

Editorial



Investment Protection in Times of Armed Conflict

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The tragic developments in Ukraine have not only brought unspeakable suffering upon the population but also raise multiple questions of international economic law. The aftermath of this destructive armed conflict will pose numerous challenges to international investment law. Investments involve long term commitments and are even more vulnerable to conditions of violence than trade relations.

International investment agreements offer several types of provisions that address emergency situations, including armed conflicts. These include so-called compensation-for-losses clauses, extended war clauses and security clauses. Clauses on full protection and security are designed to cover situations of violence. These are supplemented by principles such as necessity and *force majeure* in general international law.

The question remains whether these provisions offer an adequate legal framework to deal with the numerous consequences of armed conflict upon foreign investment. As will be shown below, the current legal regime leaves considerable gaps and is less than satisfactory.

1 The Applicability of Investment Treaties in Armed Conflict

A first question is the application of the relevant treaties in times of armed conflict. The International Law Commission's (ILC) Draft Articles on the effects of

armed conflicts on treaties¹ contain a presumption of continuity: the existence of an armed conflict does not *ipso facto* terminate or suspend the operation of treaties (Article 3). Under the Draft Articles certain factors indicate whether a treaty is susceptible to termination, withdrawal or suspension. These include the nature of the treaty and the characteristics of the armed conflict (Article 6). In addition, '[w]here a treaty itself contains provisions on its operation in situations of armed conflict, those provisions shall apply' (Article 4).

The Draft Articles on the effect of armed conflict on treaties also refer to treaties that by their subject-matter imply that they continue to operate, in whole or in part, during armed conflict (Article 7). The list of treaties annexed to that provision includes '[t]reaties of friendship commerce and navigation and agreements concerning private rights.'² The Commentary to that provision speaks of 'treaties of friendship, commerce and navigation and analogous agreements concerning private rights, including bilateral investment treaties.'³ In addition, under the ILC Draft Articles, any termination or suspension of a treaty in times of armed conflict would not be automatic but would be subject to a defined procedure (Article 9). All of this indicates that bilateral investment treaties (BITs) and other treaties for the protection of investments continue to operate in times of armed conflict.

In addition, the Vienna Convention on the Law of Treaties (VCLT) contains provisions on supervening impossibility of performance (Article 61) and fundamental change of circumstances (Article 62) that may be invoked in armed conflict.

An example for impossibility of performance would be the impossibility to guarantee the free transfer of payments during an armed conflict. Under Article 61(2) of the VCLT, impossibility of performance may, however, not be invoked by a State if the impossibility is the result of a breach by that State of an international obligation.

As for fundamental change of circumstances under Article 62 VCLT or *rebus sic stantibus*, the continued existence of the circumstances would have to constitute an essential basis of the parties' consent. The change would also have to radically transform the extent of the obligations. The existence of peace as an essential basis of consent to an investment treaty is difficult to argue, especially

1 Adopted by the International Law Commission at its sixty-third session, in 2011, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/66/10). ILC, 'Draft Articles on the Effects of Armed Conflicts on Treaties, with Commentaries' (UN 2011) vol II(2) Yearbook of the International Law Commission.

2 *ibid* Annex to art 7, lit (e).

3 *ibid* commentary 48 to Annex to art 7.

if the treaty contains provisions dealing with armed conflict. The second condition for the application of Article 62 VCLT, the radical transformation of the obligations' extent, would require that the remaining performance was 'essentially different from that originally undertaken.'⁴

Any use of the doctrines of impossibility of performance and fundamental change of circumstances would be subject to the procedural requirements of the VCLT for the termination or suspension of treaties (Articles 65–68).

Article 73 of the VCLT states that the Convention does not prejudice any question that may arise from the outbreak of hostilities between States. Therefore, the rules governing the effects of armed conflict on treaties, as set out in the ILC's Draft Articles of 2011, will apply.

