The Protection of Investments in Armed Conflicts

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Recent events in Libya have turned the spotlight on an aspect of international investment law that has, so far, attracted little attention. Investments, almost by definition, require stability and cannot thrive in situations of violence and political volatility. Libya is host to a number of important foreign investments, notably in the energy sector. The current armed struggle has seriously affected these investments and is likely to lead to a series of disputes with foreign investors. At the same time Libya is party to bilateral investment treaties (BITs) with several countries including Austria, Belarus, Belgium-Luxemburg, Croatia, France, Italy, Malta, Portugal and Switzerland.[1]

Similar situations have arisen and are likely to arise in the future in other parts of the world. Therefore, a discussion about the protection of foreign investments in times of armed conflicts is by no means relevant only to the current situation in Libya.

A. Treaties in Times of Armed Conflict

Investment law is in large measure governed by treaties. Therefore, the preliminary question arises if and to what extent the outbreak of armed conflict affects the continued application of treaties relating to the protection of foreign investments. The International Law Commission of the United Nations (ILC) has for some time pursued the project of codifying the rules governing the effects of armed conflicts on treaties. Starting 2004 its Special Rapporteur was Sir Ian Brownlie. In 2009 the ILC appointed Lucius Caflisch as Special Rapporteur. An advanced set of Draft Articles on the topic, published in 2010[2], may be taken as reflecting the current state of international law.

The Draft Articles define "armed conflict" as armed force between States or protracted armed force between government authorities and organized armed groups.[3] Therefore,

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[1] Libya is not a Party to the Energy Charter Treaty.

[2] See A/65/10.

[3] Draft Article 2(b): “Armed conflict” means a situation in which there has been a resort to armed force between States or protracted resort to armed force between governmental authorities and organized armed groups.

international as well as non-international armed conflicts are covered. As far as non-international armed conflicts are concerned, these would have to be more than merely sporadic.

The Draft Articles contain a presumption of continuity of treaties: the outbreak of an armed conflict does not *ipso facto* terminate or suspend the operation of treaties.[4] In addition, the Draft Articles offer a list of treaties the subject matter of which implies continued operation during armed conflicts. This list includes "treaties of friendship commerce and navigation and analogous agreements concerning private rights." It also includes "treaties relating to commercial arbitration".[5] Where a treaty contains express provisions on its operation in situations of armed conflict these provisions shall apply.[6] As will be shown below, some bilateral investment treaties contain specific provisions that address the consequences of armed conflict.

Termination or suspension of a treaty in times of armed conflict would be subject to certain formalities. An intention by a State Party to terminate or suspend requires notification. A State Party thus affected may object. This procedure would lead to the obligation to resort to dispute settlement. The rights and obligations of States with regard to dispute settlement, as far as they have remained applicable, despite the existence of the armed conflict, under other provision of the Draft Articles, remain unaffected by a notification of termination or suspension.[7] Even where suspension or termination takes

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[4] Draft Article 3: **Absence of *ipso facto* termination or suspension**
The outbreak of an armed conflict does not *ipso facto* terminate or suspend the operation of treaties as:
(a) Between States parties to the treaty that are also parties to the conflict;
(b) Between a State party to the treaty that is also a party to the conflict and a State that is a third State in relation to the conflict.

[5] Draft Article 5: **The operation of treaties on the basis of implication from their subject matter**
[1.] In the case of treaties the subject matter of which involves the implication that they continue in operation, in whole or in part, during armed conflict, the incidence of an armed conflict will not as such affect their operation.
…
Annex: Indicative list of categories of treaties referred to in draft article 5
…
(d) Treaties of friendship, commerce and navigation and analogous agreements concerning private rights;
…
(l) Treaties relating to commercial arbitration; …

[6] Draft Article 7: **Express provisions on the operation of treaties**
Where a treaty itself contains [express] provisions on its operation in situations of armed conflict, these provisions shall apply.

[7] Draft Article 8: **Notification of intention to terminate, withdraw from or suspend the operation of a treaty**

place the treaty may contain clauses that are separable.[8] Obligations existing under international law independently of a treaty are unaffected by a termination or suspension as a consequence of an armed conflict.[9]

Therefore, as a rule, treaties dealing with the protection of foreign investments, such as bilateral investment treaties, continue to apply after the outbreak of armed hostilities. This is particularly so where these treaties address the consequences of armed conflicts.

Some BITs contain general security clauses. These clauses reserve the right of States to take measures to safeguard its essential interests in emergency situations. Security clauses of this kind are discussed below in section D.

Bilateral investment treaties (BITs) contain several types of clauses dealing with violent situations including armed conflict. These treaty provisions safeguard the interests of investors even in situations of armed conflict. Some of these treaty clauses have been interpreted and applied by investment tribunals.

