tribunal of three members. The arbitration shall be conducted according to UNCITRAL Rules<sup>15</sup>.

#### **4. Admissibility Criteria for Disputes Originated from Foreign Investment by the European Court of Human Rights**

Applying to international arbitration in case of disputes related to foreign investment by parties is an established practice, however, this does not exclude a foreign investor when starting litigation, in other words when making a choice under the *Fork in the Road Principle*, to choose host state’s domestic judiciary or administrative bodies for resolving a dispute. In such cases, disputes are settled by the procedural and material norms of the respective country, taking into consideration the obligations set out in the international treaties of that country. Therefore, if the host state is also a member of Council of Europe, the investment dispute, provided it meets the required legal preconditions, may also be resolved by the European Court of Human Rights. Even more so, the European Court of Human Rights has a practice of resolving (clearly, taking into consideration the principle of subsidiarity) a number of disputes that at a glance were investment disputes.

##### **4.1. Admissibility of a Foreign Investor’s Application (Complaint) During Parallel Proceedings**

Before moving to the consideration on merits of the disputes by the European Court of Human Rights, it needs to be noted, that decision on admissibility by the European Court of Human Rights is no less important than consideration on the merits of the case. In case an investor decided to choose host state’s domestic courts and has exhausted all domestic remedies provided by the specific jurisdiction, investor’s application (complaint) will be examined according to the standard admissibility criteria of the European Court of Human Rights.

Nevertheless, as case-law shows, there are cases, when investor opts for parallel proceedings both in international arbitration and in the European Court of Human Rights<sup>16</sup>, i.e. investor initiates litigation both in international arbitration and in the host state, the violations of principles of fair trial by the courts of the latter caused applying to the European Court of Human Rights. Thus, it is crucial to

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<sup>14</sup> “Agreement between the Republic of Austria and Georgia for the Promotion and Protection of Investment”, adopted: 18/10/2001, entrance into force: 01/03/2004.

<sup>15</sup> “Agreement on Reciprocal Promotion and Protection of Investment between the Government of the Republic of Georgia and the Government of the Islamic Republic of Iran”, adopted: 26/09/1995, entrance into force: 22/06/2005.

<sup>16</sup> *Kriebaum U.*, Is the European Court of Human Rights an Alternative to Investor-State Arbitration? in: *Dupuy P. M., Francioni F., Petersmann E. U. (eds.)*, Human Rights in International Law and Arbitration, Oxford University Press, 2009, 219.

establish cases for which parallel litigation is possible and which the European Court of Human Rights considers to be admissible or inadmissible.

The European Court of Human Rights gave a very important explanation regarding parallel proceedings carried out in the international arbitral tribunal in the case *OAO Neftyanaya Kompaniya Yukos v. Russia*. After the case was found to be admissible by the European Court of Human Rights, the Government claimed that prior to such admission the applicant company's majority shareholders (all of them were legal persons), which jointly owned over 60% of shares in the applicant company, brought arbitration proceedings against the Russian Federation for the alleged breaches of the Energy Charter Treaty in the Permanent Court of Arbitration in the Hague<sup>17</sup>.

The European Court of Human Rights reviewed positions of the applicant company and of the Government and concluded, that these litigations were not identical. Namely, the Court stated that arbitration proceedings initiated by two shareholders registered in Cyprus and one shareholder registered in the Isle of Man against the Russian Federation before the Permanent Court of Arbitration in the Hague among other things, referred to the same events and proceedings as those complained of by the applicant company in the application before the Court, but also alleged numerous violations of their rights as investors under the Energy Charter Treaty<sup>18</sup>. Some of the company's minority shareholders had also initiated similar proceedings under bilateral investment treaties. The Court noted, however, that despite certain similarities in the subject-matters of the Court case and of the arbitration proceedings, the claimants in those arbitration proceedings were the applicant company's shareholders acting as investors, and not the applicant company itself, which at that moment in time was still an independent legal entity<sup>19</sup>. The Court considered to be an essential argument that the Court case has been introduced and maintained by the applicant company in its own name and although the above-mentioned shareholders could arguably be seen as having been affected by the events leading to the applicant company's liquidation, they have never taken part, either directly or indirectly, in the Strasbourg proceedings<sup>20</sup>. Relying on all these circumstances, the Court concluded that the parties in the above-mentioned arbitration proceedings and in the present case were different and therefore the two matters were not "substantially the same" within the meaning of Article 35 paragraph 2 (b) of the Convention<sup>21</sup>. Consequently, the application (claim) was found to be admissible, the merits of the case were examined and the respondent was ruled to pay an unprecedented sum in the amount of more than 1.8 billion Euros in favor of the shareholders<sup>22</sup> (especially considering that the Russian Federation managed to liquidate and remove the applicant company from the register of legal persons during the dispute settlement period).