2 Compensation for Losses Clauses

Many bilateral investment treaties contain clauses referring to losses owing to war or to other forms of armed conflict, or similar events. These clauses provide for national treatment and most favoured nation (MFN) treatment in relation to any measures such as restitution or compensation that the States may take. An example is Article 4(5) of the Germany-Russia BIT of 1989:

Investors of one Contracting Party whose investments have suffered losses in the territory of the other Contracting Party as a result of war, armed conflict or other extraordinary circumstances shall not be discriminated against and shall be accorded most-favoured-nation treatment in respect of the payment of compensation or other forms of restitution for the loss suffered. The payments and restitution must be effectively realizable and freely transferable.

Compensation-for-losses clauses are a common feature in BITs including those of Russia and the Ukraine. The Model BITs of Austria, France, Germany, Italy, Latvia, Netherlands and the United Kingdom foresee clauses of this kind.⁵ Multilateral treaties, such as the North American Free Trade Agreement

4 *Fisheries Jurisdiction (Federal Republic of Germany v Iceland)* (Judgment) [1973] ICJ Rep 49, para 43. See also *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* (Judgment) [1997] ICJ Rep 7, para 104. But see CJEU, C-162/96, *Racke GmbH and Co v Hauptzollamt Mainz*, Judgment (16 June 1998) para 56.

5 Chester Brown, *Commentaries on Selected Model Investment Treaties* (OUP 2013) 33, 269, 310, 335, 450, 577, 730.

(NAFTA) (Article 1105(2)), the United States–Mexico–Canada Agreement (USMCA) (Article 14.7(1)), the Energy Charter Treaty (ECT) (Article 12(1)) and the EU-Canada Comprehensive Economic and Trade Agreement (CETA) (Article 8.11) also contain the obligation to grant non-discriminatory treatment with respect to measures adopted relating to losses suffered owing to armed conflict.

Clauses of this type do not create absolute rights to compensation, restitution or other settlement. All they do is to promise non-discrimination in case there is a program of indemnification. Therefore, their effect is limited and depends on measures taken by the host State in relation to these investments.

Compensation-for-losses clauses typically refer to ‘compensation’ and ‘restitution’. These terms have a technical meaning under the law of State responsibility.⁶ This does not justify the interpretation of compensation-for-losses clauses in terms of the law of State responsibility which is premised on the existence of an internationally wrongful act. Clauses providing for compensation for losses operate independently of any illegality that may have led to the losses. Their triggering events are measures by States designed to remediate losses caused by war, armed conflict, or other extraordinary circumstances irrespective of any illegality that may have caused these losses. For similar reasons, the use of the term ‘compensation’ does not justify an interpretation in analogy to the law on expropriation. Compensation for losses under these clauses differs from a State’s duty to pay compensation for a taking of private property.

In cases involving compensation-for-losses clauses, a frequent argument put forward by respondent States was that these clauses exempted them from the BITs’ other substantive obligations. Tribunals have declined to follow this line of reasoning. In cases against Libya and Zimbabwe the tribunals rejected arguments to the effect that the compensation-for-losses clause in the relevant BIT was a *lex specialis* that superseded the BIT’s substantive protections. Rather, the BIT’s full protection and security (FPS) standard and the compensation-for-losses clause had to be applied cumulatively because they had distinct subject-matters.⁷

6 See Articles 34 to 36 of the ILC Articles on Responsibility of States for International Wrongful Acts (2001) vol II(2) Yearbook of the International Law Commission (ARSIWA). UN General Assembly Resolution 56/83 Responsibility of States for Internationally Wrongful Acts (12 December 2001) A/56/49 (Vol. I)/Corr.4.