The most common provision of this kind that may be found in most BITs is a clause guaranteeing full protection and security (section B below). In addition, some BITs contain clauses that specifically address wars and other armed conflicts. One type of these "war clauses" merely promises non-discrimination in the treatment of losses incurred through armed conflicts and similar situations (section C 1. below). The other type goes

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1. A State engaged in armed conflict intending to terminate or withdraw from a treaty to which it is a party, or to suspend the operation of that treaty, shall notify the other State party or States parties to the treaty, or its depositary, of that intention.
…
3. Nothing in the preceding paragraphs shall affect the right of a party to object, in accordance with the terms of the treaty or applicable rules of international law, to termination, withdrawal from or suspension of the operation of the treaty. …
4. If an objection has been raised within the prescribed time limit, the States parties concerned shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations.
5. Nothing in the preceding paragraphs shall affect the rights or obligations of States with regard to the settlement of disputes insofar as they have remained applicable, pursuant to draft articles 4 to 7, despite the incidence of an armed conflict.

[8] Draft Article 10: **Separability of treaty provisions**
Termination, withdrawal from or suspension of the operation of the treaty as a consequence of an armed conflict shall, unless the treaty otherwise provides or the parties otherwise agree, take effect with respect to the whole treaty except where:
(a) The treaty contains clauses that are separable from the remainder of the treaty with regard to their application;
…

[9] Draft Article 9: **Obligations imposed by international law independently of a treaty**
The termination of or the withdrawal from a treaty, or the suspension of its operation, as a consequence of an armed conflict, shall not impair in any way the duty of any State to fulfil any obligation embodied in the treaty to which it would be subject under international law independently of that treaty.

further and actually promises compensation for losses incurred under these circumstances provided certain conditions are met (Section C 2. below).

B. Full Protection and Security.

Most investment treaties contain provisions granting protection and security for investments.[10] Many of these treaties, including the NAFTA[11], refer to "full protection and security".[12] Others, including the Energy Charter Treaty[13], refer to "most constant protection and security". Some put "security" before "protection". These variations in language do not appear to carry any substantive significance.

There is no doubt that this provision is designed to protect investors and investments against violent action. In fact, in a number of cases tribunals seem to have assumed that this standard applies exclusively to physical security and to the host State's duty to protect the investor against violence directed at persons and property stemming from State organs or private parties.[14] More recently, there is authority to the effect that this standard extends to legal protection.[15]

1. Violence by State Organs

Clauses guaranteeing protection and security have been applied in a number of cases. In some of these cases the violent action came from State organs. It is clear that the State is responsible for actions perpetrated by its organs.[16] The applicability of a treaty provision

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[10] Provisions on full protection and security are contained in Libya's BITs with Austria, Belgium-Luxemburg (subject to a public order exception), Italy, Portugal and Switzerland.

[11] North American Free Trade Agreement, Article 1105(1).

[12] For the historical origin of the concept see *A. Newcombe/L. Paradell*, Law and Practice of Investment Treaties Standards of Treatment 307-308 (2009); *J.D. Salacuse*, The Law of Investment Treaties 208-210 (2010).

[13] Energy Charter Treaty, Article 10(1).

[14] *PSEG* v. *Turkey*, Award, 19 January 2007, at paras. 257-259; *Enron* v. *Argentina*, Award, 22 May 2007, paras. 284-287; *BG Group* v. *Argentina*, Award, 24 December 2007, paras. 323-328; *Sempra* v. *Argentina*, Award, 28 September 2007, paras. 321-324; *Plama* v. *Bulgaria*, Award, 27 August 2008, para. 180; *Rumeli* v. *Kazakhstan*, Award, 29 July 2008, para. 668; *Saluka Investments BV (The Netherlands)* v. *The Czech Republic*, Partial Award, 17 March 2006, paras. 483, 484; *Eastern Sugar* v. *Czech Republic*, Partial Award, 27 March 2007, para. 203; *Parkerings* v. *Lithuania*, Award, 11 September 2007, para. 355.

[15] For detailed discussion see C. Schreuer, Full Protection and Security, Journal of International Dispute Settlement (2010) 6- 10.

