PROTECTION OF FOREIGN INVESTMENTS IN ARMED CONFLICTS. PART 1

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Abstract

The article discusses the notion of protection of foreign investments within the context of armed conflict. The author examines the provisions of bilateral investment treaties aimed at protecting investors in the situations of violence, as well as the substantive standards rooted in investment protection. The author also refers to the historical context behind the advent of the first investment treaties and the colonial nature that characterises the emergence of international investment law. The analysis focuses on the challenges commonly indicative of the applicability of investment agreements in armed conflict, which is further complicated by the weakness of the current international legal regulation and the insufficiency of existing provisions. The author argues that the regulatory framework for the protection of foreign investments is not only imperfect for regulating the protection of investments in the event of armed conflict but is also overly cautious with regard to the application of the principles of international humanitarian law to investment disputes. The author considers that the concept of investment protection should be reconciled with the concept of human rights, as well as with the interests of developing countries, since although investment is usually associated with economic stability, this discourse is inapplicable to developing countries, which are often negatively affected by both foreign investment itself and its protection, as the example of Colombia shows. Therefore, the article dwells on the fact that the effectiveness of protecting foreign investment, which is always based on the premise of peace, should be viewed through the prism of three lenses: the law of international treaties, international humanitarian law, and international human rights law. It is precisely on these three levels the author shows the interaction between the economic aims of investors who wish to safeguard their investments, the goals of governmental agencies, and the rights and interests of local communities and indigenous peoples.

Keywords

foreign investment protection, armed conflict, human rights, bilateral investment treaties, international humanitarian law

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Introduction

According to the International Committee of the Red Cross, there are currently more than 120 armed conflicts worldwide, while the number of non-international armed conflicts (hereinafter — NIAC) has tripled since 2000.[1] Naturally, the moment a conflict arises, international law is affected. As of now, with more than 2000 bilateral investment treaties (hereinafter — BITs) in force,[2] the clash between the two areas is as inevitable as ever.

Nevertheless, given that international humanitarian law (hereinafter — IHL) and international investment law (hereinafter — IIL) have been deliberately structured as fundamentally distinct fields, there is a significant lack of agreement both in practical application and in scholarly literature regarding the integration and implementation of IHL in the context of investment relations. Although there is an extensive and comprehensive body of literature on the matter of operation of IIL in the realm of the armed conflict (e.g. by prominent scholars C. Schreuer,[3] T. Ackermann,[4] D. Davitti,[5] G. Hernández,[6]

[1] *How is the term Armed Conflict defined in international humanitarian law?* // ICRC. 16 April 2024. URL: https://www.icrc.org/en/document/icrc-opinion-paper-how-term-armed-conflict-defined-international-humanitarian-law (accessed: 20.06.2024).

[2] *International Investment Agreements Navigator* // Investment Policy Hub. URL: https://investmentpolicy.unctad.org/international-investment-agreements (accessed: 20.06.2024).

[3] Schreuer C. *War and Peace in International Investment Law* // *International Investment Law and the Law of Armed Conflict* / ed. by F. Baetens. Springer, 2019. P. 3–21; Schreuer C. *Investments, International Protection* // Max Planck Encyclopedias of International Law. Oxford, 2013.

[4] Ackermann T. *Investments under Occupation: The Application of Investment Treaties to Occupied Territory* // International Investment Law and the Law of Armed Conflict / ed. by F. Baetens. Springer, 2019. P. 67–93; Ackermann T. *The Effects of Armed Conflict on Investment Treaties*. Cambridge : Cambridge University Press, 2022.

[5] Davitti D. *Investment and Human Rights in Armed Conflict: Charting an Elusive Intersection*. Hart Publishing, 2019.

[6] Hernández G. *The Interaction Between Investment Law and the Law of Armed Conflict in the Interpretation of Full Protection and Security Clauses* // *International Investment Law and the Law of Armed Conflict* / ed. by F. Baetens. Springer, 2019. P. 21–51.

P. Ambach,[7] J. Zrilic[8]), only few address investment protection from the perspective of the latter being a double-edged sword for conflict-prone states. In other words, only few are scrutinising over the question of whether these states actually benefit from foreign investments. As more investors enter conflict-prone areas, the question of protection stands even more problematic. As such, is the protection provided by bilateral investment treaties sufficient enough? Does armed conflict impede foreign investments, or does it facilitate heightened risks within the state? And more importantly, can there be any silver lining to such protection, even if human rights are affected?

The author relies on critical approaches to international law to identify whether and to what extent the outbreak of armed conflict affects the continued application of treaties relating to the protection of foreign investments, and the ways such protection is influenced by IHL and international human rights law (hereinafter — IHRL). By assuming that the notion of IIL protection is heavily influenced by the socio-political landscape both within and outside of IIL, the analysis addresses the specifics of investment treaties, e.g. their application in times of armed conflict, as well as possible approaches to interpreting them and existing case law. The aim is to discuss how the standards of investment protection treaties apply in armed conflict and to explore any implications behind the dichotomy between IHL and IHRL.

Hence, in this first part of the paper, the author sets out a general overview of the historical background of the regime of IIL to reveal possible patchwork in the legal regulation of foreign investment protection through the analysis of substantive standards enshrined in the BITs, as well as armed conflict clauses. In the second part of the paper, the author will proceed with the rest of the analysis by exploring the intersection between IHL and IHRL. It will identify a surprising interconnection between foreign direct investment and facilitation of violence in developing countries on the example of Colombia, along with the impact of foreign investment protection on the rights of indigenous people in developing countries.

1. Specifics of bilateral investment treaties within the law of international treaties

In recent decades, the world has witnessed an impressive proliferation of international investment treaties, a process also known as "*treatification*"[9] or "*multilateralization*"[10] of IIL. This development sparked an emergence of international investment regime, which has been characterised by its "bilaterality",[11] "private and decentralized decision-making",[12] and a lack of a "multilateral international organization."[13] Yet, despite being portrayed as neutral and objective, both international investment arbitration system and the rules of IIL are deeply imbedded in a political framework[14] that ultimately benefits foreign investors.[15]

Historically, the roots of IIL can be traced back to the colonial period of the XVIII century. Since the need for investments in that period was "minimal",[16] international economic agreements were primarily concluded for the purposes of the establishment of commercial relations. The early examples of such agreements are friendship, commerce and navigation treaties, which are often called the "progenitors"[17] of the modern BITs. IIL of that period operated largely within the ambit of colonial power.[18] Even if some of these treaties were true to their name, focusing only on the expansion of trade relations with other states, some already contained provisions with respect to the treatment of alien property on the territory of the foreign state.[19] The incentive that the developed states of that time sought was therefore to establish a new legal order for facilitation of foreign relations and trade, as well as create such relationships that would prove useful in the future.

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[7] Ambach P. *International Criminal Responsibility of Transnational Corporate Actors Doing Business in Zones of Armed Conflict* // International Investment Law and the Law of Armed Conflict / ed. by F. Baetens. Springer, 2019. P. 51–83.

[8] Zrilic J., Fleck D. *The Handbook of Humanitarian Law in Armed Conflict*. Oxford University Press, 1995; Idem. *The Protection of Foreign Investment in Times of Armed Conflict*. Oxford University Press, 2019.

[9] Salacuse J. *The Treatification of International Investment Law* // Law and Business Review of the Americas. 2007. Vol. 13. № 1. P. 155–166; Miles K. *The Origins of International Investment Law: Empire, Environment, and the Safeguarding of Capital.* Cambridge University Press, 2013. P. 3; See Schill S. *The Multilateralization of International Investment Law.* Cambridge University Press, 2009.

[10] Schill S. *Op. cit.*

[11] Salacuse J. *The Law of Investment Treaties*. Oxford University Press, 2021. P. 19.