7 *Cengiz İnşaat Sanayi ve Ticaret AŞ v Libya*, ICC Case No 21537/ZF/AYZ, Final Award (7 November 2018) paras 350 ff; *Strabag v Libya*, ICSID Case No ARB (AF) /15/1, Award (29 June 2020) paras 221–25. In *Öztaş v Libya*, ICC Case No 21603/ZF/AYZ, Final Award (14 June 2018) para 167, the Tribunal reached a contrary decision, but the question had

A series of cases against Argentina did not concern armed conflicts but the respondent's invocation of a national economic emergency. Argentina argued that a compensation-for-losses clause constituted a *lex specialis* governing emergency situations exempting it from the BITs' other substantive obligations, notably FPS. Tribunals have consistently rejected this argument finding that the compensation-for-losses clauses did not displace the BITs' other protections but were additional to them.⁸

Some compensation-for-losses clauses go beyond guaranteeing non-discriminatory treatment where the host State offers compensation or restitution for losses suffered under conditions of armed conflict. In the context of indemnification of such damage they offer not just MFN treatment but also fair and equitable treatment.⁹ Alternatively, they provide that those payments will be adequate.¹⁰

Yet another type of treaty clause provides for MFN and fair and equitable treatment (FET) in the context of losses suffered due to armed conflict without referring to compensation and restitution.¹¹ This raises the question whether a clause of this type can still be said to operate in addition to the treaty's other standards, notably FPS, or whether it displaces them.¹²

Compensation-for-losses clauses in their most common form offer little comfort to an investor whose investment has been affected by an armed conflict. They operate only in case the host State has initiated a programme for compensation and restitution by guaranteeing non-discrimination.

not been argued before the Tribunal. *Funnekotter v Zimbabwe*, ICSID Case No ARB/05/6, Award (22 April 2009) para 104; *von Pezold v Zimbabwe*, ICSID Case No ARB/10/15, Award (28 July 2015) paras 588–99.

8 *CMS v Argentina*, ICSID Case No ARB/01/8, Award (12 May 2005) para 375; *Enron v Argentina*, ICSID Case No ARB/01/3, Award (22 May 2007) paras 320–21; *BG Group v Argentina*, UNCITRAL, Final Award (24 December 2007) para 382; *National Grid v Argentina*, UNCITRAL, Award (3 November 2008) para 253; *Suez and AWG v Argentina*, ICSID Case No ARB/03/19, Decision on Liability (30 July 2010) paras 270–71; *Total v Argentina*, ICSID Case ARB/04/1, Decision on Liability (27 December 2010) para 229; *EDF v Argentina*, ICSID Case No ARB/03/23, Award (11 June 2011) paras 1153–60; *Impregilo v Argentina*, ICSID Case No ARB/07/17, Award (21 June 2011) paras 336–43; *El Paso v Argentina*, ICSID Case No ARB/03/15, Award (31 October 2011) paras 559–60.

9 See eg Russia–Switzerland BIT (1990) art 6(2); Netherlands–Russia BIT (1989) art 7; Switzerland–Ukraine BIT (1995) art 7.

10 See eg Korea–Russia BIT (1990) art 4.

11 See eg France–Russia BIT (1989) art 4(4).

12 In the latter sense: *LESI and ASTALDI v Algeria*, ICSID Case No ARB/05/3, Award (12 November 2008) paras 174–82.

3 Extended War Clauses

Extended war clauses also relate to armed conflict and similar emergencies.¹³ They typically include a compensation-for-losses clause of the type discussed above. But, in addition, they also contain absolute standards. Under extended war clauses, losses suffered by investors at the hands of the host State's armed 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.

Under an extended war clause, compensation is due only if the adverse act was caused by the host State's government forces or authorities and not by rebel forces or by foreign military forces.

Article 12 of the ECT¹⁴ is an example for an extended war clause:

- (1) Except where Article 13¹⁵ 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

13 Extended war clauses are not as widespread as compensation-for-losses clauses. Many BITs of the United Kingdom offer extended war clauses. See UK Model BIT (2008) art 4. They are common in the BITs of Ukraine but not in those of the Russian Federation. See eg United Kingdom–Ukraine BIT (1993) art 5(2); Sweden–Ukraine BIT (1995) art 4(2); Austria–Ukraine BIT (1996) art 5(2); Spain–Ukraine BIT (1998) art 6(2); Israel–Ukraine BIT (2010) art 4(2).