[16] See the International Law Commission's Articles on State Responsibility:

Article 4: Conduct of organs of a State

on protection and security to direct attacks on the investor's person and property by organs of the host State is beyond doubt. In *Biwater Gauff* v. *Tanzania* the Tribunal said:

> The Arbitral Tribunal also does not consider that the "*full security*" standard is limited to a State's failure to prevent actions by third parties, but also extends to actions by organs and representatives of the State itself.[17]

In *AMT* v. *Zaire*,[18] the investment had been subject to looting by elements of Zaire's armed forces. The applicable treaty provided that "... protection and security of investment shall be in accordance with applicable national laws, and may not be less than that recognized by international law... ". The Tribunal found that the treaty provision imposed upon Zaire a duty of vigilance to take all necessary measures of precaution. Zaire had breached this obligation by taking no measure that would ensure the protection and security of the investment. It followed that Zaire was in breach of its treaty obligation.[19] The Tribunal said:

> … Zaire has breached its obligation by taking no measure whatever that would serve to ensure the protection and security of the investment in question. ... Zaire is responsible for its inability to prevent the disastrous consequences of these events adversely affecting the investments of AMT which Zaire had the obligation to protect.[20]
> ... Zaire has manifestly failed to respect the minimum standard required of it by international law.[21]...
> The responsibility of the State of Zaire is incontestably engaged by the very fact of an omission by Zaire to take every measure necessary to protect and ensure the security of the investment made by AMT in its territory.[22]

Interestingly, the Tribunal did not base responsibility on the attribution of the acts of the soldiers to the State but on the State's failure to protect the investment.

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1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.

2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

[17] *Biwater Gauff* v. *Tanzania*, Award, 24 July 2008, para. 730.

[18] *AMT* v. *Zaire*, Award, 21 February 1997, 5 ICSID Reports 11.

[19] At paras. 6.02-6.11.

[20] At para. 6.08.

[21] At para. 6.10.

[22] At para. 6.11.

Toto v. *Lebanon*[23] concerns the construction of a highway. The investor had complained about the failure of the Lebanese government to remove Syrian troops from the construction site. In its Decision on Jurisdiction the Tribunal made the tentative finding that the alleged inaction of Lebanon, if proven, would constitute a failure to protect under the BIT between Italy and Lebanon.[24]

2. Private Violence

Another important application of the protection and security standard concerns the State's duty to protect the investor against violence stemming from non-State actors. These may be rebels or insurgents engaged in a struggle against the government or private groups engaged in violent action against the investment.

In *AAPL* v. *Sri Lanka*,[25] the investment had been destroyed in the course of a counter-insurgency operation by the Sri Lankan Security Forces. The applicable treaty provided that foreign investments "shall enjoy full protection and security". The Tribunal found no conclusive evidence as to whether the destruction had been caused by the State's security forces or by the rebels.[26] The Tribunal stated that while a State is not, in principle, responsible for the actions of insurgents it had a duty of protection that applied regardless of whether the damaging acts originated from the insurgents or government forces. The Tribunal said:

> It is a generally accepted rule of International Law, clearly stated in international arbitral awards and in the writings of the doctrinal authorities, that:
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> (i) A State on whose territory an insurrection occurs is not responsible for loss or damage sustained by foreign investors unless it can be shown that the Government of that state failed to provide the standard of protection required, either by treaty, or under general customary law, as the case may be; and
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> (ii) Failure to provide the standard or protection required entails the state's international responsibility for losses suffered, regardless of whether the damages occurred during an insurgents' offensive act or resulting from governmental counter-insurgency activities.[27]

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[23] *Toto Costruzioni* v. *Lebanon*, Decision on Jurisdiction, 11 September 2009.

[24] At paras. 110-118.

[25] *AAPL* v. *Sri Lanka*, Award, 21 June 1990, 4 ICSID Reports 246.

[26] At para. 85(D).

[27] At para. 72.

On that basis the Tribunal found Sri Lanka responsible.[28] After a detailed analysis of the course of events the Tribunal concluded:

> …the Tribunal considers that the Respondent through said inaction and omission violated its due diligence obligation which requires undertaking all possible measures that could be reasonably expected to prevent the occurrence of killings and property destructions.[29]

The guarantee of full protection and security extends to a duty to protect against violent action stemming from private persons falling short of the ILC's definition of armed conflict as set out above.[30] This may be demonstrated with the help of two cases involving hotels.

Wena Hotels v. *Egypt*,[31] involved the forcible seizure of two hotels by employees of a State entity (EHC) with whom the investor had contractual relations. The weapons used consisted of sticks and cudgels. The treaty applicable in that case provided that investments "shall enjoy full protection and security". Government officials did not participate in the forcible seizure but the police and other authorities took no effective measures to prevent or redress the seizure. The Tribunal had no doubt that Egypt violated its obligation to accord full protection and security.[32] This result was based on the finding that Egypt was aware of the intentions to seize the hotels and took no action to prevent EHC from doing so. Nor did the police and the competent ministry take any immediate action to restore the hotels to the investor. Also, no substantial sanctions had ever been imposed on the perpetrators. The Tribunal said:

> 84. The Tribunal agrees with Wena that Egypt violated its obligation under Article 2(2) of the IPPA to accord Wena's investment "fair and equitable treatment" and "full protection and security-." Although it is not clear that Egyptian officials other than officials of EHC directly participated in the April 1, 1991 seizures, there is substantial evidence that Egypt was aware of EHC's intentions to seize the hotels and took no actions to prevent EHC from doing so. Moreover, once the seizures occurred, both the police and the Ministry of Tourism took no immediate action to restore the hotels promptly to Wena's control.