[12] Ibid.

[13] Ibid.

[14] Ibid. P. 11.

[15] Miles K. *Op. cit*. P. 3.

[16] Sornarajah M. *The International Law on Foreign Investment*. Cambridge : Cambridge University Press, 2010. P. 19.

[17] Ibid. P. 180.

[18] Salacuse J. *The Law of Investment Treaties*. P. 63.

[19] Ibid.

However, due to the lack of treaty mechanisms, investment protection during that period was largely based on the minimum standard of treatment (hereinafter — MST) enshrined in customary international law. This often offered an "inadequate mechanism"[20] for investment protection. As such, the rise of the Calvo Doctrine in Latin American states stipulated that "aliens should not be entitled to any rights or privileges not accorded to nationals".[21] In response, states often resorted to either diplomacy, or military forces.[22] Hence, the IIL of that period was determined to protect investors, "enmesh the interests of state and investor within the operation of diplomatic protection, and legitimiz[e] military intervention against host states".[23] Since most foreign investment during the XVIII century occurred within the framework of colonial expansion, the XIX century was not different. It was to a larger degree that the idea of protecting alien property was often articulated in the sense and in the meaning of domestic law.[24] There was no international standard to adhere to.

Following the end of XX century, the IIL started to drift away from agreements with "far-reaching rights [of] foreign investors and <…> host State with limited control over their activities"[25] to a New International Economic Order. As a result of a post-colonial era, many newly independent states were hostile toward the idea of foreign investment, which they perceived as a "tool to protect the interests of capital-exporting states".[26] Even though the US had concluded more than 23 treaties in just 20 years, many states were still distrustful of such policies.[27]

Hence, the period can only be characterised as a clash between the two opposing mindsets. One side resorted to waves of expropriation in fear of exploitation, while the other advocated for the external IIL protection. In the 1960s, investor-state dispute settlement was created with the pursuit of protecting the "depoliticiz[ation] of the settlement of investment disputes"[28] as one of its major goals. When the Declaration of New International Economic Order proclaimed that states have "[f]ull permanent sovereignty over their natural resources and other economic activities",[29] developed states responded with creation of the first BITs.[30]

Nevertheless, understanding the context behind the advent of IIL is a demanding exercise. While the phenomenon of foreign trade and investment has drastically brightened as a result of Western colonialism, this would not have been possible without the existence of other "indigenous trading networks".[31] In the end, although the modern IIL had been created within the European rule of international law, it is unlikely that "Europeans were <…> creating legal regimes on a blank canvas".[32]

The end of the XX century marked not only the end of the post-colonial era, but also indicated the beginning of crucial changes for BITs, the number of which increased dramatically. While developing countries have partially abandoned their resentment towards foreign investment, the very purpose of investment agreements has shifted towards the idea of liberalisation of investment flows.

Thus, the notion of investment protection in the early times demonstrates a drastically different approach to the importance of investment relations, which was largely based on the colonial domination of developed states. Despite this, through addressing the more "enduring impact" of IIL background, history has led us to the view that IIL was "shaped at a fundamental level through this colonial encounter into a mechanism that protected only the interests of capital-exporting states, excluding the host state from the protective sphere of investment rules".[33] Therefore, the dynamic of "politically oriented law"[34] cannot be ignored.

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[20] Sauvant K., Sachs L. *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows.* Oxford University Press, 2009. P. 5.
[21] Juillard P. *Calvo Doctrine* // Max Planck Encyclopedias of International Law, 2007. § 3.
[22] Schwarzenberger G. *Foreign Investments and International Law*. Praeger, 1969. P. 22–24.
[23] Miles K. *Op. cit.* P. 69.
[24] Dolzer R., Schreuer C. *Principles of International Investment Law*. Oxford University Press, 2022. P. 17–18.
[25] Schreuer C. *Investments, International Protection*… § 3.
[26] Miles K. *Op. cit.* P. 19.
[27] Salacuse J. *The Law of Investment Treaties*. P. 102.
[28] Dolzer R., Schreuer C. *Op. cit.* P. 20; Newcombe A., Paradell L. *Law and Practice of Investment Treaties: Standards of Treatment*. Kluwer Law International, 2009. P. 27.
[29] UN General Assembly. Declaration on the Establishment of a New International Economic Order, 1974.
[30] Treaty between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments, 1959.
[31] Miles K. *Op. cit*. P. 3.
[32] Ibid.
[33] Ibid. P. 2.
[34] Koskenniemi M. *The Gentle Civilizer of Nations*. Cambridge University Press, 2009. P. 488.

Today, BITs, along with bilateral economic agreements with investment provisions and other investment-related agreements constitute one of the three types of international investment agreements.[35] While the purpose of BITs is concerned with "providing the guarantees for foreign investors from the respective countries",[36] their effectiveness in this regard remains disputable.[37] As such, the discussion about the exact manifestation provided by the global investment regime is unlikely to cease soon, and may grow sharper in the future.

Hence, while the history of IIL does stem from the very beginning of time, the rise of investments that establish substantive obligations for host states is a relatively new phenomenon. The history behind the emerging international investment regime reveals that IIL has always remained "innately political",[38] since it has "evolved out of the political and commercial aspirations of Western capital-exporting nations and with its core purpose designed to further those interests".[39]

2. Application of international investment treaties in armed conflict

There is no doubt that an armed conflict has devastating consequences for all parties involved. It is indisputable that armed violence "provides the setting for the most egregious human rights abuses, and that abuses feed conflict".[40] Certainly, in conflict settings, the operation of the rule of law cannot remain unaffected. To this day, the impact of armed conflicts on the operation of treaties remains "one of the most disputed subjects in public international law".[41] Although historically war has been considered to terminate all treaties,[42] today's perception of continuity of treaties during conflicts has changed.

Pursuant to Article 73 of the Vienna Convention on the Law of Treaties (hereinafter — VCLT),[43] the convention "shall not prejudge any question that may arise in regard to a treaty <…> from the outbreak of hostilities between States". At the same time, the International Law Commission (hereinafter — ILC) was "justified" to perceive "the case of an outbreak of hostilities between parties to a treaty to be wholly outside the scope of the general law of treaties and that no account should be taken of that case or any mention made of it in the draft articles".[44] As such, the VCLT does not "purport to regulate the consequences of an outbreak of hostilities, nor do they contain any general reservation with regard to the effect of that event on the application of their provisions".[45]

Clearly, the incentive of the drafters was to indicate the existence of another legal framework applicable in times of armed conflict. As it was not the intention of the drafters to exclude the application of the VCLT to treaties in armed conflict, other provisions could still potentially invoke the grounds necessary for suspension of a treaty. Nevertheless, the only authoritative instrument that remains for those questioning such exclusion is the Draft Articles on the Effect of Armed Conflict on Treaties, which were adopted by the United Nations General Assembly in 2011.[46] Years later, in 2017, the General Assembly in its Resolution 72/121 "[e]mphasize[d] the value of the articles on the effects of armed conflicts on treaties in providing guidance to States",[47] and "invite[d] States to use the articles as a reference whenever appropriate".[48]

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[35] *International Investment Agreements Navigator* // Investment Policy Hub. URL: https://investmentpolicy.unctad.org/international-investment-agreements (accessed: 20.06.2024).

[36] Schreuer C. *Investments, International Protection*… § 7.

[37] Hallward-Driemeier M. *Do Bilateral Investment Treaties Attract FDI? Only a Bit . . . and They Could Bite* // The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows // The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows / ed. by K. Sauvant, L. Sachs. Oxford University Press, 2009; Salacuse J. *Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and Their Grand Bargain* // Harvard International Law Journal. 2005. Vol. 46. № 1. P. 67–130.