Admissibility of the application in regard to arbitral dispute was also discussed in the case *Le Bridge Corporation Ltd. S.R.L. against the Republic of Moldova*. The court of Moldova annulled the decision announcing the winner of the tender for the right to build and run duty free shops (after some

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<sup>17</sup> OAO Neftyanaya Kompaniya Yukos v. Russia, [2011], ECHR, (HUDOC), § 517.

<sup>18</sup> Ibid, § 524.

<sup>19</sup> Ibid.

<sup>20</sup> Ibid, § 525.

<sup>21</sup> Ibid, § 525-526.

<sup>22</sup> OAO Neftyanaya Kompaniya Yukos v. Russia, Just Satisfaction, [2014], ECHR, (HUDOC), § 38.

of the shops were built and made operational) and announced the rival company to be the winner. As a result, the sole shareholder, a natural person who was a French national, of the former winner company introduced an action before the International Centre for Settlement of Investment Disputes (ICSID) on the basis of the bilateral agreement between the Governments of the Republic of Moldova and France concerning protection of investment<sup>23</sup>. The arbitral tribunal established the breach of provisions of the France-Moldova Agreement as a result of the applicant company's impossibility to open and operate a fifth duty free shop at Chişinău airport and the Government of the Republic of Moldova was ordered to pay compensation in an amount of 2 187 487 Euros<sup>24</sup>.

Following this *Le Bridge* addressed the European Court of Human Rights under Article 6 of the Convention and Article 1 of Protocol No. 1 to the Convention indicating that proceedings were unfair and resulted in loss of the property.

After examining in details the application submitted to the ICSID by the company's 100% shareholder, it became clear to the Court that the applicant's complaint under the Convention was the same in substance. Indeed, the essence of the argument in both sets of international proceedings was that the civil proceedings before the domestic courts were unfair<sup>25</sup>.

The European Court of Human Rights recalled the case of *OAO Neftyanaya Kompaniya Yukos* and its own judgment and clarified that these cases could not be considered similar, as the *Yukos* case involved numerous shareholders who did not coordinate their actions and were not aware of the actions of the applicant company, and only a part of whom applied to arbitration tribunals, while in case with *Le Bridge*, the only shareholder was directly involved in the Strasbourg proceedings and also in the capacity of the CEO signed the application form when introducing the case with the Court<sup>26</sup>. In such circumstances and given that in the proceedings before the ICSID the 100% shareholder claimed that *Le Bridge* could not be dissociated from him as investor and in its submissions to the European Court the applicant company did not dissociate itself from its sole founder, the European Court of Human Rights could not but conclude that *Le Bridge's* application was substantially the same as a matter that had already been decided by "another procedure of international investigation or settlement and contained no new information" and was therefore rejected<sup>27</sup>.

Following reasoning given in both above mentioned cases regarding admissibility of investment disputes in case of parallel proceeding, it can be concluded that in order for the application derived from investment dispute to be considered admissible, it is of paramount significance that the application is not the same in substance. The application is the same in substance if the following are the same: a) the parties; b) legal norms; c) scope of the claim; d) the type of claim reimbursement.

At the same time, reviewing procedure during parallel proceedings should be so effective as to exclude the jurisdiction of the European Court of Human Rights.