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[28] At paras. 78-86. The Tribunal interpreted the requirement of due diligence as a reference to the minimum standard under customary international law. At paras. 67-69.

[29] At para. 85(B).

[30] See also *Elettronica Sicula SpA (ELSI) (United States of America* v. *Italy)*, ICJ Reports 1989, p.15, paras. 105-108; *Tecnicas Medioambientales Tecmed S. A.* v. *The United Mexican States*, Award, 29 May 2003, 43 ILM 133 (2004) at paras. 175-177; *Noble Ventures Inc*. v. *Romania*, Award, 12 October 2005, paras. 164-166; *Pantechniki* v. *Albania*, Award, 30 July 2009, paras. 71-84.

[31] *Wena Hotels* v. *Egypt*, Award, 8 December 2000, 41 ILM 896 (2002).

[32] At para. 84.

> Finally, Egypt never imposed substantial sanctions on EHC or its senior officials, suggesting Egypt's approval of EHC's actions.

Amco v. *Indonesia*[33] was not decided on the basis of a BIT but in the framework of customary international law. In that case the investment consisted of a lease and management contract for a hotel. The local partner in the contract took over the hotel by force with the assistance of members of the Indonesian armed forces. The Tribunal held that the forcible takeover was not attributable to the Government of Indonesia. But it found that Indonesia was in breach of international law since it had failed to protect the investor against the takeover of the hotel by its citizens. The Tribunal said:

> It is a generally accepted rule of international law, clearly stated in international awards and judgments and generally accepted in the literature, that a State has a duty to protect aliens and their investment against unlawful acts committed by some of its citizens (…). If such acts are committed with the active assistance of state-organs a breach of international law occurs.[34]

3. Standard of Liability

It is generally accepted that the obligation to provide protection and security does not create absolute liability. Rather, the standard is one of "due diligence", i.e. a reasonable degree of vigilance.[35] In *AAPL* v. *Sri Lanka*[36] the Tribunal rejected claimant's argument that the provision granting "full protection and security" had created a strict or absolute liability. The Tribunal said:

> ... the Tribunal declares unfounded the Claimant's main plea aiming to consider the Government of Sri Lanka assuming strict liability under Article 2.(2) of the Bilateral Investment Treaty, without any need to prove that the damages suffered were attributable to the State

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[33] *Amco Asia Corporation and Others* v. *The Republic of Indonesia*, Award, 20 November 1984, 1 ICSID Reports 413.

[34] At para. 172.

[35] *Elettronica Sicula SpA (ELSI) (United States of America* v. *Italy)*, ICJ Reports 1989, p.15, para.108. See also *Tecnicas Medioambientales Tecmed S. A.* v. *The United Mexican States*, Award, 29 May 2003, 43 ILM 133 (2004) at para. 177; *Noble Ventures Inc*. v. *Romania*, Award, 12 October 2005, para. 164; *Wena Hotels Ltd*. v. *Arab Republic of Egypt*, Award, 8 December 2000, 6 ICSID Reports 68, para.84; *Saluka Investments BV (The Netherlands)* v. *The Czech Republic*, Partial Award, 17 March 2006, para. 484; *MCI* v. *Ecuador*, Award, 31 July 2007, paras. 245-246; *Plama* v. *Bulgaria*, Award, 27 August 2008, para. 181; *Biwater Gauff* v. *Tanzania*, Award, 24 July 2008, paras. 725, 726; *Rumeli* v. *Kazakhstan*, Award, 29 July 2008, para. 668; *Siag* v. *Egypt*, Award, 1 June 2009, para. 447.

[36] *AAPL* v. *Sri Lanka*, Award, 21 June 1990, 4 ICSID Reports 246, paras. 45-53.

> or its agents, and to establish the State's responsibility for not acting with "due diligence".[37]

In the same sense the Tribunal in *Wena* v. *Egypt* said about the interpretation of the full protection and security clause in the BIT between Egypt and the United Kingdom:

> In interpreting a similar provision from the bilateral investment treaty between Zaïre and the United States, another ICSID panel has recently held that "the obligation incumbent on [the host state] is an obligation of vigilance, in the sense that [the host state] shall take all measures necessary to ensure the full enjoyment of protection and security of its [sic] investments and should not be permitted to invoke its own legislation to detract from any such obligation."[38] Of course, as still another ICSID panel has observed, a host state's promise to accord foreign investment such protection is not an "absolute obligation which guarantees that no damages will be suffered, in the sense that any violation thereof creates automatically a 'strict liability' on behalf of the host State."[39] A host state "is not an insurer or guarantor….[i]t does not, and could hardly be asked to, accept an absolute responsibility for all injuries to foreigners."[40] [41]

It follows from the above practice that the standard of full protection and security involves the obligation of the host State to exercise restraint in the use of armed force where a protected investor is involved. It also involves the obligation to protect the investment against rebel forces and other forms of private violence. This obligation does not create strict liability but an obligation of due diligence, *i.e.* it exists to the extent of the reasonable use of the host State's capabilities.