[38] Miles K. *Op. cit.* P. 71.

[39] Ibid.

[40] Davitti D. *Op.cit*. P. 19.

[41] Silja V. *Armed Conflict, Effect on Treaties* // Max Planck Encyclopedias of International Law. 2011. § 1; ILC. *Draft Articles on the Effects of Armed Conflicts on Treaties with Commentaries Thereto*. Yearbook of the International Law Commission, 2011. Vol. 2. Part 2. UN Doc A/CN.4/SER.A/2010/Add.1.

[42] McNair L. *The Legal Effects of War*. Cambridge : Cambridge University Press, 1966; ILC. *Draft Articles on the Effects of Armed Conflicts on Treaties with Commentaries Thereto* II(2) YBILC 108. 2011. § 25; ILC. *The Effect of Armed Conflict on Treaties: an Examination of Practice and Doctrine.* Memorandum by the Secretariat. UN Doc. A/CN.4/550 (2005). § 14.

[43] Vienna Convention on the Law of Treaties (adopted on 23 May 1969, and entered into force on 27 January 1980).

[44] ILC. *Draft Articles on the Effects of Armed Conflicts on Treaties…* § 9.

[45] Ibid.

[46] Ibid. Part 2. Article 2.

[47] UNGA. General Assembly Resolution 72/121, 2017. § 2.

[48] Ibid.

Article 3 of the Draft Articles provides that "the existence of an armed conflict does not *ipso facto* terminate or suspend the operation of treaties: (a) as between States parties to the conflict; [and] (b) as between a State party to the conflict and a State that is not".[49] Subsequently this notion has been considered as part of customary international law,[50] since "the opinion is pretty general that war by no means annuls every treaty",[51] and "[i]t is thus clear that war does not per se put an end to pre-war treaty obligations in existence between opposing belligerents".[52] Despite the commonly adopted view that the continuity of a treaty may depend on its type, "treaties do not continue in operation simply because they fall into one of the listed categories".[53] The latter merely creates "weak rebuttable presumptions".[54]

Regarding the continuity of bilateral investment treaties in times of war, "treaties dealing with the protection of foreign investments, such as BITs, continue to apply after the outbreak of armed hostilities",[55] which is "particularly so where these treaties address the consequences of armed conflicts".[56] This position has had large acceptance over the years. It seems that suspension may still occur if, in the meaning of the VCLT, the subject vital to the investment treaty has been destroyed. In that case, as long as the host state has not contributed to the violation of the provision, Article 61 may be invoked.

At the same time, the Draft Articles propose a test to determine the continuity of the treaty in armed conflict on a case-by-case basis. As a first step, ILC suggests looking at the intent of the parties to the treaty.[57] Secondly, it proposes to verify whether the agreement in question "itself contains provisions on its operation in armed conflict".[58] In a way, the very existence of special armed clauses in a BIT, which will be addressed further in this paper, may indicate the fulfilment of this criterion within the meaning of Draft Article 4.

However, the following question arises. What does the absence of such provisions mean for termination or suspension of the treaty? In this case, one may look at Draft Article 6, which considers such relevant factors as the nature of the treaty, and the characteristics of the treaty.[59] Article 7 then suggests an indicative list, which involves "an implication that they continue in operation during armed conflict".[60] This list includes, *inter alia*, treaties of friendship, commerce and navigation and agreements concerning private rights.[61] As was noted by the ILC, disputes arising "in the context of private investments abroad <…> may, however, come within group (e) as agreements concerning private rights".[62] Hence, although Draft Articles make the continuity of operation of investment treaties in armed conflict rather clear, other questions remain.

As such, the questions of the applicability of the doctrine of impossibility of performance within the meaning of Article 61 of the VCLT to investment agreements is subject to debate.[63] On the one hand, it may be suggested that the doctrine does not apply, since "during the drafting of the provision emphasis was put on natural events that make impossible to perform a treaty by making disappear or destroying the treaty's object — since IIAs [international investment agreements] have the protection of foreign investment as one of their objects, IIAs could not be terminated on this ground".[64] On the other hand, "an object indispensable for the execution" of an international investment agreement is not the only possible interpretive option under Article 61 VCLT.[65] Even an end of a legal regime, which may as well happen during an armed conflict of high intensity, leads to the invocation of the doctrine. As the events of the present day indicate a frightening rise in armed conflicts worldwide, both states and investors may

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[49] ILC. *Draft Articles on the Effects of Armed Conflicts on Treaties…* Article 3(a).

[50] *Society for the Propagation of the Gospel v. Town of New Haven*. AILC 1783–1968. Vol. 19. P. 41; *Karnuth v. United States*. AILC 1783–1968. Vol. 19. P. 49, 52−53; ILC. *Caflisch Report*, § 33. 74 UNGA, *Sixth Committee Meeting*. § 10, 13.

[51] Oppenheim L. *International Law: a Treatise. Vol. 2: War and Neutrality.* London : Longman, 1952. P. 302.

[52] McNair A. *The Law of Treaties*. Oxford : Clarendon Press, 1961. P. 697.

[53] ILC. Caflisch Report. § 53.

[54] ILC. *Draft Articles on the Effects of Armed Conflicts on Treaties…*, Commentaries to the Annex. § 2; ILC. *Second Brownlie Report.* § 42.

[55] Baetens F. *Investment Law within International Law*: *Integrationist Perspective*. Cambridge University Press, 2013. P. 5.

[56] Ibid.

[57] ILC. *Draft Articles on the Effects of Armed Conflicts on Treaties…* Article 4.

[58] Ibid.

[59] Ibid. *Draft Articles on the Effects of Armed Conflicts on Treaties…* Article 6.

[60] Ibid. Annex. Indicative List of Treaties Referred to in Article 7.

[61] Ibid. P. 129.

[62] Ibid.

[63] Gagliani G. *Supervening Impossibility of Performance and the Effect of Armed Conflict on Investment Treaties: Any Room for Manoeuvre?* // International Investment Law and the Law of Armed Conflict / ed. by F. Baetens. Springer, 2019. P. 341–363.

[64] Ibid.

[65] Ibid.

attempt to have their recourse to the VCLT to terminate the concluded treaties. For this reason, the question of investment protection in armed conflicts becomes even more complex, as international law has avoided addressing this issue.

All in all, although the Draft Articles represent a serious discussion of the matter of armed conflict's effect on treaties by the ILC, they nevertheless remain a flawed attempt to "update a doctrine that has been written largely for another age".[66] As of now, the cases of invocation of Draft Articles in practice have been rare or undocumented until recently.[67] For example, in *Guris v. Syria*, for the first time Draft Articles had any practical importance for the tribunal. In that case, the Claimant alleged that "due to the escalating armed conflict, Syrian government armed forces started withdrawing from most of the northern Syrian territories, including the regions where the Claimants' cement facilities are located".[68] In turn, the tribunal concluded that "nothing in Article 2 suggests that it ceases altogether to apply at times of war or armed conflict. Indeed, it is at such times that protection may be needed the most".[69] The conclusions of the tribunal are not entirely satisfying. In a way, one could argue that it ignored those "aspects of the Draft Articles that are accommodating of realities of armed conflict and have been endorsed in earlier international and municipal case law".[70] Furthermore, due to the non-binding character of the Draft Articles on the Effect of Armed Conflict on Treaties, as well as some states' apprehension with respect to the possibility of their codification,[71] the authority and significance of the Draft Articles remain disputable.