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<sup>23</sup> Le Bridge Corporation Ltd. S.R.L. against the Republic of Moldova, [2018], ECHR, (HUDOC).

<sup>24</sup> Ibid, § 18.

<sup>25</sup> Ibid.

<sup>26</sup> Ibid, § 29.

<sup>27</sup> Ibid, § 31-33.

## **5. Examination of Merits of the Disputes Related to Foreign Investment by the European Court of Human Rights**

Disputes related to foreign investments that are not carried out under parallel proceedings, fall under the general rules of admissibility and are reviewed on merits. In particular, investment (or property or right purchased as a result of investment) is regarded as property under paragraph 1, Article 1 of Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, consequently, all criteria set forth in the mentioned article and case-law apply to it. Furthermore, case-law of the European Court of Human Rights provides several possibilities for the investor to participate in the disputes related to foreign investment.

### **5.1. Investor as an Applicant (Author of the Claim)**

Clearly, the most common way of participation in a litigation in Strasbourg for an investor is participation as an applicant (author of the claim) as investor's rights were directly violated. In case *Bimer S.A. v. Moldova* an applicant was a legal person with shares owned by Moldovan, American and British investors and therefore it qualified as a company owned by foreign investors and thus, benefited from special benefits and guarantees as provided for by the Law of Moldova<sup>28</sup>. According to the Presidential Decree the companies were entitled to operate duty free shops, on this basis the applicant company signed a contract with the Customs Department, at the border between Moldova and Romania, providing for the opening of duty free shops on the territory of the customs. The applicant company also obtained two licences for operating a duty free shop and a duty free bar and started operating them in 1998<sup>29</sup>. Later, as a result of the amendment to the relevant law, the Customs Department ordered the closure of all duty free outlets, however, according to the Law on Foreign Investment, in the event of the adoption of new, less favourable legislation, companies owned by foreign investors were entitled to rely on the old legislation for a period of ten years and the activity of a company owned by foreign investors could be terminated only by a governmental decision or a court order<sup>30</sup>.

The Court found no grounds in the present case to call into question that the order deprived the applicant of the right to conduct its business at specified place and interfered with the applicant's property, namely, it controlled applicant's property, moreover, the order was not lawful and was therefore incompatible with the applicant's right to the peaceful enjoyment of its possessions within the meaning of Article 1 of Protocol No. 1<sup>31</sup>.

A similar approach was used by the European Court of Human Rights in 2008 in the case *Unistar Ventures GmbH. V. Moldova*. The State-owned airline company was reorganized into a limited liability airline company called *Air Moldova S.R.L.* The Civil Aviation State Authority retained 51% of the shares of the company, while remaining 49% was transferred to *Unistar Ventures*

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<sup>28</sup> *Bimmer S.A. v. Moldova*, [2007], ECHR, (HUDOC), § 7.

<sup>29</sup> *Ibid*, § 9-10.

<sup>30</sup> *Ibid*, § 13-18.

<sup>31</sup> *Ibid*, § 58.

GmbH, that in return was to contribute 2 384 705 USD to the registered capital of the company. This obligation was fulfilled by the Unistar Ventures GmbH<sup>32</sup>.

After the Communist Party of Moldova won the parliamentary elections, economic policy of the State changed and the Civil Aviation State Authority changed the company's CEO by using its 51% of the votes, this was followed by court proceedings, claim and counter claim. In the operative part of the final judgment the Economic Court made the following order: "The parties shall be put in the same position as they had been prior to the conclusion of the contract, following an audit and accounting control to be carried out by the Government, the Ministry of Finance and the Civil Aviation State Authority<sup>33</sup>". Enforcement of the above-mentioned operative part of the judgement was hindered due to its vagueness. The court was addressed to clarify its judgement twice. In the last explanatory ruling the court explained that the parties should recover all the assets and moneys with which they had participated in the company and that any profit obtained by the company during its existence should be divided among them in accordance with the percentage of their participation<sup>34</sup>. Nonetheless, the investor company has not been refunded and it applied to the European Court of Human Rights.

