Armed Conflicts and Investor State Disputes[*]

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I. Introduction

This piece provides brief examination of how the existence of an armed conflict affects the application of the law relating to the protection of foreign investments. Perhaps it would be obvious to say that this topic was provoked by the ongoing conflict in Ukraine. However, I will not be speaking about Ukraine specifically. Sadly, armed conflicts continue to rage in many parts of the world, and the issues that I will address have arisen, with increasing frequency in

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the practice of investor-state dispute settlement. In addition to these issues arising in cases relating to the conflict between Russia and Ukraine,[1] they have, for example, arisen in recent cases brought against Syria,[2] Libya,[3] Yemen[4] and Azerbaijan.[5] They are also being considered in some detail in the academic literature.[6]

In armed conflicts, the laws do not fall silent. The conduct of parties to a conflict is regulated by a number of bodies of international law. There are rules of international law specifically

[1] Since the beginning of the conflict in Ukraine in 2014, at least 10 claims have been filed under the 1998 Russia-Ukraine BIT by Ukrainian companies See 'Russian Federation' (Investment Dispute Settlement Navigator, UNCTAD) <https://investmentpolicy.unctad.org/investment-dispute-settlement/country/175/russian-federation> accessed 30 March 2023. See, for example, *Everest Estate et al v Russia,* PCA Case No. 2015-36; *PSJC Ukrnafta v Russia,* PCA Case No. 2015-34; *Stabil LLC et al v Russia,* PCA Case No. 2015-35*; Lugzor and others v Russia,* PCA Case No. 2015-29*; JSC CB PrivatBank and Finilon v Russia,* PCA Case No. 2015-2*; Kolominsky and Aeroport Belbek LLC v Russia,* PCA Case No. 2015-07; *Oschadbank v Russia*, PCA Case No. 2016-14.

[2] See *Güriş Construction and Engineering Inc, Idris Yamanturk, Tevfik Yamanturk, Musfik Hamdi Yamanturk v Syrian Arab Republic*, ICC Case No 21845/ZF/AYZ, Award (31 August 2020).

[3] For an overview of cases brought against Libya, see LE Peterson, 'Investigation: As Fight Continues Over $1bil Award, Libya Facing At Least A Dozen Investment Treaty Arbitrations – Possibly More – In Aftermath Of Arab Spring' (*IA Reporter,* 31 March 2017)<https://www-iareporter-com/articles/investigation-as-fight-continues-over-1bil-award-libya-facing-at-least-a-dozen-investment-treaty-arbitrations-possibly-more-in-aftermath-of-arab-spring/> accessed 31 March 2023; LE Peterson, 'As Libya Begins To See Wave Of Investment Treaty Arbitrations, At Least Seven Turkish Bit Claims Are Pursued At ICC' (*IA Reporter*, 31 March 2017) <https://www-iareporter-com.ezproxy-prd.bodleian.ox.ac.uk/articles/as-libya-begins-to-see-wave-of-investment-treaty-arbitrations-at-least-seven-turkish-bit-claims-at-icc/> accessed 31 March 2023.

[4] For an overview of the disputes initiated against Yemen, see LE Peterson, 'Investigation: As Yemen's Oil Sector Crumbles Due To Armed Conflict, Numerous Arbitrations By Chinese, Indian And Western Investors Have Quietly Played Out' (*IA Reporter,* 3 August 2022)<https://www-iareporter-com/articles/investigation-as-yemens-oil-sector-crumbles-due-to-armed-conflict-numerous-arbitrations-by-chinese-indian-and-western-investors-have-quietly-played-out/> accessed 30 March 2023.

[5] It has been reported that Armenian investors have filed a notice of dispute against Azerbaijan under the Energy Charter Treaty for losses suffered in the context of the 2020 Nagorno-Karabakh Conflict. V Djanic, 'Hydro Energy Investors File First Known Treaty-Based Notice Of Dispute Prompted By The Armenia-Azerbaijan Armed Conflict' (*IA Reporter,* 5 December 2022) <https://www-iareporter-com/articles/first-treaty-based-notice-of-dispute-prompted-by-the-armenia-azerbaijan-armed-conflict-surfaces/> accessed 30 March 2023.