C. War Clauses in Investment Treaties

1. Non-Discrimination Clauses

Many bilateral investment treaties contain clauses referring to war or to other forms of armed conflict, state of emergency, revolution, insurrection, civil disturbance or similar events. In their simple form these clauses provide for national treatment and most

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[37] At para. 53.

[38] [Referring to *AMT* v. *Zaïre*, Award, 21 February 1997, para. 6.05].

[39] [Referring to *AAPL* v. *Sri Lanka*, Award, 21 June 1990, para. 48].

[40] [Referring to *AAPL* v. *Sri Lanka*, Award, 21 June 1990, para. 49].

[41] *Wena* v. *Egypt*, Award, 8 December 2000, para. 84.

favoured nation (MFN) treatment in relation to any measures such as restitution or compensation that the States may take.

Article 7 of the Libya-Portugal BIT contains such a clause:

> **Article 7**
> **Compensation for damages or losses**
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> Each Party shall provide to investors of the other Party, whose investments suffer losses in the territory of the first Party owing to war or armed conflict, revolution, a state of national emergency, disobedience or disturbances or any other event considered as such, treatment that restitutes the conditions of these investments that existed before the damage had occurred, or compensation, or any other settlement that is no less favourable than that Party accords to the investments of its own investors, or of any third State, whichever is more favourable. Any payment made under this article shall be, without delay, freely transferable in convertible currency.

Provisions of this type are not uncommon in BITs.[42] The NAFTA in Article 1105(2) also contains the obligation to non-discriminatory treatment with respect to measures adopted relating to losses suffered owing to armed conflict or civil strife.

Clauses of this type do not create substantive rights to restitution or compensation beyond non-discrimination vis-à-vis host State nationals or nationals of third countries. In other words, their effect depends on measures taken by the host State in relation to these investors.[43]

In *CMS* v. *Argentina* the Tribunal said with respect to a similar provision in Article IV(3) of the Argentina-US BIT:

> The plain meaning of the Article is to provide a floor treatment for the investor in the context of the measures adopted in respect of the losses suffered in the emergency, not different from that applied to nationals or other foreign investors. The Article does not derogate from the Treaty rights but rather ensures that any measures directed at offsetting or minimizing losses will be applied in a non-discriminatory manner.[44]

[42] Libya's BITs with Belgium-Luxemburg, France and Italy contain similar clauses.

[43] See also *AAPL* v. *Sri Lanka*, Award, 21 June 1990, paras. 65-67; LG&E v. Argentina, Decision on Liability, 3 October 2006, paras. 243, 244; *Enron* v. *Argentina*, Award, 22 May 2007, para. 320.

[44] *CMS* v. *Argentina*, Award, 12 May 2005, para. 375

2. Extended War Clauses

Some treaties contain extended war clauses. These extended war clauses also relate to war or to other armed conflict, state of emergency, revolution, insurrection, civil disturbance or similar events. They typically include the non-discrimination clause just described. But they go further in that they also contain absolute standards. Under these clauses losses suffered by investors at the hand of the host State's forces or authorities through requisitioning or destruction not required by the necessities of the situation are treated in analogy to expropriation. In other words such acts require compensation that is prompt, adequate and effective. Article 12 of the Energy Charter Treaty is an example for such an extended war clause.[45]

Article 15 of the BIT between Austria and Libya contains such an extended war clause.[46] Its first paragraph reflects the standard of non-discrimination previously discussed. Its second paragraph goes beyond non-discrimination and provides for an absolute standard of restitution or compensation:

> **ARTICLE 5**
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> **Compensation for Losses**
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> (1) An investor of a Contracting Party who has suffered a loss relating to its investment in the territory of the other Contracting Party due to war or to other armed conflict, state of emergency, revolution, insurrection, civil disturbance, or any other similar event, or acts of God or force majeure, in the territory of the latter Contracting Party, shall be accorded by the latter Contracting Party, as regards restitution, indemnification, compensation or any other settlement, treatment no less favourable than that which it accords to its own investors or to investors of any third state, whichever is most favourable to the investor.
>
> (2) An investor of a Contracting Party who in any of the events referred to in paragraph (1) suffers loss resulting from:

[45] Article 12 of the ECT provides: COMPENSATION FOR LOSSES
(1) Except where Article 13 applies, an Investor of any Contracting Party which suffers a loss with respect to any Investment in the Area of another Contracting Party owing to war or other armed conflict, state of national emergency, civil disturbance, or other similar event in that Area, shall be accorded by the latter Contracting Party, as regards restitution, indemnification, compensation or other settlement, treatment which is the most favourable of that which that Contracting Party accords to any other Investor, whether its own Investor, the Investor of any other Contracting Party, or the Investor of any third state.
(2) Without prejudice to paragraph (1), an Investor of a Contracting Party which, in any of the situations referred to in that paragraph, suffers a loss in the Area of another Contracting Party resulting from
(a) requisitioning of its Investment or part thereof by the latter's forces or authorities; or
(b) destruction of its Investment or part thereof by the latter's forces or authorities, which was not required by the necessity of the situation, shall be accorded restitution or compensation which in either case shall be prompt, adequate and effective.

[46] Libya's BIT with Croatia contains a similar clause.

> (a) requisitioning of its investment or part thereof by the forces or authorities of the other Contracting Party, or
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> (b) destruction of its investment or part thereof by the forces or authorities of the other Contracting Party, which was not required by the necessity of the situation,
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> shall in any case be accorded by the latter Contracting Party restitution or compensation which in either case shall be prompt, adequate and effective and, with respect to compensation, shall be in accordance with Article 4 (2) and (3).

It will be noted that under paragraph (2) compensation is due only if the adverse act was caused by government forces or authorities and not by rebel forces. The duty to make restitution or pay compensation in the case of requisitioning of the investment or part thereof is independent of military necessity: even if the requisitioning was mandated by military necessity restitution or compensation is still due. By contrast, restitution or compensation for destruction is due only if the forces acted in excess of military necessity. In other words, collateral damage arising from military action that is lawful under the *ius in bello* are not covered. This corresponds to the situation under customary international law.

Two cases demonstrate that the requirements contained in extended war clauses are not easy to meet. In *AAPL* v. *Sri Lanka*[47] Article 4 of the applicable BIT between Sri Lanka and the United Kingdom contained an extended war clause. Its first paragraph provided for non-discrimination as regards restitution, indemnification, compensation or other settlement in cases of losses suffered owing to war or other armed conflict, revolution, a state of national emergency, revolt, insurrection or riot. The second paragraph provided:

> (2) Without prejudice to paragraph (1) of this Article, nationals and companies of one Contracting Party who in any of the situations referred to in that paragraph suffer losses in the territory of the other Contracting Party resulting from
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> (*a*) requisitioning of their property by its forces or authorities, or
>
> (*b*) destruction of their property by its forces or authorities which was not caused in combat action or was not required by the necessity of the situation,
>
> shall be accorded restitution or adequate compensation. Resulting payments shall be freely transferable.

[47] *AAPL* v. *Sri Lanka*, Award, 21 June 1990, 4 ICSID Reports 246.

The Tribunal refused to grant a remedy under this provision seeing that there was no conclusive proof that the losses were incurred as a consequence of acts committed by government forces. The Tribunal said:

> … it has to be noted that the foreign investor who invokes the applicability of said Article 4.(2) assumed a heavy burden of proof, since he has, …, to establish:
> (i) that the governmental forces and not the rebels caused the destruction;
> (ii) that this destruction occurred out[side] of "combat";
> (iii) that there was no "necessity" in the sense that the destruction could have been reasonably avoided due to its unnecessary character under the prevailing circumstances.
> … there is no convincing evidence produced which sufficiently sustains the Claimant's allegation that the firing which caused the property destruction came from the governmental troops, and no reliable evidence was adduced to prove that the shrimps were lost due to acts committed by the security forces; …
> Therefore the Arbitral Tribunal finds that the first condition required under Article 4.(2) cannot be considered fulfilled in the present case, due to the lack of convincing evidence proving that the losses were incurred due to acts committed by the governmental forces.[48]

The Tribunal found that the second and third condition were also not met: the destruction was caused by "combat action" in the sense of Article 4(2)(*b*).[49] In addition, the Tribunal was unable to conclusively determine the issue of military necessity.[50]

In *AMT* v. *Zaire*[51] the looting and destruction had taken place at the hands of elements of the armed forces in uniform involving the use of army weapons. In interpreting an extended war clause of the type discussed here, the Tribunal reached the conclusion that the soldiers in uniform did not, in fact, represent the country's armed forces since they had acted individually and not in any organized manner. Therefore, the destruction was caused by separate individuals and not the "forces". The Tribunal said:

> In the present case, it is true from the information received that they were the military, at least persons in military attire who manifestly acted individually without any one being able to show either that they were organized or that they were under order, nor indeed that they were concerted.
> The nature of the looting and the destruction of property which were looted show clearly that it was not "the army" or "the armed

[48] At paras. 58-60.