14 Ukraine is a party to the Energy Charter Treaty (signed December 1994, entered into force April 1998) (ECT). The Russian Federation has signed the ECT but on 20 August 2009 officially informed the Depository of the ECT that it did not intend to become a party.

15 Article 13 of the ECT deals with expropriation.

- (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.

The duty to make restitution or pay compensation in the case of requisitioning does not hinge on military necessity: even if the requisitioning was mandated by military necessity, restitution or compensation is still due. By contrast, in the case of destruction, restitution or compensation 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* need not be compensated. Extended war clauses reflect the principles of the laws of war on the protection of private property as codified in The Hague and Geneva Conventions.¹⁶

In *AAPL v Sri Lanka*,¹⁷ the Tribunal applied the extended war clause in Article 4(2) of the United Kingdom–Sri Lanka BIT. Anti-insurgent operations had led to the investment's destruction. The Tribunal held that the investor had to prove that the government forces and not the rebels had caused the destruction, that the destruction occurred as a result of combat, and that there was no military necessity for the destruction.¹⁸ The Tribunal found that the claimant had been unable to bear this heavy burden of proof and dismissed the claim based on the extended war clause.¹⁹

AMT v Zaire,²⁰ involved looting and destruction of the investment by elements of the host State's armed forces. The Tribunal applied the extended war clause in Article IV 2(b) of the US–Zaire BIT but reached the conclusion that the soldiers in uniform had acted individually and did not represent the country's armed forces. Therefore, the destruction was not attributable to the host State.²¹

16 For more extensive discussion see Merryl Lawry-White, 'International Investment Arbitration in a *Just Post Bellum* Framework' (2015) 16 *JWIT* 633, 649; Suzanne Spears and Maria Fogdestam Agius, 'Protection of Investments in War-Torn States: A Practitioner's Perspective on War Clauses in Bilateral Investment Treaties' in Katia Fach Gómez, Anastasios Gourgourinis and Catharine Titi (eds), *International Investment Law and the Law of Armed Conflict* (Springer 2019) 283, 292.

17 *AAPL v Sri Lanka*, ICSID Case No ARB/87/3, Final Award (27 June 1990).

18 *ibid* para 58.

19 *ibid* paras 59–64.

20 *AMT v Zaire*, ICSID Case No ARB/93/1, Award (21 February 1997).

21 *ibid* paras 7.02–7.15.

In *Strabag v Libya*,²² the Tribunal applied the extended war clause in Article 5 of the Austria–Libya BIT. The case involved both requisitioning and destruction of the investor’s property. The claimant alleged that, during the civil war, a significant quantity of its property had been requisitioned by Libyan Government forces and not returned.²³ The Tribunal, although placing the burden of proof on the investor, awarded compensation for lost equipment based on the evidence before it.²⁴

Extended war clauses clarify that the laws of war dealing with the requisitioning and destruction of private property apply to foreign investments. But they have serious limitations. Only a minority of treaties dealing with the protection of foreign investments contain clauses of this type. Even where they exist, their scope of application is limited. They are restricted to action by a belligerent State on its own territory. They do not extend to requisitioning or destruction by armed forces operating on another State’s territory.

4 Full Protection and Security

The standard of FPS is not geared specifically to situations of armed conflict. Nevertheless, it is the most important standard of protection in times of international as well as national strife.²⁵ Most BITs contain FPS clauses. Multilateral treaties such as NAFTA (Article 1105(1)), the USMCA (Article 14.6(1)) and the ECT (Article 10(1)) also offer this standard.

Under the FPS standard States have a duty to protect and a duty to refrain. The duty to protect means that the State must defend the investment against violence by other actors. The duty to refrain means that the host State must exercise restraint in the use of armed force. 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.’²⁶

22 *Strabag v Libya*, ICSID Case No ARB(AF)/15/1, Award (29 June 2020).

23 *ibid* para 214.

24 *ibid* paras 257–63, 270–71.