[6] See, for example, K Fach Gómez, A Gourgourinis and C Titi (eds) *International Investment Law and the Law of Armed Conflict* (Springer 2019); T Ackermann and S Wuschka (eds) *Investments in Conflict Zones* (Brill 2020); T Ackermann, *The Effects of Armed Conflict on Investment Treaties* (CUP 2022) J Zrilic, *The Protection of Foreign Investment in Times of Armed Conflict* (OUP 2019); and K Greenman, *State Responsibility and Rebels: The History and Legacy of Protecting Investment Against Revolution* (CUP 2021); G Hernández, 'The Interaction between Investment Law and the Law of Armed Conflict in the Interpretation of Full Protection and Security Clauses' in F Baetens (ed), *Investment Law Within International Law: Integrationist Perspectives* (CUP 2013); C Schreuer, 'The Protection of Investments in Armed Conflicts' in F Baetens (ed), *Investment Law Within International Law: Integrationist Perspectives* (CUP 2013); C Schreuer, 'Investment Protection in Times of Armed Conflict' (2022) 23 Journal of World Investment and Trade 701.

designed to apply with respect to armed conflicts – the law relating to the use of force and international humanitarian law. However, increasingly, the question is posed regarding the extent to which other bodies of international law regulate the conduct of parties in an armed conflict.[7] Relatedly, the question also arises whether and to what extent the existence of an armed conflict modifies pre-existing obligations of parties. These discussions regarding the application of bodies of law other than the laws of war to situations that occur in conflict are the consequences of a significant paradigm shift in respect of the rules governing the relationships between states after the adoption of the Geneva Conventions.

Pre-1945 international law was divided into the law of peace on the one hand, and the law of war on the other. This division can be observed in the classical international treatises like *Oppenheim's International Law*, which from its first edition was divided into two parts – Laws of Peace and Laws of War.[8] War was a state of relations between sovereigns that brought them into a different set of legal relations distinct from that which existed in peacetime. However, this is no longer the case. International law no longer uses the concept of 'war'. We speak now of armed conflict and with this, the divide between the war and peace, at least as a matter of law, has fallen away. Not only is it the case that international law is not silent in armed conflict, the law applicable outside of armed conflict does not, as a general matter, automatically cease to apply simply because an armed conflict is in existence. This is also true for the legal regime governing the protection of foreign investments.

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[7] For the application of international human rights law regime during armed conflicts see e.g. *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, paras 24 – 25; *Legality of the Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, para 106 et seq. See also *Armed Activities on the Territory of the Congo (Democratic Rep. of Congo v Uganda)* [2005] ICJ Rep 168, para 216.; *Hassan v UK,* App No 29750/09 (ECtHR, 2014) paras 102-107.

[8] L Oppenheim, *International Law: A Treatise,* vol 1 – Peace (1905); L Oppenheim, *International Law: A Treatise,* vol 2 – War and Neutrality (Longmans, Green, and Co., 1905).

II. Different Categories of Investment Disputes Arising in the Context of Armed Conflicts

Armed conflicts lead to instability and uncertainty in the economy and legal order of the states party to a conflict, and create the risk of damage to, or even destruction of assets protected under international investment treaties. Investments may be the object of targeted military attacks during an armed conflict. It could for example be the case that the premises belonging to an investor are used by a party to a conflict for military purposes, thus becoming a direct military target. Similarly, host state measures such as seizures or freezing of assets may eliminate or decrease the value of the investment. As a result, there are myriad opportunities for investment disputes to arise in situations of armed conflict.

Different scenarios may be envisaged with respect to investment disputes arising out of an armed conflict. **First,** the dispute between the host state and the investor may arise in the context of an ongoing armed conflict between the host state and home state of the investor. The most prominent example of this scenario is the conflict between Russia and Ukraine. After the annexation and occupation of Crimea by Russia in 2014, a number of Ukrainian companies instituted investment arbitrations under the Russia-Ukraine Bilateral Investment Treaty (BIT)[9] seeking compensation for losses suffered in the territory of Crimea.[10] One can speculate that the present armed conflict, sparked by the invasion of Ukraine in 2022, will

[9] Since 2014, a total of 10 claims were filed under the 1998 Russia-Ukraine BIT by Ukrainian companies according to the data available on UNCTAD database. See 'Russian Federation' (Investment Dispute Settlement Navigator, UNCTAD) <https://investmentpolicy.unctad.org/investment-dispute-settlement/country/175/russian-federation> accessed 30 March 2023.