[49] At paras. 61-62.

[50] At paras. 63-64.

[51] *AMT* v. *Zaire*, Award, 21 February 1997.

> forces" that acted as such in the circumstance. And this in no way resembles expropriation or requisition by the State.[52]

These cases show that extended war clauses subject the investor's right to restitution or compensation to a number of stringent requirements. The practice on these clauses indicates that these conditions are not easy to meet. Any requisitioning or destruction must have occurred at the hands of the government's forces and not as a consequence of action by rebel forces or individuals. In a war situation it is often difficult to prove the source of destruction. Requisitioning is easier to trace to government forces and will usually go hand in hand with some formality.

Military necessity is relevant only in case of destruction but not of requisitioning. The existence of military necessity for the destruction of the investment or part thereof will be difficult to ascertain. Much will depend on who has to bear the burden of proof. In *AAPL* v. *Sri Lanka* the Tribunal put the burden of proof for the existence of military necessity upon the claimant. This would appear to be an unreasonably onerous requirement. It should be incumbent upon the State exercising military force to justify it in terms of military necessity.

D. Security Clauses in Investment Treaties

Some treaties, especially BITs of the United States, contain general security exceptions.[53] The NAFTA in Article 2102 also contains a provision of this kind. Article XI of the BIT between Argentina and the United States is an example:

> **ARTICLE XI**
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> This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.[54]

[52] At paras. 7.08-7.9.

[53] For more detailed treatment see *A. Newcombe, L. Paradell*, Law and Practice of Investment Treaties (2009) 488- 500.

[54] For a detailed analysis of this clause see *R. Dolzer*, Emergency Clauses in Investment Treaties: Four Versions, in: Looking to the Future - Essays on International Law in Honor of W. Michael Reisman 705-718 (2011).

A more recent version based on the 2004 US Model BIT is self judging in that it contains the words "that it considers necessary".[55]

This provision has received much attention, especially as it relates to the customary international law requirements for a state of necessity as reflected in Article 25 of the ILC's Articles on State Responsibility. This discussion and the relevant cases do not concern an armed conflict but an alleged economic emergency.[56]

The application of a security exception of this kind has radical and far reaching consequences. In the words of the CMS *ad hoc* Committee:

> Article XI is a threshold requirement: if it applies, the substantive obligations under the Treaty do not apply.[57]
> Article XI, if and for so long as it applied, excluded the operation of the substantive provisions of the BIT.[58]

Therefore, if the security exception applies, the investor is deprived of the BIT's protection. This would also exclude reliance on the treaty's full protection and security standard. Of course the protection afforded by customary international law remains unaffected.

The conditions for the application of such a security exception are relatively easily met in a situation involving armed force. The Article speaks of public order and of essential security interests. This would cover not only international or civil wars but also terrorism and armed rebellion. The reference to "the maintenance or restoration of international peace or security" echoes Article 39 of the UN Charter. Therefore, action in pursuance of Security Council resolutions under Chapter VII of the Charter may also be covered by this exception. It is evident that the potential danger to the rights of investors posed by security exceptions of this kind in investment treaties is considerable.

The Energy Charter Treaty contains a more elaborate security clause that explicitly refers to armed conflict. Article 24(3) of the ECT provides:

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[55] On the issue of the self-judging nature of security exceptions see A. Newcombe, L. Paradell, op.cit. pp. 492-495.

[56] See especially *LG&E* v. *Argentina*, Award, 3 October 2006, paras. 226-261; *CMS* v. *Argentina*, Award, 12 May 2005, paras. 332-378; *CMS* v. *Argentina*, Decision on Annulment, 25 September 2007, paras. 101-150; *Sempra* v. *Argentina*, Award, 28 September 2007, paras. 364-391; *Sempra* v. *Argentina*, Decision on Annulment, 29 June 2010, paras. 173-219; *Enron* v. *Argentina*, Award, 22 May 2007, paras. 322-342; *Enron* v. *Argentina*, Decision on Annulment, 30 July 2010, paras. 347-408.

[57] At para. 129.

[58] At para. 146.

(3) The provisions of this Treaty other than those referred to in paragraph (1) shall not be construed to prevent any Contracting Party from taking any measure which it considers necessary:

(a) for the protection of its essential security interests including those

(i) relating to the supply of Energy Materials and Products to a military establishment; or

(ii) taken in time of war, armed conflict or other emergency in international relations;

(b) relating to the implementation of national policies respecting the non-proliferation of nuclear weapons or other nuclear explosive devices or needed to fulfil its obligations under the Treaty on the Non-Proliferation of Nuclear Weapons, the Nuclear Suppliers Guidelines, and other international nuclear non-proliferation obligations or understandings; or

(c) for the maintenance of public order.