The European Court of Human Rights examined the claim and concluded that the relevant domestic legislation (the Civil Code) afforded the applicant company a right to "*restitutio in integrum*" as a result of the rescission of the contract between the parties and this was also recognized in the judgment of the domestic court. This gave rise to a debt in the applicant company's favor that consisted of the compensation of the initial investment and the return of the profit earned by the company during its existence. The failure by the authorities to enforce a final judgment was considered by the European Court of Human Rights to be a disproportionate interference with the right to peaceful enjoyment of "possessions" and there has accordingly been a violation of Article 1 of Protocol No. 1 to the Convention. As a result, the Court awarded the applicant company a total amount of 6 700 000 Euros for pecuniary damage and 3 000 Euros for non-pecuniary damage<sup>35</sup>. This judgment straightforwardly provides the method applied by the European Court of Human Rights for determining the volume of investment – performed investment plus profit acquired by the investor during its participation period – thus setting a standard for investment compensation.

Examination of the above-mentioned judgments makes us assume that when property in the form of investment or created as a result of investment was not confiscated, the European Court of Human Rights qualified interference of the state not as confiscation but as a control of the right of possession, even though in both cases applicants were not able to continue their initial businesses. All these causes violation of paragraph 2, Article 1 of Protocol No. 1 to the Convention and makes it possible for the investor to be awarded non-pecuniary damage.

## **5.2. Foreign Investor as a Third Party**

Apart from acting as an applicant (claimant) a foreign investor can participate in litigation as a third party. Undoubtedly, such participation increases protection of investor's rights and provides a

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<sup>32</sup> Unistar Ventures GmbH. V. Moldova, [2008], ECHR, (HUDOC), § 8.

<sup>33</sup> Ibid, § 6-32.

<sup>34</sup> Ibid, § 58.

<sup>35</sup> Ibid, § 90, 98.



sense of stability for the investment made by them. In this regard a case of Industrial Financial Consortium Investment Metallurgical Union v. Ukraine, that concerned domestic and foreign investment, is of particular interest. The case originated as the consequences of the decision of the Ukrainian Government to privatize one of the world's largest steel manufacturing companies Kryvorizhstal. The initial buyer – Industrial Financial Consortium Investment Metallurgical Union was returned 608 million euros paid by it, while the new owner of the 93.02% of Kryvorizhstal's share capital, for the price of 3,9 billion Euros was announced to be Mittal Steel Germany GmbH. Eventually, Mittal Steel Germany GmbH was succeeded by ArcelorMittal Duisburg GmbH, which, according to the documents submitted by that company, made significant investment in Kryvorizhstal<sup>36</sup>.

The applicant and the initial buyer of the shares – Industrial Financial Consortium Investment Metallurgical Union applied to the European Court of Human Rights for acknowledging violation of both Article 1 of Protocol No. 1 to the Convention and paragraph 1, Article 6 of the Convention. The European Court of Human Rights did not consider Article 1 of Protocol 1 to be violated, as the applicant was returned the money it had paid for the shares. However, paragraph 1 of Article 6 was considered to be violated, due to the shortcomings existing in the proceedings of the domestic courts. Most importantly, however, the European Court of Human Rights allowed the new owner, a foreign investor company – ArcelorMittal Duisburg GmbH to participate in the proceedings as a third party, when according to the paragraph 2 of Article 36 of the Convention a company had been granted permission to intervene as a third person by the President of the Section at the time<sup>37</sup>.

As can be seen, the foreign investor was allowed to submit his views to the European Court of Human Rights and these views were reflected in the text of the judgment, albeit this circumstance itself did not prevent acknowledgment of violation of paragraph 1, Article 6 due to shortcomings in the domestic proceedings. After all, this judgment is an interesting precedent in terms of demonstrating the rights of the investor by means of involving such investor as a third person in the proceedings.