Conversely, another method of thinking is to consider the law of armed conflict as *lex specialis*. Pursuant to Article 55 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts (hereinafter — ARSIWA),[72] the Articles do not apply "where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law".[73] As was recognised by the International Court of Justice in the *Nuclear Weapons Advisory Opinion*, "the protection of the International Covenant on Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency".[74] Nevertheless, it is important to remember that the idea of *lex specialis*, which establishes that "if a matter is being regulated by a general standard as well as a more specific rule, then the latter should take precedence over the former"[75] is neither a panacea, nor a tool to displace one norm with the other but only an "interpretation technique".[76]

In *AAPL v. Sri Lanka*, the tribunal noted that the "[BIT] is not a self-contained closed legal system limited to provide for substantive material rules of direct applicability, but it has to be envisaged within a wider juridical context in which rules from other sources are integrated".[77] As was later confirmed by the tribunal, such integration may derive either from "implied incorporation methods",[78] or by "direct reference to certain supplementary rules, whether they are of international law character or of domestic law nature".[79] Hence, the purpose of Article 31(3) of the VCLT is encapsulated in the forewarning to take into account all relevant rules of international law that might establish some rights and obligations for the parties in some other areas of international law, i.e. human rights law, environmental law, or IHL.

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[66] ILC. Secretariat Memorandum. § 164.

[67] Zrilic J. *Armed Conflicts and the Law of Treaties: Recent Developments and Reappraisal of the Doctrine in Light of the Wars in Syria and Ukraine* // Japanese Yearbook of International Law. 2022. Vol. 65. P. 107–137.

[68] ICC. *(1) Mr Idris Yamantürk (2) Mr Tevfik Yamantürk (3) Mr Müsfik Hamdi Yamantürk (4) Güriş İnşaat ve Mühendislik Anonim Şirketi (Güris Construction and Engineering Inc) v. Syrian Arab Republic.* Case № 21845/ZF/AYZ. Final Award of 31 August 2020. § 114.

[69] Ibid.

[70] Zrilic J. *Armed Conflicts and the Law of Treaties…* P. 107–137.

[71] UNGA. Sixth Committee Meeting. Summary record of the 17th meeting Held at Headquarters, New York. Friday, 20 October 2017. A/C.6/72/SR.17. § 9, 32, 20, 43, 46.

[72] UNGA Res. 56/83. 12 December 2001. UN Doc. A/RES/56/83.

[73] ARSIWA. Article 55.

[74] ICJ. *Legality of the Threat or Use of Nuclear Weapons*. Advisory Opinion of 8 July 1996. § 25.

[75] UNGA. *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law.* Report of the Study Group of the International Law Commission finalised by M. Koskenniemi. Fifty-Eighth Session, Geneva, 2006. A/CN.4/L.702. § 56.

[76] Ackermann T. *The Effects of Armed Conflict on Investment Treaties…* P. 92; UN Commission on Human Rights. Working Paper on the Relationship between Human Rights Law and International Humanitarian Law E/CN.4/Sub.2/2005/14, 2005. § 57.

[77] ICSID. *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka.* Case № ARB/87/3. Award of 27 June 1990. § 21.

[78] Ibid.

[79] Ibid.

Although some tribunals lean more towards restrictive interpretation, the irrevocable significance of reliance on other areas of international law is still to be confirmed by investment tribunals.[80] In particular, this is important "not only to align the development of investment norms within the broader normative framework of international law but also to strengthen the system's integrity, to bring consistency and interpretive balance pivotal for value judgments, and to disprove the allegations of undermining public interests levelled against the system".[81] From this perspective, the rules of IHL clearly suffice to be qualified within the meaning of the test enshrined in Article 31(3)(c) of the VCLT.

However, it is not the only element that may be used in the process of treaty interpretation. For instance, as was noted by the *Ping An v. Belgium* tribunal, "the presumed intentions of the parties should not be used to override the explicit language of a BIT, or to override the agreed-upon framework, or be used as an independent basis of interpretation".[82] Not only do external rules require a certain proximity test,[83] but other parts of the treaty, the object and purpose, the preamble, should also be taken into account.[84] As such, the tribunals equally agree that neither external rules nor any other meaning shall derogate from the original intention of the drafters of the treaty. In the end, "it should not be presumed, as a starting point, that a certain type of instrument — here, an investment protection treaty — entails a certain formulation, and if the text does not reflect that formulation, it should further be presumed the contracting parties have made a drafting error; in short, neither intentions nor mistakes should be presumed; the text should be examined".[85]

Interpretation of investment treaties stems from the rules of treaty interpretation enshrined in the VCLT, which reflect customary international law.[86] In fact, as was observed by the tribunal in *RosInvest v. Russian Federation,* it is "surprisingly rare in practice"[87] for the VCLT to be "more than just a convenient reference point for the rules of general international law".[88] Tribunals have no problem accepting their customary nature,[89] albeit not always in a consistent manner.[90]

For example, the tribunal in *Saluka v. Czech Republic* emphasised that the rules of interpretation laid down in the VCLT were binding upon the contracting parties to the BIT and also represented customary international law. Meanwhile, the tribunal in *Uzan v. Turkey* noted that, even though the treaty specifies that the issues in dispute shall be decided "in accordance with this Treaty and applicable rules and principles of international law",[91] and this "cannot be taken to mean that rules of customary international law are capable of overriding the clear text of the treaty".[92] Still, investment tribunals seem to agree that investment treaties cannot exist in isolation of international law. Even more so, the reluctance of some states to adhere to rules of IHL due to political reasons only serves as a confirmation of the previously made argument. As was confirmed by the tribunal in *Urbaser v. Argentina,* the BIT has to be construed in harmony with other rules of international law of which it forms part, including those relating to human rights.[93] In the end, a BIT is "not a self-contained system isolated from international law".[94]

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[80] ICSID. *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentina*. Case № ARB/07/26. Award of 8 December 2016. § 1200; ICSID. *Parkerings-Compagniet AS v. Lithuania*. Case № ARB/05/8. Award of 11 September 2007. § 377–397; *S.D. Myers, Inc. v. Canada*. UNCITRAL. Partial Award of 13 November 2000. § 201–21; ICSID. *Continental Casualty Co. v. Argentina*. Case № ARB/03/9. Award of 5 September 2008. § 192–195.

[81] Ghouri A. *Interaction and Conflict of Treaties in Investment Arbitration*. Kluwer Law International, 2015. P. 147; Rosenteter D. *Article 31(3)(c) of the Vienna Convention on the Law of Treaties and the Principle of Systemic Integration in International Investment Law and Arbitration* // Luxembourg Legal Studies. 2015. P. 328–331.

[82] ICSID. *Ping An v. Belgium.* Case № ARB/12/29. Award of 30 August 2015. § 166 (citations omitted).

[83] Ackermann T. *The Effects of Armed Conflict on Investment Treaties*… P. 82.

[84] Gardiner R. *Treaty Interpretation*. Oxford University Press, 2015. P. 305.

[85] ICSID. *Hasanov v. Georgia*. Case № ARB/20/44. Decision on Respondent's Inter-State Negotiation Objection of 19 April 2022. § 88.

[86] PCA. *Saluka v. Czech Republic.* Case №2001–04. Partial Award of 17 March 2006. § 296; ICSID. *Mondev International Ltd v. United States*. Award of 11 October 2002. § 43.

[87] *RosInvestCo UK Ltd. v. The Russian Federation.* SCC Case № 079/2005. Award on Jurisdiction of 5 October 2007. § 38.

[88] Ibid.

[89] ICSID. *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka.* Case № ARB/87/3. Award of 27 June 1990. *Salini v. Jordan*. Case № ARB/02/13. Decision on Jurisdiction of 29 November 2004. *Aguas del Tunari v. Bolivia.* Case № ARB/02/3. Decision on Respondent's Objections to Jurisdiction of 21 October 2005. *Mytilineos Holdings v. Serbia*. Partial Award on Jurisdiction of 8 September 2006.