25 Gleider Hernández, ‘The Interaction Between Investment Law and the Law of Armed Conflict in the Interpretation of Full Protection and Security Clauses’ in Freya Baetens (ed), *Investment Law Within International Law – Integrationist Perspectives* (CUP 2013) 21. Generally on clauses guaranteeing full protection and security, see August Reinisch and Christoph Schreuer, *International Protection of Investments – The Substantive Standards* (CUP 2020) 536–86.

26 *Biwater Gauff v Tanzania*, ICSID Case No ARB/05/22, Award (24 July 2008) para 730.

The obligation to provide protection and security does not create absolute liability but an obligation of due diligence: It exists to the extent of the reasonable use of the host State's capabilities.²⁷ There is some debate as to whether this standard is to be measured against the conduct of a modern well-organized State or, more subjectively, against the capabilities of the particular State in question which may be fragile and have only limited resources at its disposal.²⁸ Obviously, ongoing hostilities or a situation of acute self defence will be a decisive factor in assessing a State's due diligence.

In *AAPL v Sri Lanka*,²⁹ the Tribunal applied the provision on FPS in the Sri Lanka–United Kingdom BIT. Sri Lankan Security Forces had destroyed the investment during a counter insurgency operation. Although unable to determine who had caused the damage directly, the Tribunal found that the respondent had violated its obligation of due diligence since it had failed to take all reasonable measures to prevent the destruction. The Tribunal also

27 *Elettronica Sicula SpA (ELSI) (US v Italy)* (Judgment) [1989] ICJ Rep 15, para 108; *AAPL v Sri Lanka* (n 17) para 53; *Tecmed v Mexico*, ICSID Case No ARB(AF)/00/2, Award (29 May 2003) para 177; *Noble Ventures v Romania*, ICSID Case No ARB/01/11, Award (12 October 2005) para 164; *Saluka v Czech Republic*, UNCITRAL, PCA Case No 2001-04, Partial Award (17 March 2006) para 484; *Biwater Gauff v Tanzania*, ICSID Case No ARB/05/22, Award (24 July 2008) paras 725–26; *Suez and InterAgua v Argentina*, ICSID Case No ARB/03/17, Decision on Liability (30 July 2010) para 158; *Frontier Petroleum v Czech Republic*, UNCITRAL, PCA Case No 2009-09, Final Award (12 November 2010) paras 269–70; *Paushok v Mongolia*, UNCITRAL, Award on Jurisdiction and Liability (28 April 2011) paras 324–25; *Vannessa v Venezuela*, ICSID Case No ARB(AF)/04/6, Award (16 January 2013) para 223; *Mamidoil v Albania*, ICSID Case No ARB/11/24, Award (30 March 2015) para 821; *von Pezold v Zimbabwe*, ICSID Case No ARB/10/15, Award (28 July 2015) para 596; *MNSS v Montenegro*, ICSID Case No ARB(AF)/12/8, Award (4 May 2016) para 351; *Ampal-American v Egypt*, ICSID Case No ARB/12/11, Decision on Liability and Heads of Loss (21 February 2017) para 241; *Strabag v Libya*, ICSID Case No ARB (AF)/15/1, Award (29 June 2020) para 335; *Eskosol v Italy*, ICSID Case No ARB/15/50, Award (4 September 2020) paras 479–82.

28 *AAPL v Sri Lanka* (n 17) para 77; *Pantechniki v Albania*, ICSID Case No ARB/07/21, Award (30 July 2009) paras 76, 77; *Suez and AWG v Argentina*, ICSID Case No ARB/03/19, Decision on Liability (30 July 2010) para 234; *Frontier Petroleum v Czech Republic*, UNCITRAL, PCA Case No 2009-09, Final Award (12 November 2010) para 271; *Mr Franck Charles Arif v Moldova*, ICSID Case No ARB/11/23, Award (8 April 2013) paras 605, 606. See also Nick Gallus, 'The Influence of the Host State's Level of Development on International Investment Treaty Standards of Protection' (2005) 6 JWIT 711–30; Ursula Kriebaum, 'The Relevance of Economic and Political Conditions for the Protection Under Investment Treaties' (2011) 10 *The Law and Practice of International Courts and Tribunals* 383–404; Maria Gritsenko, 'Relevance of the Host State's Development Status in Investment Treaty Arbitration' in Baetens (n 25) 341–51.