### **5.3. Participation of Foreign Investor's State as a Third Party**

In practice of the European Court of Human Rights there were cases when states of the foreign investors were involved in the proceedings as third persons. From the prospective of investment protection this circumstance is very important, as an investor knows, that, in case of the respective will, its state may participate in proceedings on investor's side and help to protect its rights. In case of *Zlinsat, spol. S.r.o. v. Bulgaria*, that originated following an application by *Zlinsat, spol. s r.o.*, a limited liability company incorporated under Czech law, the European Court of Human Rights transmitted a notice of the application to the Czech Government. The latter relied on the right granted to it under paragraph 1, Article 36 of the Convention and submitted its views<sup>38</sup>. As for the case itself, it

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<sup>36</sup> *Industrial Financial Consortium Investment Metallurgical Union v. Ukraine*, [2018], ECHR, (HUDOC), § 25.

<sup>37</sup> *Ibid*, § 5.

<sup>38</sup> *Zlinsat, spol. S.r.o. v. Bulgaria*, [2006], ECHR, (HUDOC), §4.

is interesting since, unlike previously discussed investment disputes, the foreign investor managed to protect its rights in the domestic courts. Application to such courts was probably caused by absence of bilateral investment agreements – the applicant company entered into a hotel privatization contract with the Sofia Municipal Council in 1997, while the Agreement between the Czech Republic and the Republic of Bulgaria for the Promotion and Reciprocal Protection of Investment was signed in 1999<sup>39</sup>. Nevertheless, the European Court of Human Rights found a violation of property rights and violation of a fair trial – absence of procedural norms limiting the scope of interference of the prosecutor’s office in the civil case (suspension of the decision on privatization of the hotel in Sofia and request to prevent obstruction) and absence of protecting norms against such actions was found to be an interference with the peaceful enjoyment of the possessions. At the same time, the violation of the right to a fair trial was established due to the fact that no judicial review was available in respect of the prosecutors’ decisions concerning civil cases. Therefore, together with the violation of property rights under Article 1 of the Protocol No. 1 to the Convention, a foreign investor can also claim violation of paragraph 1, Article 6 of the Convention in case procedural violations occurred.

## **6. Resolving Disputes Originating from Foreign Investment by the European Court of Human Rights – Advantages and Disadvantages**

What can presuppose a foreign investor’s decision to address domestic courts for dispute settlement and then, in perspective, obtain the right to apply to the European Court of Human Rights instead of choosing international arbitration? In other words, what advantages may the European Court of Human Rights have compared to international arbitration?

We believe several circumstances can be indicated here:

a) We cannot disagree with the opinion shared in the doctrine, that the biggest advantage of the European Court of Human Rights is absence of citizenship (nationality) principle, which is crucial for international investment law. Therefore, an investor, who is a national of the state with no bilateral or multilateral investment agreements, can rely on property protection mechanism under the Convention<sup>40</sup>.

b) No court fee is required to be paid by an investor when applying to the European Court of Human Rights;

c) An investor is not required to pay for the services of the arbitrators and the arbitration itself, which in practice is quite expensive. For instance, Arbitration Institute of the Stockholm Chamber of Commerce in its final award dated 25 March 2020 in one of the cases arbitration fee and fees of the arbitrators constituted 381 100 euros<sup>41</sup>. While in another case resolved by the International Centre for

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<sup>39</sup> Agreement between The Czech Republic and The Republic of Bulgaria For the Promotion and Reciprocal Protection of Investment, adopted: 17.03.1999, entrance into force: 30.09.2000.

<sup>40</sup> *Kriebaum U.*, Is the European Court of Human Rights an Alternative to Investor-State Arbitration? in: *Dupuy P. M., Francioni F., Petersmann E. U. (eds.)*, Human Rights in International Law and Arbitration, Oxford University Press, 2009, 229.

<sup>41</sup> Sunreserve Luxco Holdings S.A.R.L. (Luxemburg), Sunreserve Luxco Holdings II S.A.R.L. (Luxemburg), Sunreserve Luxco Holdings III S.A.R.L. (Luxemburg) v. The Italian Republic, §1025, 25.03.2020, <<https://www.italaw.com/sites/default/files/case-documents/italaw11475.pdf>> [19.10.2021].