[90] *Uzan v. Turkey*. SCC Case № V 2014/023. Award on Respondent Bifurcated Preliminary Objection of 20 April 2016. § 144.

[91] Ibid.

[92] Ibid.

[93] ICSID. *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentina*. Case № ARB/07/26. Award of 8 December 2016. § 1200.

[94] PCA. *Fraiz v. Venezuela*. Case № 2019-11. Award of 31 January 2022.

Another peculiar feature to notice with respect to the support of a less restrictive approach within the realm of treaty interpretation is that a substantial number of tribunals share the view that the provisions of a BIT should not be interpreted solely for the benefit of investors, and the aim of a BIT should not be misinterpreted. For example, as was noted by the tribunal in *Quasar de Valors v. Russia*, Article 31 of the VCLT "does not compel the result that all textual doubts should be resolved in favour of the investor; the long-term promotion of investment is likely to be better ensured by a well-balanced regime rather than by one which goes so far that it provokes a swing of the pendulum in the other direction".[95] In other words, that it is a "truism to say that the purpose of any BIT is to promote investments; but it does not follow from this general proposition that every ambiguity found in such treaties should invariably be resolved in favour of the investor; every BIT represents a negotiated bargain between two contracting States and the provisions therein reflect the extent to which the sovereignty of each contracting State has been curtailed".[96]

Arbitrators seem to agree on the avoidance of restrictive interpretations.[97] For instance, Dr. J. Voss in his Dissenting Opinion in *Lemire v. Ukraine* held that "BIT protection in tender processes, since it could lead to an unjustified privilege in favour of foreign investors, should be construed narrowly".[98] In this regard, it seems logical to suggest that using a systemic approach lies between what can be considered restrictive on the one hand and too overbroad on the other hand when it comes to treaty interpretation. Since the tribunal is not bound by the arguments invoked by the parties on the basis of the maxim *jura novit curia,* the Tribunal "is required to apply the law of its own motion".[99] For instance, as was highlighted by the tribunal in *Garanti Koza v. Turkmenistan*, "the fact that both parties have not advanced this approach to interpretation is no reason not to apply it, since it is a normal approach to treaty interpretation that the Tribunal can and should apply".[100]

It is traditionally accepted that the notion of investment protection in IIL is concerned with the "safeguarding of foreign investments against interference by the host State".[101] Such safeguarding is implemented through the imposition in BITs of a set of substantive obligations providing specific guarantees of protection to foreign investors. In a way, such investment protection also requires a balancing exercise: between the states' right to legitimate regulation on the one hand, and the important interests of the local population on the other.[102] One of the guarantees that a state adheres to in the BIT is a special full protection and security (hereinafter — FPS) clause, which is designed specifically to "offer aliens and their property a certain degree of protection from physical injury, caused either by the State or by private parties".[103] Importantly, the notion of the FPS standard is "not geared specifically to situations of armed conflict".[104] The application of the FPS standard outside of realm of IIL is also quite limited,[105] although there are some cases in general international law, where the FPS has been applied.[106] It is also generally agreed that a violation of the FPS is possible both in the event of state violence, as well as state's inadequate actions in case of harm caused by non-state actors.[107]

There is no consensus on the wording used to indicate the existence of such a clause, since a specific formulation "do[es] not appear to carry any substantive significance".[108] In fact, while some treaties do not

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95 SCC. *Quasar de Valores SICAV S.A., Orgor de Valores SICAV S.A., GBI 9000 SICAV S.A. and ALOS 34 S.L. v. The Russian Federation.* Case № 24/2007. Award on Preliminary Objections of 20 March 2009. § 55.

96 PCA. *Sanum Investments Limited v. Lao People's Democratic Republic* (I). Case № 2013-13I. Judgment of the High Court of Singapore. Award of 20 January 2015. § 124.

97 Ad hoc. *Ethyl v. Canada*. Award on Jurisdiction of 24 June 1998; Ad hoc. *Canadian Cattlemen v. United States*. Award on Jurisdiction of 28 January 2008; ICSID. *Joseph Charles Lemire v. Ukraine* (II). Case № ARB/06/18. Dissenting Opinion of Dr. Jorgen Voss.

98 ICSID. *Joseph Charles Lemire v. Ukraine* (II). Case № ARB/06/18. Dissenting Opinion of Dr. Jürgen Voss. § 127, 128.

99 Ibid. § 112.

100 ICSID. *Garanti Koza LLP v. Turkmenistan*. Case № ARB/11/20. Award of 19 December 2016. Fn 16.

101 Schreuer C. *Investments, International Protection*… § 1.

102 Ibid. § 2.

103 Brabandere E. *Full Protection and Security* // Max Planck Encyclopedias of International Law. 2022.

104 Schreuer C. *Investment Protection in Times of Armed Conflict…* P. 708.

105 Brabandere E. *Op. cit*. § 12.

106 ICJ. *United States Consular and Diplomatic Staff in Tehran (United States v. Iran).* Judgment of 24 May 1980; ICJ. *Elettronica Sicula SpA (ELSI) (US v. Italy).* Judgment of 20 July 1989.

107 ICSID. *Wena Hotels Limited v. Arab Republic of Egypt*. Case № ARB/98/4. Award of 8 December 2000; ICSID. *Noble Ventures Inc v Romania*. Case №ARB/01/11. Award of 5 October 2005.

108 PCA. *Frontier v. Czech Republic.* Case № 2008-09. Final Award of 12 November 2010. § 260.

contain such a clause at all, it is usually adjectives such as "constant",[109] "continuous"[110] or "complete"[111] that appear in the provisions of BITs with respect to protection of foreign investment that are commonly indicative of the FPS standard. At the same time, it is also not clear whether the model for such protection should be a well-organised state or the one that only has limited sources at its disposal.[112] In *AAPL v. Sri Lanka*, the first case concerned with the FPS standard, the tribunal established Sri Lanka's responsibility due to the failure of its authorities to provide foreign investors with the FPS required under the relevant international law rules and standards.[113] Yet, it remains unclear why the tribunal failed to cut the paper with the scissors. The tribunal did not address the FPS standard from the perspective of IHL. At the same time, it noted that the violation of the FPS required a cumulative existence of such factors as the destruction of property "being committed by the governmental forces or authorities themselves; that the destruction was not caused in combat action <…> and that the destruction was not required by the necessity of the situation".[114] Further, in the opinion of the tribunal, the standard required that "the governmental forces and not the rebels caused the destruction".[115] However, with non-state actors being the most common actors of modern NIACs, it appears significant for IIL to take into account the actions of such subjects in accordance with the rules of IHL.