[10] See, for example, *Everest Estate et al v Russia,* PCA Case No. 2015-36; *PSJC Ukrnafta v Russia,* PCA Case No. 2015-34; *Stabil LLC et al v Russia,* PCA Case No. 2015-35*; Lugzor and others v Russia,* PCA Case No. 2015-29*; JSC CB PrivatBank and Finilon v Russia,* PCA Case No. 2015-2*; Kolominsky and Aeroport Belbek LLC v Russia,* PCA Case No. 2015-07; *Oschadbank v Russia*, PCA Case No. 2016-14.

generate additional claims of a similar nature. Indeed, the Ukrainian owner of the now famous steel plants in Mariupol announced his intention to bring claims against Russia over the destruction caused during the siege.[11] Russian state-owned banks have also announced their intention to pursue claims under the Russia-Ukraine BIT due to Ukraine's decision to allow seizure of their assets in Ukraine.[12]

A **second scenario** relates to disputes that arise in the context of an armed conflict that is taking place in the host state, but which is between the host state and a third state, which is not the home state of the investor. That would be the case if companies that are nationals of third countries initiate proceedings against either Russia or Ukraine for losses suffered in the context of the current armed conflict.

Third, the dispute may arise in the context of a non-international armed conflict within the host state, which takes place between the host state and a non-state armed group, or indeed between different non-state armed groups. For example, there are a number of cases initiated by foreign investors against Libya for losses suffered due to the civil war in that country.[13] In such circumstances, questions of attribution of conduct to the state,[14] or relating

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[11] J Ballantyne, 'Ukraine's richest man warns of claim against Russia over Mariupol siege' (*Global Arbitration Review,* 27 May 2022) <https://globalarbitrationreview.com/article/ukraines-richest-man-warns-of-claim-against-russia-over-mariupol-siege> accessed 30 March 2023.

[12] 'Russia's Sberbank to appeal against Ukraine's move to seize its assets' (*Reuters,* 12 May 2022) <https://www.reuters.com/legal/transactional/russias-sberbank-appeal-against-ukraines-move-seize-its-assets-2022-05-12/> accessed 30 March 2023.

[13] See e.g. *Way2B ACE v State of Libya,* ICC Case No. 20971/MCP/DDA; *Tekfen, TML, Tekfen-TML joint venture v Libya*, ICC Case No. 21371/MCP/DDA; *Strabag v Libya*, ICSID Case No. ARB(AF)/15/1; *Cengiz İnşaat Sanayi ve Ticaret A.S v Libya*, ICC Case No. 21537/ZF/AYZ; *Trasta Energy Ltd v Libya,* PCA Case No. 2020-09; *Üstay Yapi Taahhut ve Ticaret AS v Libya*, ICC Case No. 22673/ZF; *Nurol v Libya*, ICC Case No. 22042/AYZ; *Etrak Insaat Taahut ve Ticaret Anonim Sirketi v Libya*, ICC Case No. 22236/ZF/AYZ; *Güriş İnşaat ve Mühendislik A.Ş. v Libya*, ICC Case No. 22137/ZF/AYZ.

[14] The *Cengiz v Libya* tribunal, for example, had to decide which actions were attributable to the state for the purposes of ascertaining a breach of the full protection and security (FPS) standard, and found that both the actions of the loyal to Gaddafi military forces (under Art. 4 ASR) and the actions of the militias controlled/loyal

to the due diligence obligations of the state to protect investments against the conduct of non-state actors will often arise.[15] Additionally, in this type of civil war scenario, issues relating to the identification of the government entitled to represent the state at the international level might be at stake, raising difficult questions for investment tribunals.[16]

III. Legal Regime Applicable to the Protection of Investments During an Armed Conflict

Let me now turn to some of the legal questions that arise in situations where an investment dispute arises between an investor and a party to an armed conflict, or between the investor and a state where the armed conflict takes place. Those questions may relate to (A) the effect of the armed conflict on the applicability of investment treaties; (B) the territorial scope of the scope of the protections provided by the treaty; (C) the meaning and application of the substantive protections provided for in an investment agreement; and (D) the interaction of

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to the National Transitional Council (NTC) later recognised internationally as Libya's government (under Art 10 ASR) were attributable to Libya. See *Cengiz v Libya*, Award (7 November 2018) paras 425, 431 (n 13). Further, in one of the Crimean cases, the tribunal found that the actions of paramilitary groups in Crimea were attributed to Russia either under Art. 5 ASR or Art. 11 ASR. See *Stabil v Russia*, Final Award (12 April 2019) (n 10).