Settlement of Investment Disputes, ICSID's administrative fees, fees and expenses of the Tribunal and direct expenses equaled to 1 059 052, 84 USD<sup>42</sup>.

d) In some cases parallel proceedings may be permitted;

e) Interference with the business of the company founded through investment or obstacles in using obtained license caused by administrative bodies may result in violations of Article 1 of the Protocol 1 to the Convention or paragraph 1 of Article 6. Furthermore, where an investment protection treaty only provides for jurisdiction in case of expropriation and no expropriation has occurred, the property protection by the European Court of Human Rights may become an option, especially when interference of the state was unlawful<sup>43</sup>. In such cases an unlawful control of property right can become a basis for a claim.

Nevertheless, addressing European Convention on Human Rights may have a number of disadvantages for the investor, for instance:

a) The requirement to exhaust local remedies. Completion of administrative or judiciary procedures may take several years.

b) The European Court of Human Rights is overwhelmed by the cases that often causes backlogs in hearing of the cases for years. For instance, in case of *Zlinsat, spol. S.r.o* an application was submitted on 14 December 1999, while judgment was adopted on 15 June 2006; in case of *Unistar Ventures GmbH* the application was submitted on 7 March 2003, while the judgment was adopted on 9 December 2008; in case of *Le Bridge* a case was submitted to the court on 27 July 2009, while the judgment was adopted on 19 April, 2018.

c) The possibility to be awarded lesser compensation. For instance, in case *AO Neftyanaya Kompaniya Yukos v. Russia* the European court of Human Rights awarded the shareholders of applicant company a total amount of 1,8 billion euros, while international arbitration (the Permanent Court of Arbitration in The Hague) ordered the Russian Federation to pay: 39 971 834 360 USD in favor of *Hulley Enterprises Limited (Cyprus)* – a legal entity registered in Cyprus shareholder of *Yukos*;<sup>44</sup> 8 203 032 751 USD<sup>45</sup> in favor of second shareholder *Veteran Petroleum Limited (Cyprus)*; 1 846 000 687 USD<sup>46</sup> in favor of third shareholder *Yukos Universal Limited (Isle of Man)*.

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<sup>42</sup> *Antin Infrastructure Services Luxemburg S.a.r.l. and Antin Energia Teromosolar B.V. v. the Kingdom of Spain*, § 742, 15.06.2018, <<https://www.italaw.com/sites/default/files/case-documents/italaw9875.pdf>> [19.10.2021].

<sup>43</sup> *Kriebaum U.*, *Is the European Court of Human Rights an Alternative to Investor-State Arbitration?* in: *Dupuy P. M., Francioni F., Petersmann E. U. (eds.)*, *Human Rights in International Law and Arbitration*, Oxford University Press, 2009, 229.

<sup>44</sup> *Hulley Enterprises Limited (Cyprus) v. the Russian Federation*, UNCITRAL, PCA Case No. 2005-03/AA226, §1888, 18.07.2014, <<https://www.italaw.com/sites/default/files/case-documents/italaw3278.pdf>> [19.10.2021].

<sup>45</sup> *Veteran Petroleum Limited (Cyprus) v. The Russian Federation*, UNCITRAL, PCA Case No. 2005-05/AA228, §1888, 18.07.2014, <<https://www.italaw.com/sites/default/files/case-documents/italaw3280.pdf>> [19.10.2021].

<sup>46</sup> *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, UNCITRAL, PCA Case No. 2005-04/AA227, §1888, 18.07.2014, <<https://www.italaw.com/sites/default/files/case-documents/italaw3279.pdf>> [19.10.2021].

## 7. Conclusion

To summarize all said above, we can conclude that according to the case-law of the European Court of Human Rights foreign investment is considered as property under Article 1 of Protocol No 1 and the foreign investor has the right in relevant circumstances to address the European Court of Human Rights without hindrance. The European Convention of Human Rights is an effective mechanism that can be used for protection of the foreign investors' rights and despite a number of disadvantages generally caused by the work of the European Court and not related to the peculiarities of these type of disputes, investors use this mechanism and, as showed by the case-law, achieve the restoration of violated rights.

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