After the Arab Spring, a number of proceedings related to the violation of investment treaties has risen.[116] Although investment tribunals did not resort to IHL, some of them excluded responsibility for the breach of the FPS standard. For instance, in *Tekfen, TML and Tekfen-TML Joint Venture v. State of Libya*, the tribunal held that Libya did not violate its FPS obligations "when it failed after 21 February to provide the military forces required to collect and relocate Claimants' machinery, equipment and supplies <…> [b]ecause, by that date, the circumstances in Libya (and in Kufra) had deteriorated even further and the ability of Libya to provide the protection now said to have been required was almost certainly non-existent".[117]

Conversely, in *Strabag v. Libya*, the tribunal concluded that "a significant amount of Al Hani's property was lost to requisition by regular Libyan armed forces during the events of 2011".[118] To establish this, the tribunal proposed a test, which required the property "was destroyed by the forces or authorities of the respondent State [which] was not required by the necessity of the situation".[119] The tribunal further admitted that "Article 5(2)(b) of the Treaty thus presents the challenge of establishing responsibility for wartime damage by forces of the State party to the investor's property in violent and often chaotic circumstances".[120]

As regards the exact scope of protection being granted by the latter, the investment tribunals may vary in their interpretation. For example, some may suggest that it is only reasonable for the FPS to extend to both physical and legal security, since "the stability afforded by a secure investment environment is as important from an investor's point of view".[121] Others may disagree, emphasising the historically physical nature of the standard,[122] as well as possible risks related to overbroad interpretation of the standard.[123]

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[109] Finland - Panama BIT (2009). Article 2(2), Japan - Russian Federation BIT (1998), Treaty of Friendship, Commerce and Navigation between the United States of America and Nicaragua (1956). Article 3(3).
[110] China - Nigeria BIT (2001). Article 2.2; BLEU - United Arab Emirates BIT (2004), BLEU (Belgium-Luxembourg Economic Union) - Guatemala BIT (2005). Article 3(1).
[111] Oman - Turkey BIT (2007). Article 3; Oman - Pakistan BIT (1997). Article 5.1; Algeria - Jordan BIT (1996). Article 5(1); Finland - United Arab Emirates BIT (1996). Article 5(1); France Model BIT (2006). Article 6(1); Benin - China BIT (2004). Article 2(2); China - Uganda BIT (2004). Article 2(2).
[112] ICJ. *Elettronica Sicula SpA (ELSI) (US v. Italy)*. Judgment. 1989. § 108; ICSID. *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka.* Case № ARB/87/3. Award of 27 June 1990. § 53.
[113] ICSID. *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka.* Case № ARB/87/3. Award of 27 June 1990. § 87.
[114] Ibid. § 57.
[115] Ibid.
[116] ICSID. *Ampal v. Arab Republic of Egypt*. Case №ARB/12/11. Decision on Liability and Heads of Loss of 21 February 2017; ICC. *Olin Holdings Limited v. Libya*. Case № 20355/MCP. Award of 25 May 2018.
[117] ICC. *Tekfen, TML and Tekfen-TML Joint Venture v. State of Libya*. Case № 21371/MCP/DDA. Award of 11 February 2020. § 7.7.141.
[118] ICSID. *Strabag v. Libya*. Case №ARB (AF)/15/1. Award of 29 June 2020. § 257.
[119] Ibid.
[120] Ibid.
[121] ICSID. *Azurix Corp. v. Argentine Republic*. Case № ARB/01/12. Award of 14 July 2006. § 408.
[122] ICSID. *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L. P. v. Argentine Republic*. Case № ARB/01/3. Award of 1 November 2001. § 286.
[123] Ibid. § 286.

In fact, many tribunals[124] or even BITs[125] may go as far as pronouncing the legal nature of the FPS clause. For instance, as was affirmed by the *Global Telecom v. Canada* tribunal, the FPS standard of the BIT is not limited to safeguards against physical interference by state organs and private persons, but extends to "accord legal safeguard for the investment and the returns of the investor; the tribunal observes the State must act with due diligence to meet its obligation".[126]

Yet all formalities aside, what does sadly remain undisputed is the fact that there is still no strict or absolute standard to adhere to when it comes to the FPS. In a sense, the FPS standard is historically[127] nothing more but a due diligence obligation for a state to comply with,[128] which is not exclusive to IIL, but present in many other fields of international law.[129] Since due diligence is an obligation of conduct and not of result,[130] the expectation is that of a state being diligent enough to exercise "reasonable measures within its authority and likely to avoid unfair damage" (фр.: *"les mesures raisonnables relevant de son autorité et de nature à éviter un dommage injuste*)"[131] which does not mean that the state has to prevent any injury whatsoever.[132] In the end, a BIT cannot possibly be an "insurance policy for bad business decisions".[133] Meanwhile, it is unlikely that a tribunal completely ignores the economic, political, social or even cultural background of the host state,[134] although a standard of a "reasonably well-organized modern State"[135] may persevere.

For instance, as was observed in *Churchill and Planet v. Indonesia*, the scope of due diligence depends on the particular circumstances of each case, such as the general business environment and includes ensuring that a proposed investment complies with local laws.[136] In the end, as was rightfully noted by the *BSG v. Guinea* tribunal, it is "generally accepted, when investing in a country, an investor must exercise reasonable due diligence, including with respect to the use of third parties in transactions with the government, and must be more diligent in a country or sector with a high degree of endemic corruption".[137]

The FPS standard also often overlaps with the fair and equitable treatment (hereinafter — FET) standard, which is another investment law standard aimed at protecting the investment from adverse effects. The FET, as does the FPS, often arises in the context of expropriation.[138] However, neither of these two standards make any distinction between the international and local conflicts. In the same vein, there is also no discrimination in their application to state actors. Unsurprisingly, there is also almost to none interaction between these standards and the principles of IHL.

The FET has sometimes been defined as "a more general standard which finds its specific application in *inter alia* the duty to provide FPS, the prohibition of arbitrary and discriminatory measures and the obligation to observe contractual obligations towards the investor".[139] Nevertheless, in outlining the defining features of FET, tribunals agree that "it is easier to find agreement about what the function of the FET standard is than about its content".[140] Nevertheless, in formulating content of the standard

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[124] ICSID. *Addiko Bank v. Montenegro*. Case № ARB/17/35. Award of 24 November 2021.

[125] PCA. *Consutel v. Algeria CPA*. Case № 2017-33. Final Award of 3 February 2020. § 413; Netherlands - Romania BIT (1994). Article 3; Algérie - Italie TBI (1991). Article 4; Argentina - Germany BIT (1991). Article 4; BLEU (Belgium-Luxembourg Economic Union) - Burundi BIT (1989). Article 3.

[126] ICSID. *Global Telecom Holding S.A.E. v. Canada*. Case № ARB/16/16. Award of 27 March 2020. § 664.

[127] Dolzer R., Schreuer C. *Op. cit.* P. 166; ICJ. *United States Consular and Diplomatic Staff in Tehran (United States v. Iran).* Judgement of 24 May 1980. P. 29.

[128] ICSID. *Infinito Gold v. Costa* Rica. Award of 3 June 2021. § 626, 627; ICSID. *Toto v. Lebanon*. Award of 7 June 2012. § 227.

[129] ICJ. *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*. Judgment on Merits of 16 December 2015. § 104, 153.

[130] Koivurova T., Krittika S. *Due Diligence* // Max Planck Encyclopedias of International Law. 2022. § 1, 2, 5, 10.

[131] PCA. *Consutel v. Algeria CPA.* Case № 2017-33. Final Award of 3 February 2020. § 414, 415.

[132] Ad hoc. *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia*. Award on Jurisdiction and Liability of 28 April 2011. § 325.

[133] ICSID. *Total S.A. v. Argentine Republic*. Case № ARB/04/1. Individual Opinion of Henri Alvarez of 27 December 2010.

[134] ICSID. *Churchill and Planet v. Indonesia.* Case № ARB/12/40 and 12/14. Award of 6 December 2016; ICSID. *BSG v. Guinea.* Case № ARB/14/22. Award of 18 May 2022; ICSID. *Eco Oro Minerals Corp. v. Republic of Colombia*. Case № ARB/16/41. Decision on Jurisdiction, Liability and Directions on Quantum of 9 September 2021.

[135] *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka*. ICSID Case № ARB/87/3. Award of 27 June 1990. § 77.

[136] *Churchill and Planet v. Indonesia.* ICSID Case № ARB/12/40 and 12/14. Award of 6 December 2016.

[137] *Pantechniki SA Contractors & Engineers v The Republic of Albania.* ICSID Case № ARB/07/21. Award of 30 July 2009. § 81.