[15] e.g. *AAPL v Sri Lanka*, ICSID Case No ARB/87/3, Final Award (27 June 1990); *Ampal-American Israel Corp., and others v Egypt*, ICSID Case No. ARB/I 2/1 I, 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.

[16] See the *Güris v Libya* case and the *Etrak v Libya* case (n 13), where it was argued by the Respondent that the Turkey-Libya BIT had not entered into force because Turkey had communicated its instrument of ratification to the Gaddafi government at a time when the NTC was internationally recognised. The Tribunal rejected this argument. See also *Slim Ben Mokhtar Ghenia v Libya* case (n 13) where an UNCITRAL Tribunal retracted an award confirming a settlement between the parties on account of the fact that the investor had fraudulently struck a deal with the Tobruk-based Government bypassing the Libya State Lawsuits Department. See D Charlotin, 'Revealed: Reasons Why BIT Tribunal Retracted 2016 Consent Award; Confusion Swirling Around Libya's True Government Had Offered Opportunity for Investor to Strike What Tribunal Initially Viewed as a Respondent-Authorized Settlement' (*IA Reporter*, 25 July 2019) <https://www-iareporter-com.ezproxy-prd.bodleian.ox.ac.uk/articles/revealed-reasons-why-bit-tribunal-retracted-2016-consent-award-confusion-swirling-around-libyas-true-government-had-offered-opportunity-for-investor-to-strike-what-tribunal-initially-viewed-as-a-r/> accessed 1 April 2023. For a discussion on the identification of the government entitled to represent the state outside of conflict situations, see *Valores Mundiales, S.L. and Consorcio Andino S.L. v Bolivarian Republic of Venezuela,* ICSID Case No. ARB/13/11; *ConocoPhillips Petrozuata B.V, ConocoPhillips Hamaca B.V and ConocoPhillips Gulf of Paria B.V v Bolivarian Republic of Venezuela,* ICSID Case No. ARB/07/30; *Mobil Cerro Negro Holding, Ltd., Mobil Cerro Negro, Ltd., Mobil Corporation and others v Bolivarian Republic of Venezuela,* ICSID Case No. ARB/07/27.

the law relating to the protection of foreign investment with other bodies of international law in the context of ongoing armed conflicts.

a. Effect of an Armed Conflict on the Applicability of Investment Treaties

The very first issue that needs to be addressed when we are discussing protections under investment treaties in times of armed conflict is whether such treaties remain in force with the effect that the obligations under that treaty remain applicable in such conflict. In other words, it is necessary to determine whether the occurrence of an armed conflict between two states precludes reliance on a bilateral (or multilateral) investment treaty that those states have entered into with each other. Three distinct issues arise here: (1) does the occurrence of an armed conflict automatically lead to the suspension or termination of the investment treaty; (2) does the existence of an armed conflict give the party grounds for suspending or terminating a treaty under the law of treaties, i.e. under the provisions of the Vienna Convention of the Law of Treaties (VCLT); and (3) might international law provide additional grounds for suspending or terminating a treaty during an armed conflict, which are not contained in VCLT.

There is a fourth issue, which will not be discussed here because it is conceptually distinct, but which is related. This is the question whether the occurrence of an armed conflict provides grounds for non-performance of obligations under an investment treaty because the circumstances precluding wrongfulness in the law of state responsibility (such as necessity or *force majeure*) exist.[17] The matter is conceptually distinct because where such circumstances

[17] See Part One, Chapter V of the ILC Articles on the Responsibility of States for Internationally Wrongful Acts, (2001) UN Doc A/56/10 (hereafter 'ARS').

precluding wrongfulness exist, the treaty obligations remain in force (and thus are neither suspended nor termination), it is just that there are grounds that would exclude international responsibility for non-performance of those obligations.[18] However, discussion of the application of the circumstances precluding wrongfulness under the law of state responsibility may be regarded as related to suspension of a treaty because the effect of the existence of those circumstances is to permit temporary non-performance of obligations which is precisely the effect sought by suspension of a treaty. Also, some of the circumstances precluding wrongfulness which may be relevant under the law of state responsibility are, at first sight, similar to the grounds which could permit suspension of a treaty.[19]

It should be evident that the distinction between, on the one hand, the first question identified in this sub-section, and the second and third questions, on the other hand, is significant. The first explores *automatic* suspension or termination and asks whether a treaty is suspended or terminated simply on the basis that an armed conflict is in existence, and without the parties having to take specific steps. However, the second and the third questions raise the issue whether the parties to the treaty can take specific action to suspend or terminate a treaty as a result of the armed conflict. If the answer to either the second or third question is positive then procedural steps would have to be taken by a party to effect such a suspension or termination. In particular, if there are grounds for suspending or terminating the treaty under the VCLT (the second question), then the procedures regarding notification

[18] See *Gabčikovo-Nagymaros Project (Hungary/Slovakia)* (Judgment) ICJ Rep 1997, 7, paras 47 & 101; *Fisheries Jurisdiction* Case (Judgment) ICJ Rep 1973, para 36.