29 *AAPL v Sri Lanka* (n 17).

found that the force deployed by the armed forces was excessive and unwarranted by the circumstances.³⁰

In *AMT v Zaire*,³¹ the investment had been subject to looting by elements of Zaire's armed forces. The Tribunal found that Zaire had breached the FPS obligation under the United States–Zaire BIT by failing to take measures that would ensure the investment's protection and security.³²

In *Ampal-American v Egypt* the Tribunal found that the Egyptian authorities' failure to protect claimant's investment against terrorist attacks was a violation of the FPS standard.³³

The FPS standard, although not specifically geared towards belligerent action, is the most important protection for investment in times of armed conflict. Most relevant treaties offer it. Yet, it is limited to duties of the host State towards foreign investments on its own territory.

5 Security Clauses

Some investment treaties contain clauses that reserve far-reaching discretion to States to take protective action in times of armed conflict. These clauses are called security clauses or non-precluded measures clauses. Under these clauses States may use essential security interests to justify action that is otherwise prohibited.³⁴

An example is Article IX(1) of the United States–Ukraine BIT of 1994: '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.'³⁵

30 *ibid* paras 78–86.

31 *AMT v Republic of Zaire*, ICSID Case No ARB/93/1, Award (21 February 1997).

32 *ibid* paras 6.02–6.11.

33 *Ampal-American v Egypt*, ICSID Case No ARB/12/11, Decision on Liability and Heads of Loss (21 February 2017) para 290.

34 See Lawry-White (n 16) 633, 651; Facundo Pérez-Aznar, 'Investment Protection in Exceptional Situations' (2017) 32 ICSID Rev 696, 697, 699; Spears and Fogdestam Agius (n 16) 307.

35 Other examples of BITs containing this type of clause are the Argentina–United States BIT (1991) art XI; Finland–Ukraine BIT (2004) art 4(1); Israel–Ukraine BIT (2010) art 7(1); Hungary–Russia BIT (1995) art 2(3).

National security clauses have the potential to offset the entire range of protections under the treaty including the FPS standard and the protection against uncompensated expropriation.³⁶

The reference to ‘the maintenance or restoration of international peace or security’ echoes Article 39 of the UN Charter. Therefore, action pursuant to Security Council resolutions under Chapter VII of the Charter may also be covered by this exception.

In their simple form, security clauses refer to ‘measures necessary’. This sets an objective standard that subjects their invocation to the scrutiny of tribunals. Other clauses, however, are self-judging. This means that the State taking the measures reserves the right to decide which measures it considers necessary. The self-judging nature of clauses of this kind is usually expressed by the words ‘which it considers necessary’. It is accepted in international practice that the self-judging nature of a clause must be stated expressly. It cannot be implied.³⁷

An example for a self-judging security clause is Article 19 of the Japan–Ukraine BIT:

36 A series of cases dealing with the security clause in Article XI of the Argentina–US BIT, did not concern armed conflict but a state of economic emergency. Tribunals reached conflicting decisions on whether this clause incorporated the customary international law on necessity or should be interpreted autonomously. See *CMS v Argentina*, ICSID Case No ARB/01/8, Award (12 May 2005) paras 322–58; *CMS v Argentina*, ICSID Case No ARB/01/8, Decision on Annulment (25 September 2007) paras 128–36; *Continental Casualty v Argentina*, ICSID Case No ARB/03/9, Award (5 September 2008) paras 160–236; *Continental Casualty v Argentina*, ICSID Case No ARB/03/9, Decision on Annulment (16 September 2011) paras 114–32; *Sempra v Argentina*, ICSID Case No ARB/02/16, Decision on Annulment (29 June 2010) paras 192–219; *Enron v Argentina*, ICSID Case No ARB/01/3, Decision on Annulment (30 July 2010) paras 400–05; *El Paso v Argentina*, ICSID Case No ARB/03/15, Award (31 October 2011) paras 552–55; *Mobil v Argentina*, ICSID Case No ARB/04/16, Decision on Jurisdiction and Liability (10 April 2013) paras 1024–28. See also *Devas v India*, UNCITRAL, PCA Case No 2013–09, Award on Jurisdiction and Merits (25 July 2016) paras 256, 293–94; *Deutsche Telekom v India*, UNCITRAL, PCA Case No 2014–10, Interim Award (13 December 2017) paras 225–29.

37 *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States)* (Judgment) [1986] ICJ Rep 14, paras 222, 282; *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* (Judgment) [1997] ICJ Rep 7, paras 51–52; *Oil Platforms (Iran v United States)* (Judgment) [2003] ICJ Rep 161, para 43; *CMS v Argentina*, ICSID Case No ARB/01/8, Award (12 May 2005) paras 370–74; *Enron v Argentina*, ICSID Case No ARB/01/3, Award (22 May 2007) para 336; *LG&E v Argentina*, ICSID Case No ARB/02/1, Decision on Liability (3 October 2006) para 213; *Sempra v Argentina*, ICSID Case No ARB/02/16, Award (28 September 2007) para 383; *El Paso v Argentina*, ICSID Case No ARB/03/15, Award (31 October 2011) paras 563–610; *Mobil v Argentina*, ICSID Case No ARB/04/16, Decision on Jurisdiction and Liability (10 April 2013) paras 1030–56; *Devas v India*, UNCITRAL, PCA Case No 2013–09, Award on Jurisdiction and Merits (25 July 2016) paras 218–220.

1. [E]ach Contracting Party may take any measure:
 - (a) which it considers necessary for the protection of its essential security interests;
 - (ii) taken in time of war, or armed conflict, or other emergency in that Contracting Party or in international relations; or
 - (iii) relating to the implementation of national policies or international agreements respecting the non-proliferation of weapons; or
 - (b) in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

NAFTA (Article 2102), USMCA (Article 32.2.), and CETA (Article 28.6) also contain self-judging security clauses. The current US Model BIT (Article 18(2)) and recent BITs of the United States also contain clauses of this type.

A self-judging security clause gives the State far-reaching freedom of action. The only limiting factors to the State's discretion are the principles of good faith and the prohibition of abuse of right. But only a minority of treaties contain security clauses, and an even smaller number are self-judging.

The security clause in Article 24(3) of the ECT provides in relevant part:

- (3) The provisions of this Treaty ... 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
 - ...
 - (ii) taken in time of war, armed conflict or other emergency in international relations;

Therefore, the ECT's security clause is self-judging in that it refers to 'any measure which it [i.e. the State] considers necessary' in times of international armed conflicts. It refers to measures 'taken in time of war, armed conflict or other emergency in international relations'. This excludes non-international armed conflicts from its scope.

The ECT's security clause contains a savings clause for certain standards of protection. It exempts expropriation (Article 13) and the extended war clause (Article 12). In other words, requisitioning as well as destruction beyond the necessity of war remain compensable. This seems logical. It does not make

sense to have treaty provisions on specific protection in times of armed conflict only to have the entire treaty defeated by a far-reaching security clause which gives the State unlimited discretion.

Overall, national security clauses, especially those of the self-judging type, give States wide latitude to take protective action. In the face of clauses of this kind, the possibilities for investors to seek legal redress are severely limited.

6 Necessity and Force Majeure

In addition to clauses in investment treaties, customary international law may become relevant in situations of armed conflict. The ILC's Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) list several 'Circumstances Precluding Wrongfulness' (Articles 20–27). Of these, necessity and force majeure are the most pertinent in situations of armed conflict.