[138] ICSID. *Infinito Gold v. Costa Rica*. Award of 3 June 2021. § 699; ICSID. *Agility v. Iraq.* Final Award of 22 February 2021. § 112; PCA. *LDA v. India*. Award of 11 September 2018. § 414; ICSID. *Valores Mundiales* and *Consorcio Andino v. Venezuela*. Award of 25 July 2017. § 394; SCC. *Aleksandrowicz and Częścik v. Cyprus*. Award of 11 February 2017. § 213, § 214; ICSID. *Tenaris and Talta v. Venezuela* (II). Award of 12 December 2016. § 320; ICSID. *Mamidoil v. Albania*. Award of 30 March 2015. § 561.

[139] ICSID. *Noble Ventures v. Romania*. Case № ARB/01/11. Award of 12 October 2005. § 182.

[140] ICSID. *Garanti Koza v. Turkmenistan*. Award of 19 December 2016. § 380; ICSID. *Suez v. Argentina*. Decision on Liability of 30 July 2010. § 195.

tribunals emphasise such criteria as "protection of legitimate expectations",[141] "a means to guarantee justice to foreign investors",[142] "an obligation to act transparently and with due process",[143] and "predictability".[144] In the end, "while the precise formulations of the FET treatment standard in various awards differ, they all have in common the notion that the State must be shown to have acted delinquently in some way or the other if it is to be held to have violated that standard; it is "not enough that a claimant should find itself in an unfortunate position as a result of all of its dealings with a respondent".[145]

Similarly, there is no unanimity in whether the FPS standard should be equated with the customary minimum standard of treatment (hereinafter — MST),[146] or whether it constitutes a completely autonomous standard in international law.[147] For example, as was held by the *CMS v. Argentina* tribunal, "the standard of fair and equitable treatment and its connection with the required stability and predictability of the business environment, founded on solemn legal and contractual commitments, is not different from the international law minimum standard and its evolution under customary law".[148] Yet, merging two distinct standards of protection[149] into one would be absurd, since it would automatically uncover the faulty nature of one of the standards, as well as inconsistent not only with the very object and purpose of the investment treaty, which in this scenario would be the one including the faulty standard from the very beginning. Although some argue that mentioning the two standards in one sentence implies their relationship, it would seem logical to continue the comparison technique using such other standards as the MST and most favoured nation treatment, which is also often used as a floor with respect to the treatment that states must afford to aliens.

However, the following surprising question arises. Are there any standards actually aimed at protecting the local population from the adverse effects of the investments? Case law indicates that tribunals at times suggest that states are free to employ excessive force to bring order, especially if the violence is partially caused by the actions of the investor. For instance, in *Copper Mesa v. the Republic of Ecuador*, despite acknowledging a widespread uprising against a mining project that would have necessitated the state to use force against its own citizens, the tribunal found the state in breach of its obligations.[150] Additionally, the arbitrators recognised that the investor had contributed to escalating violence by employing private security personnel who committed crimes against locals. The only repercussion for this behaviour was a 30% reduction in the compensation awarded. Similarly, in *von Pezold v. Republic of Zimbabwe*, the arbitrators ruled that the respondent had breached its obligations under the FPS clause by failing to suppress protesters occupying white-owned farms to push for land redistribution, stemming from historical racial inequalities.[151] The respondent argued that suppressing the protests would require significant violence due to the politically charged nature of land redistribution in Zimbabwe.[152] However, the arbitrators disagreed, stating that violent suppression was both feasible and necessary under the FPS clause.[153]

Another point to consider here is the existence of armed conflict clauses, or war-losses clauses, which refer to "losses owing to war or to other forms of armed conflict, or similar events",[154] and designed to provide certain guarantees to foreign investors. As of now, 856 out of 2,574 treaties have extended armed conflict clauses.[155] Nevertheless, their effect is quite "limited and depends on measures taken by the host State in relation to these investments".[156] Since such basic clauses only ensure that investors are not

[141] ICSID. *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*. Case № ARB/02/5. Award of 19 January 2007. § 225.
[142] ICSID. *El Paso Energy International Company v. Argentine Republic*. Case № ARB/03/15. Award of 6 February 2004. § 373.
[143] ICSID. *Electrabel v. Hungary*. Case № ARB/07/19. Decision on Jurisdiction of 30 November 2012. § 7.74.
[144] PCA. *Flemingo DutyFree v. Poland.* Case № 2014-11. Award of 12 August 2016. § 533.
[145] ICSID. *David Minnotte and Robert Lewis v. Republic of Poland*. Case № ARB(AF)/10/1. Award of 16 May 2014. § 198.
[146] ICSID. *Eco Oro v. Colombia*. Decision on Jurisdiction. Liability and Directions on Quantum of 9 September 2021. § 744, § 745; ICSID. *El Paso v. Argentina*. Award of 31 October 2011. § 336; LCIA. *Occidental v. Ecuador*. Award of 1 July 2004. § 190; ICSID. *CMS v. Argentina*. Award of 12 May 2005. § 284.
[147] ICSID. *Infinito Gold v. Costa Rica* ICSID. Award of 3 June 2021. § 350; ICSID. *Border Timbers v. Zimbabwe*. Award of 28 July 2015, § 546; ICSID. *Enron v. Argentina*. Award of 22 May 2007. § 258; ICSID. *Vivendi v. Argentina (I).* Award II of 20 August 2007. § 7.4.5, 7.4.6.
[148] ICSID. *CMS Gas Transmission Company v. Republic of Argentina*. ICSID Case № ARB/01/8. Award of 12 May 2005. § 284.
[149] ICSID. *Electrabel v. Hungary*. Case № ARB/07/19. Decision on Jurisdiction. Award of 30 November 2012. § 7.80.
[150] PCA. *Copper Mesa Mining Corporation v. Republic of Ecuador*. Case № 2012-02. Award of 15 March 2016.
[151] ICSID. *Bernhard von Pezold and others v. Republic of Zimbabwe.* Case № ARB/10/15. Award of 28 July 2015.
[152] Ibid.
[153] Ibid.
[154] Schreuer C. *Investment Protection in Times of Armed Conflict*… P. 3.
[155] Korea–Libya BIT (2006). Article 4; Spain–Syria BIT (2003). Article 7; Austria–Egypt BIT (2001). Article 5.
[156] Dolzer R., Schreuer C. *Op. cit.* P. 704.

treated less favorably in the event a state decides to accord compensation, they do not normally establish "an absolute right to compensation".[157] Despite the lack of a uniform name and their "cloistered life in investment arbitration",[158] they remain the only conceivable way for provisions of the BITs to specifically address compensation in the event of war.

Importantly, the purpose of the basic armed conflict clauses is not to create new substantial obligations but to establish "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 national or other foreign investors, [which] ensures that any measures directed at offsetting or minimizing losses will be applied in a non-discriminatory manner".[159] By guaranteeing national and most-favoured-nation treatment in the event of losses suffered during an emergency, they are essentially advocating for a non-discrimination obligation. Although there is no guarantee that an armed conflict clause would always be included in the BIT, a substantially significant number of investment treaties indicates their presence.