[19] For example, there is a degree of similarity between force majeure under the law of state responsibility and supervening impossibility of performance as a ground for suspending or terminating a treaty; similarly countermeasures as a circumstance precluding wrongfulness shares some features with material breach of a treaty as a ground for suspension or termination.

and dispute settlement under Articles 65 to 67 of the VCLT would have to be complied with (to the extent that those provisions constitute customary international law). However, if automatic suspension or termination is possible, this is something that can be relied on by the host state in arbitral proceedings though that state had not previously taken any specific steps to suspend or terminate the treaty. If, on the other hand, the intention is to rely on the grounds in the law of treaties, the host state could not rely on those grounds in an arbitration without having taken those steps prior to the conduct that is alleged to be a breach of the treaty.

The distinction between the second and the third question is also significant. The second question asks whether, on account of the armed conflict, there are grounds *under the VCLT* permitting suspension or termination. The grounds that appear to be most relevant in a conflict situation would be those provided for in Articles 61 and 62: supervening impossibility of performance and fundamental change of circumstances. I do not have time to explore these grounds in detail, but it would be fair to conclude that the very strict conditions for both grounds means that invocations of Art. 61 & 62 is rarely successful, and it is unlikely that the existence of an armed conflict *ipso facto* brings their application into play. The International Court of Justice has accepted that these grounds exist in customary international law but has never actually applied them.[20] However, it may be noted that in one case, the *Racke* case,[21] the European Court of Justice stated that the Council of Ministers was not manifestly wrong to conclude that the conflict in the former Yugoslavia and its consequences on economic and trade relations, both between the Republics of Yugoslavia and with the European Community

[20] See *Gabčikovo-Nagymaros Project (Hungary/Slovakia)* (Judgment) ICJ Rep 1997, 7, paras 46, 99.
[21] Case C-162/96, *A. Racke GmbH & Co. v. Hauptzollamt Mainz*, [1998] ECR I-03655.

as it then was, constituted a radical change in the conditions under which the Cooperation Agreement between the European Economic Community and the Socialist Federal Republic of Yugoslavia was entered into. However, this was not a decision that Article 62 applied as a matter of law but simply that it was not manifestly wrong to say that it applied.

The third question asks whether, independently of the grounds that exist in the VCLT, a state may invoke the existence of an armed conflict as a ground *ipso facto* for the suspension or termination. The possibility that a party to a treaty my suspend or terminate the treaty on grounds other than those provided for in the VCLT and in the treaty itself might appear to be precluded by Article 42(2) of the VCLT which provides that:

> "The termination of a treaty, its denunciation or the withdrawal of a party, may take place only as a result of the application of the provisions of the treaty or of the present Convention. The same rule applies to suspension of the operation of a treaty."

However, it is important to recall Article 73 of the VCLT, which provides that:

> "The provisions of the present Convention shall not prejudge any question that may arise in regard to a treaty from a succession of States or from the international responsibility of a State or from the outbreak of hostilities between States."

The effect of Article 73 is that the question of whether there are other grounds for suspending or terminating a treaty in a situation of armed conflict is not answered by the VCLT. Indeed this was the understanding of the International Law Commission (ILC) when it drafted its 2011

Articles on the Effects of Armed Conflicts on Treaties.[22] Indeed, Article 9 of those Articles presumes that a State is entitled to terminate or suspend a treaty "as a consequence of an armed conflict" while Article 18 which deals with grounds for suspension or termination of a treaty on the grounds provided for in the VCLT is headed "other cases of termination, withdrawal or suspension." The commentary to the latter provision makes clear that "[t]he reference to 'Other' in the title is intended to indicate that these grounds are additional to those in the present draft articles."[23]

i. Automatic Suspension or Termination?