The savings clause at the beginning of Article 24(3) refers to Article 24(1), which in turn refers to Article 12. Article 12 contains an extended war clause as discussed above. Therefore, the right to restitution or compensation in case of requisitioning or destruction as provided by Article 12 remains unaffected by the security clause of Article 24(3).

The reference in Article 24(3) to essential security interests taken in time of war, armed conflict or other emergency in international relations leaves no doubt that an international armed conflict is covered by this security exception. But the limiting words "in international relations" leave open the question whether non-international armed conflicts are covered. The answer to this question will depend on whether the limitation to "international relations" is read as referring only to the immediately preceding "other emergency" or to the entire subsection (3)(a)(ii).

E. Armed Conflict and *force majeure*

In some cases the existence of violent situations has played an incidental role in investment cases. In a number of cases parties to investment disputes invoked armed conflicts and other situations of violence as an excuse for the non-performance of their obligations. This is not a peculiarity of investment arbitration. For the sake of completeness, a few examples for the invocation of *force majeure* in investment cases are summarized here.

In *Autopista* v. *Venezuela*[59] the investor was entitled to a road toll increase under the terms of a concession agreement. These toll increases had been prevented by civil unrest and rioting. Venezuela pleaded *force majeure.* The Tribunal found that a successful invocation of *force majeure* required that three conditions be met. These were impossibility of performance, unforeseeability of the intervening event and non-attributability of the intervening event to the defaulting party.[60] On the facts of the case the Tribunal found that the situation had been foreseeable and hence rejected Venezuela's reliance on *force majeure*.[61]

In *Toto* v. *Lebanon*[62] the Claimant had complained about a long delay in court proceedings.[63] The Tribunal noted that in the intervening period there had been terrorist bombings, assassinations, a war with Israel and two instances of severe internal fighting. This, together with the Claimant's own inaction, led the Tribunal to conclude that under the *prima facie* test it did not have jurisdiction over this complaint.[64]

In *RSM* c/ *République Centrafricaine*[65] the investor excused its failure to perform certain aspects of a contract by relying on *force majeure*. The argument was based on political and civic troubles which had led to a coup d'état and on the general security situation in the country. The contract defined *force majeure* as "tout événement imprévisible, irrésistible et indépendant de la volonté de la Partie l'invoquant, tels que tremblement de terre, grève, émeute, insurrection, troubles civils, sabotage, faits de guerre ou conditions imputables à la guerre."[66] The Tribunal examined the attributes of unforeseeability, irresistibility and non-attributability to the party invoking it.[67] On that basis it found that the security situation in the Central African Republic amounted to a situation of *force majeure*.[68]

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[59] *Autopista* v. *Venezuela,* Award, 23 September 2003.

[60] At para. 108.

[61] At paras. 106-119.

[62] *Toto Costruzioni* v. *Lebanon*, Decision on Jurisdiction, 11 September 2009.

[63] At paras. 139-168.

[64] At paras. 165-168.

[65] *RSM* c/ *République Centrafricaine*, Décision sur la compétence et la responsabilité, 7 December 2010.

[66] At para. 147.

[67] At paras. 148-147.

[68] At para. 185.

Conclusion

So far, the known effects of armed conflict on investment protection have been few and sporadic. But as we have seen the legal potential is considerable and it is quite likely that we will see more cases in the future.

Treaties for the protection of investments do not generally become inapplicable in times of armed conflict. In fact, some of the provisions in these treaties are designed to afford protection in situations of violent struggle. However, some of these treaties contain broad security clauses that exempt host States from compliance with the treaties' substantive standards in violent emergency situations.

Most treaties guarantee full protection and security. This standard involves an obligation by the host State to spare the investment from violent actions. It also requires a measure of protection against violent interference by private parties, and rebel forces.

Some treaties contain clauses that specifically refer to armed conflicts. In their simple and more frequent form these war clauses merely promise non-discrimination when it comes to measures designed to remedy the consequences of armed conflicts. Some treaties go further and contain a positive obligation of restitution or compensation in cases of requisitioning or destruction of investments. However, this obligation is subject to a number of restrictive requirements.

Therefore, investor protection in times of armed conflict will in large measure depend on the availability of favourable treaties upon which the investor can rely. The current situation is far from uniform and offers a patchwork of treaty provisions that favour some investors in some countries but leave other investors without treaty protection. The example of Libya shows vividly that only investors from certain nations enjoy treaty protection. Even for investors who can rely on treaties, their position is by no means uniform. To some extent this may be remedied by the availability of most favoured nation clauses. A satisfactory solution would require a much denser network of bilateral treaties or a widely ratified multilateral treaty.