Clearly, the aforementioned wording does not indicate an independent right to claim compensation. Although some tribunals, i.e. *AAPL v. Sri Lanka, AMT v. Zaire*, equated the armed conflict clause with the MST enshrined in customary international law, implying a completely different duty, it would seem illogical to ignore the fact that this wording only addresses treatment "actually adopted by the host state, not to treatment that it ought to accord".[160] In contrast to the basic armed conflict clauses, which focus exclusively on non-discrimination, extended or advanced war clauses, albeit not as common,[161] are not limited to non-discrimination guarantees, instead extending to the substantive standards, which grant "an independent right to compensation".[162]

Notably, the existence of an extended war clause is limited in the sense that it only operates if the harm was caused by the state's official military forces or authorities, which does not include third parties, e.g. forces of foreign states or rebels. The wording of the clause also clearly establishes a test for the purposes of assessing whether an extended war clause is deemed to apply. Thus, customary international law will be applied to determine the meaning of requisition or destruction. In the *Elsi* case, the International Court of Justice, dealing with an instance of alleged requisition, noted that there must be a causal link between the injury complained of and the requisition.[163]

For instance, when the tribunal in the *AAPL v. Sri Lanka* case interpreted an extended war clause in Article 4 of the *Sri-Lanka-UK* BIT, which provided that compensation was necessary in case of "a) requisition of <…> property by its forces or authorities, or (b) destruction of <...> property by its forces or authorities which was not caused in combat action or was not required by the necessity of the situation",[164] it held that there was no convincing evidence to attribute the harm to Sri Lanka's security forces.[165] When it comes to the question of attribution, a state may try to circumvent the provision by using violence on behalf of non-state actors. Thus, in the case of *Strabag v. Libya*, Libyan soldiers requisitioned numerous vehicles and equipment during the civil war.[166] Conversely, in *AAPL v. Sri Lanka*, the tribunal correctly determined that the occupation of the investor's facility by the respondent's military did not qualify as a requisition since it was not used to further military interests.[167] In another case, *Kimball Laundry v. United States*, where a laundry facility was taken over by the US Army for almost four years, the claimant was entitled to just compensation, including for the loss of its customer base. Similarly, in *Attorney General v. De Keyser's Royal Hotel,* compensation was deemed necessary for the occupation of a hotel by British armed forces during World War I.

Therefore, it is clear that although a BIT, while remaining in the special realm of IIL, continues to operate within the lens of an international treaty, which shall take into account all relevant rules and principles of international law. The claimed neutrality of investment treaty arbitration is subject to scrutiny, as the notion of BIT has always been driven by a socio-political context, and will continue to remain within it. At the same time, although it is clear that commencement of hostilities does not void the continuity of

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[157] Salacuse J. *The Law of Investment Treaties*… P. 136.
[158] Ackermann T. *The Effects of Armed Conflict on Investment Treaties…* P. 117.
[159] ICSID. *CMS Gas Transmission Company v. Argentine Republic*. Case № ARB/01/8, Award of 11 January 2002. § 375.
[160] Ackermann T. *Op. cit*. P. 119.
[161] Schreuer C. *The Protection of Foreign Investment in Times of Armed Conflict*. Oxford University Press, 2019. P. 706.
[162] Ackermann T. *The Effects of Armed Conflict on Investment Treaties…* P. 118.
[163] ICJ. *Elettronica Sicula SpA (ELSI) (US v. Italy).* Judgment of 20 July 1989.
[164] Sri-Lanka-UK BIT (1980). Article 4.
[165] ICSID. *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka*. Case № ARB/87/3. Award of 27 June 1990. § 58–60.
[166] ICSID. *Strabag v. Libya*. Case №ARB (AF)/15/1. Award of 29 June 2020.
[167] ICSID. *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka*. Case № ARB/87/3. Award of 27 June 1990.

investment treaties, it does not mean that the treaty will continue to operate in the same way. Instead, the academic discussion should focus on the question of interpretation, rather than on their general applicability. From this perspective, IIL and IHL as a mathematical combination only make sense if a systemic approach to interpretation is applied.

Yet, the vagueness of the existing legal framework of protection of foreign investment in IIL suggests that the patchwork in execution of the FPS and FET standards may be caused by the poor drafting of these clauses, which are clearly not designed for situations of IAC, or NIAC. Another drawback is that they make no reference to the protection against other states, or other groups, instead focusing on the protection against the actions of a state. And finally, the due diligence nature of these standards indicates both theoretical and practical vagueness, which would benefit from the simultaneous application of the rules of IHL. Apart from that, the rights and needs of local people should also be taken into account by the provisions of BITs. Similarly, a regulatory framework of existing war-losses clauses highlights a substantial provisional, as well as theoretical gap. As such, the vagueness of the basic armed clauses may not only lead to an overly broad interpretation by the tribunals, but also misguide the tribunal in application of the rules of IHL, especially when it comes to the violence caused by non-state actors.

Conclusion

Over the past several decades, the notion of investment protection has been carefully crafted to adhere to the needs of investors. The disturbing increase in armed conflicts all over the world may make some developing countries seem unattractive and turn an investment protection into a seemingly unattainable goal. Nevertheless, the investments into conflict-driven states, some with as many as eight armed conflicts ongoing simultaneously,[168] still continue.

Although the continuity of investment treaties is not affected by armed conflict as such, their performance is. With that, a need for action calls upon the top-down approach, meaning that it is upon both host states and investors to ensure the consistency of investment protection with other areas of international law, such as IHL and IIL. Therefore, the preliminary conclusions drawn from the paper are as follows.

First, it is clear that investment treaties apply in armed conflict, and are not automatically terminated by the latter. There is no rule in international law that would state otherwise despite the prevalence of the doctrine of the effects of war in the past. Currently, only the Draft Articles on the Effect of Armed Conflict govern this rule, which is a huge drawback of the current regime.

Secondly, the analysis has shown that the investment regulatory framework is not ideal to regulate investment protection in the event of armed conflict. As such, although IIL frameworks suggest rather vague standards, tribunals hesitate to apply IHL principles to the cases before them.

Therefore, investment protection in armed conflict does not revolve around itself, but rather gives way into something that does not have a room for a “black and white” discussion. As such, foreign investment is also capable of facilitating violence, derogation of human rights, as well as depletion of natural resources, all of which can result from the inadequacy of the legal framework of IIL. In a way, the way *lex specialis* works is almost a hint at not merely the specificity of one law over another, but at the very crux of the problem: its importance.

ЗАЩИТА ИНОСТРАННЫХ ИНВЕСТИЦИЙ В КОНТЕКСТЕ ВООРУЖЕННЫХ КОНФЛИКТОВ. ЧАСТЬ 1

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[168] *The Human Cost of Armed Conflicts in Colombia* // ICRC. 3 April 2024. URL: https://www.icrc.org/en/document/human-cost-armed-conflicts-colombia (accessed: 23.08.2024).

Аннотация

В статье анализируется система защиты иностранных инвестиций, в том числе положения двусторонних инвестиционных договоров, а также стандарты, направленные на предоставление такой защиты инвесторам в условиях вооруженных конфликтов. Автор изучает исторический контекст возникновения первых инвестиционных договоров, в частности колониальный период, когда зародилось международное инвестиционное право. Далее автор рассматривает вопрос применимости инвестиционных соглашений в вооруженном конфликте. Для сложившегося международного-правового регулирования характерно осторожное отношение к применению норм международного гуманитарного права к делам, рассматриваемым в рамках инвестиционных споров, ввиду чего имеющаяся нормативная база не идеальна для регулирования защиты инвестиций в случае вооруженного конфликта. По мнению автора, понятие защиты инвестиций должно быть согласовано с понятием прав человека, а также интересами развивающихся стран. Инвестиции, как правило, ассоциируются с экономической стабильностью, которая, однако, не характерна для последних. Пример Колумбии подтверждает, что негативными последствиями могут обернуться как сами иностранные инвестиции, так и их защита. Автор приходит к выводу, что эффективность защиты иностранных инвестиций, в основе которых всегда лежит предпосылка мира, должна рассматриваться сквозь призму права международных договоров, международного гуманитарного права и международного права прав человека: именно на этих трех уровнях происходит взаимодействие между экономическими интересами инвестора в защите своих инвестиций, интересами государства, а также интересами местных сообществ и коренных народов в защите своих прав.

Ключевые слова

защита иностранных инвестиций, вооруженный конфликт, права человека, двусторонние инвестиционные соглашения, международное гуманитарное право

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