The principles of international law regarding the effect of armed conflict on treaties has undergone significant change over a number of centuries. "The traditional view among jurists, confirmed by a large body of traditional State practice, … that treaties did not survive armed conflict"[24] has long since been abandoned.[25] By contrast, "[t]he modern view of the effect of armed conflict on treaties is that 'the question of whether treaties survive the outbreak of hostilities is resolved according to the type of treaty involved.'"[26]

Article 3 of the ILC's 2011 Articles on the Effects of Armed Conflicts on Treaties, states that "[t]he existence of an armed conflict does not *ipso facto* terminate or suspend the operation

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[22] ILC, 'Draft articles on the effects of armed conflicts on treaties, with commentaries' (2011) UN Doc A/66/10 (hereafter 'ILC Articles'), in particular para 1 of the Commentary to Art. 1, which also refers to the understanding of the ILC when it drafted the Articles on the Law of Treaties which eventually became the VCLT. See also C Schreuer, 'War and Peace in International Investment Law' in K Fach Gomez et al (n 6).

[23] ILC Articles, para 1 of the Commentary to Art. 18.

[24] 'The effect of armed conflict on treaties: an examination of practice and doctrine - Memorandum by the Secretariat', UN Doc. A/CN.4/550 (1 Feb. 2005), para 14.

[25] 'The effect of armed conflict on treaties: an examination of practice and doctrine - Memorandum by the Secretariat', UN Doc. A/CN.4/550 (1 Feb. 2005), paras 15-16.

[26] 'The effect of armed conflict on treaties: an examination of practice and doctrine - Memorandum by the Secretariat', UN Doc. A/CN.4/550 (1 Feb. 2005), paras 17, citing RG Tarasofsky, "Legal protection of the environment during international armed conflict" (1993) 24 Netherlands Yearbook of International Law 17, at 62.

of treaties."[27] This was the position also taken by the Institute of International Law in its 1985 Resolution on *The Effects of Armed Conflicts on Treaties*: "the outbreak of an armed conflict does not *ipso facto* terminate or suspend the operation of treaties in force between the parties to the armed conflict."[28]

Both the ILC and the Institute seem to suggest in their work that a treaty is never subject to automatic suspension or termination on account of armed conflict. The starting point, (under these instruments produced by the ILC and the Institute) is that the occurrence of an armed conflict does not lead to the termination or suspension of a treaty, but the interpretation of the treaty, or particular rules of law, may give a treaty party the right to suspend, terminate or withdraw from a treaty.[29] Where there is a right to suspend, terminate or withdraw, Article 9 of the ILC Articles provides for an obligation to notify the other party or parties and Article 4 of the ILC Articles states that "[w]here a treaty itself contains provisions on its operation in situations of armed conflict, those provisions shall apply". According to Article 6 of the ILC Articles:

> "In order to ascertain whether a treaty is susceptible to termination, withdrawal or suspension in the event of an armed conflict, regard shall be had to all relevant factors, including:

[27] ILC Articles.
[28] Rapporteur, *The Effects of Armed Conflicts on Treaties*, Institute of International Law (Helsinki, 1985) 61(2) Yearbook of the Institute of International Law, 278–283.
[29]

(a) the nature of the treaty, in particular its subject matter, its object and purpose, its content and the number of parties to the treaty; and

(b) the characteristics of the armed conflict, such as its territorial extent, its scale and intensity, its duration and, in the case of non-international armed conflict, also the degree of outside involvement."

Article 7 envisages that certain treaties will be presumed to continue to apply by virtue of "their subject matter". The Annex to Article 7 offers an indicative list of such treaties where the presumption will be one of continued application despite the existence of an armed conflict. That list includes "treaties of friendship, commerce and navigation and agreements concerning private rights".[30] Notably, the ILC's Commentary to the Annex to Article 7 mentions bilateral investment treaties as falling within those "agreements concerning private rights".[31]

The ILC Articles have been referred to where investment tribunals had to decide this question. In a case against Syria,[32] the state argued that due to the ongoing conflict in Syria to which Turkey was a party, the Turkey-Syria BIT on which the Turkish investor was relying to establish jurisdiction had been suspended. The Tribunal found that there was no possibility of such automatic suspension without written notice under the Treaty.[33] For the tribunal, it also did not matter whether the conflict was qualified as an international armed conflict or a non-