Necessity (ARSIWA Article 25)³⁸ may provide justification for a State's measures in times of armed conflict. Military necessity is a key concept in international humanitarian law. But under the law of State responsibility the invocation of necessity is subject to serious limitations. One of these is the requirement that the incriminated act is the only way to safeguard an essential interest against grave and imminent peril. Another limitation is that the State has not contributed to the situation of necessity. Therefore, an aggressor State cannot rely on necessity. The ILC in its Commentary states that 'necessity will only rarely be available to excuse non-performance of an obligation and that it is subject to strict limitations to safeguard against possible abuse.'³⁹

³⁸ ARSIWA (n 6) art 25 'Necessity':

1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:
 - (a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and
 - (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.
2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:
 - (a) the international obligation in question excludes the possibility of invoking necessity; or
 - (b) the State has contributed to the situation of necessity.

³⁹ *ibid* art 25, Commentary (2).

An argument based on force majeure (ARSIWA Article 23)⁴⁰ would require the existence of irresistible force or an unforeseen event, beyond the control of the State that makes it materially impossible to perform the obligation. An instance of material impossibility would be the loss of control over part of the State's territory as a consequence of the armed conflict.⁴¹

The State must not have contributed to the situation of force majeure. A State that has resorted to armed force in violation of international law clearly cannot invoke force majeure to avoid the consequences of its aggression.

In addition, under Article 23(2)(b) of the ARSIWA, force majeure may not be invoked if the State has assumed the risk of that situation occurring. Provisions in investment treaties that offer guarantees to investors in situations of armed conflict and similar emergencies constitute an assumption of risk of that kind. Therefore, compensation for losses clauses, extended war clauses and FPS clauses would remain unaffected by a plea of force majeure.

A successful invocation of necessity or force majeure would not necessarily exempt the State from paying compensation. Article 27(b) of the ARSIWA states that the invocation of a circumstance precluding wrongfulness is without prejudice to the question of compensation for any material loss caused by the act in question. Therefore, the availability to the host State of a plea of necessity or force majeure does not necessarily mean that the investor will have to bear the economic consequences. Depending on the circumstances of the case, the host State may have to compensate even where it successfully relies on necessity or force majeure.

7 Conclusion

The legal protection of investments in times of armed conflict is unsatisfactory. It is characterized by a patchwork of different treaty provisions. Most of the relevant treaties contain provisions guaranteeing full protection and

⁴⁰ *ibid* art 23 'Force Majeure':

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act is due to *force majeure*, that is the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation.
2. Paragraph 1 does not apply if:
 - (a) the situation of *force majeure* is due, either alone or in combination with other factors, to the conduct of the State invoking it; or
 - (b) the State has assumed the risk of that situation occurring.

⁴¹ *ibid* art 23, Commentary (2).

security, but these do not cater specifically for situations of armed conflict. Moreover, security clauses reserving the State's freedom of action, and the doctrines of necessity and force majeure may undermine the effectiveness of the FPS clauses.

Many treaties contain compensation for losses clauses. But in their most common form, these do not go beyond non-discrimination if the host State offers compensation or restitution to affected investors. Expanded war clauses offer compensation or restitution in case of requisitioning or destruction during armed conflicts. These clauses are specifically geared towards the exigencies of armed conflict and offer a higher level of protection, but they are relatively rare.

Worst of all, the treaty provisions addressing the consequences of armed conflict are strictly bilateral and territorial. They protect foreign investments only against action of the host State on its territory. They offer no rights or remedies against an aggressor State that inflicts damage upon investments on the territory of another State. Nor do they cover the legality and consequences of various types of economic sanctions against belligerents and their nationals.

A new set of provisions will be required to remedy the inconsistencies and gaps left by the current state of the law. Such a framework will have to overcome bilateralism and territoriality. It can only be achieved through a multilateral effort that reflects the principles of the *ius in bello* dealing with private property as well as the *ius ad bellum* as reflected in the United Nations Charter.