[30] ILC Articles (n 22), Annex to Article 7, (e).
[31] ILC Articles (n 22), Annex to Article 7, paras 48, 69.
[32] See *Güriş Construction and Engineering Inc, Idris Yamanturk, Tevfik Yamanturk, Musfik Hamdi Yamanturk v Syrian Arab Republic*, ICC Case No 21845/ZF/AYZ, Award (31 August 2020).
[33] ibid paras 143 et seq. The Tribunal also found that the suspension of diplomatic relations between the two states was immaterial in this regard.

international armed conflict, and the ILC Draft Articles make no distinction in this regard.[34] Referring to Articles 5 and 6 of the ILC Draft Articles, the Tribunal concluded that what was of particular importance was that the treaty contains clauses that implied its continued operation during the conflict, even if there is no express provision on the continued application of the treaty.[35]

However, modern case law and practice on the question of the possibility of automatic termination and suspension of treaties as a result of the occurrence of an armed conflict is not as uniform and complete as the picture presented by the ILC. Indeed, the Eritrea-Ethiopia Claims Commission was of the view that some economic treaties between the two states involved in that dispute were, at least, suspended automatically as a result of the armed conflict between them.[36]

The Claims Commission accepted that, by their terms, some treaties clearly apply during hostilities, or reveal an intention to continue to operate, for example, because they are designed to create permanent legal situations. It included in that category "treaties confirming private rights to land" but didn't speak of treaties intended to create private rights more generally.[37] The commission then accepted that some treaties reflect transitory political relationships and would be terminated by hostilities. It then spoke of a third category "where the intention to maintain a treaty in operation during hostilities is not plainly apparent from

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[34] ibid para 146.

[35] ibid paras 147-150. The Syria-Turkey BIT applicable to the dispute contained provisions stipulating "full protection and security *at all times*" (Art. II(2), emphasis added) and a "war losses" clause (Art. IV(3)). On this basis, the Tribunal found that there is "at the very least, a presumption that the Treaty did in fact continue being in effect" during the armed conflict.

[36] *Final Award, Pensions, Eritrea's Claims 15, 19 & 23*, (19 Dec. 2005), paras 29-32, Eritrea-Ethiopia Claims Commission; *Partial Award, Economic Loss Throughout Ethiopia, Ethiopia's Claim 7*, (19 Dec. 2005), paras 15-18, Eritrea-Ethiopia Claims Commission.

[37] *Final Award, Pensions, Eritrea's Claims 15, 19 & 23*, (19 Dec. 2005), para 29.

the text or the surrounding circumstances."[38] With regard to such treaties, it stated that: "Writers generally maintain that parties should be presumed to intend that such treaties be at least suspended during the hostilities. The Commission concludes that this principle applies here, and that the 1993 Protocol and its associated agreements were, at the least, suspended during the hostilities and their immediate aftermath. This seems the most reasonable result."[39]

The Commission applied its view regarding the suspension, at least, of certain political and economic agreements to a treaty entered into after Eritrea broke away from Ethiopia and which obliged Ethiopia to transfer to Eritrea sums of money to fund certain pension payments. It also held that five other economic treaties, including a Trade Agreement, a Transit and Port Services Agreement, a Commercial Road Agreement, and an Air Services Agreement became "ineffective in time of war (either through termination or suspension). Consequently because of the war, the treaties ceased to be operative."[40]

At one level, the decision of the Eritrea-Ethiopia Claims Commission is not inconsistent with the view of the ILC in that it could be argued that none of the treaties considered by the Claims Commission dealt with private rights. However, two things are noteworthy. The first is that the Commission took the view that a Trade agreement was suspended because of the war and this may raise questions about the effect of investment chapters in Free Trade Agreements, though it may be argued that it is possible for some parts of a treaty to be

[38] *Final Award, Pensions, Eritrea's Claims 15, 19 & 23*, (19 Dec. 2005), para 29.
[39] *Final Award, Pensions, Eritrea's Claims 15, 19 & 23*, (19 Dec. 2005), para 30.
[40] *Partial Award, Economic Loss Throughout Ethiopia, Ethiopia's Claim 7* (19 Dec. 2005), para 18, Eritrea-Ethiopia Claims Commission.

suspended while others remain in force.[41] The second, and more important, point is that unlike the ILC the Commission took the view that the treaties may be automatically suspended or terminated.[42] Thus, no action to suspend was required (or taken) by the parties in those cases but the relevant treaties were found to be (at least) suspended.

There are three overarching points that should be reiterated in concluding on the issue of suspension or termination of a treaty as a result of an armed conflict.

First, if one applies the view taken by the ILC and by the few investment tribunals to have considered the issue, as a general matter, investment treaties are *presumed* to continue being in effect during an armed conflict. Unless there is specific indication otherwise in the particular treaty, there will be no automatic suspension of such treaties simply because of an armed conflict between the parties.[43] Furthermore, where investment treaties explicitly envisage that conflicts or other emergency situations might arise, and make specific provision for such circumstances, this will be confirmation that the treaty was not intended to cease applying in situations of conflict.[44]

Second, although the view of the ILC is that the existence of an armed conflict does not *ipso facto* suspend or terminate treaties, modern arbitral practice, as represented by decisions of

[41] Art. 7 of the ILC Articles (n 22), speaks of treaties continuing to operate "in whole or in part" and Art. 11 speaks to the possibility of separability of provisions in case of suspension, withdrawal of termination.
[42] See for example the opening sentence of the relevant paragraph in *Partial Award, Economic Loss Throughout Ethiopia, Ethiopia's Claim 7* (19 Dec. 2005), para 18, Eritrea-Ethiopia Claims Commission- "The issue of the automatic termination of bilateral agreements with the outbreak of conflict is currently debated in the literature."
[43] *Güriş Construction and Engineering Inc, Idris Yamanturk, Tevfik Yamanturk, Musfik Hamdi Yamanturk v Syrian Arab Republic*, ICC Case No 21845/ZF/AYZ, Award (31 August 2020) paras 147-150.
[44] T Ackermann and S Wuschka, 'Introduction' in Ackermann and Wuschka (n 6) 4.

the Eritrea-Ethiopia Claims Commission, is not so categorical though that practice has not provided for automatic suspension in case of investment treaties.

Third, parties to a treaty may take steps to terminate it on account of an armed conflict, even if the conditions set forth in the VCLT do not apply. The VCLT preserves the possibility that other rules apply in situations of conflict and Article 9 of the ILC Articles on the Effect of Armed Conflicts on Treaties suggests that there is a general right to suspend or terminate on account of an armed conflict (though that right may be limited by what is provided for in the treaty itself). However, if a state wishes to invoke such a right, it must follow certain procedural obligations of notification and possibly dispute settlement.

b. Effect of an Armed Conflict on the Territorial Scope of Investment Treaties

The second question that may arise is the territorial scope of the protections provided under an investment treaty in the context of an armed conflict. The issue is also linked to the *ratione loci jurisdiction* of an arbitral tribunal which will hear an investment claim. This matter has been considered by certain investment tribunals, notably in a series of cases brought by Ukrainian investors against Russia following the annexation of Crimea.[45]

[45] See e.g. *Ukrnafta v Russia*, *Stabil v Russia*; *Everest v Russia*. See also J Hepburn, 'Investigation: Full Jurisdictional Reasoning Comes to Light in Crimea-Related BIT Arbitration vs. Russia' (*IA Reporte*r, 9 November 2017) <https://www-iareporter-com/articles/full-jurisdictional-reasoning-comes-to-light-in-crimea-related-arbitration-everest-estate-v-russia/> accessed 1 April 2023; J Hepburn and R Kabra, 'Investigation: Further Russia Investment Treaty Decisions Uncovered, Offering Broader Window into Arbitrators' Approaches To Crimea Controversy' (*IA Reporter,* 17 November 2017) <https://www-iareporter-com.ezproxy-prd.bodleian.ox.ac.uk/articles/investigation-further-russia-investment-treaty-decisions-uncovered-offering-broader-window-into-arbitrators-approaches-to-crimea-controversy/> accessed 1 April 2023; M Soldatenko, 'Ongoing Territorial Challenges in Crimea Cases: Putting Everest v Russia in Context' (*Kluwer Arbitration Blog,* 5 November 2018) <https://arbitrationblog.kluwerarbitration.com/2018/11/05/territorial-challenges-expected-in-crimea-cases-putting-everest-v-russia-in-context/> accessed 1 April 2023.

Typically, International Investment Agreements impose obligations on states to protect or to otherwise take specified action vis-à-vis investments within the territory of the host state.[46] However, armed conflicts can lead to a loss of control over territory of a state where an investor's assets are located, or alternatively, the establishment of *de facto* authority by an occupying power. These scenarios can raise questions as to (i) whether a host state continues to have obligations under the treaty when it has been deprived of control over part of its territory,[47] and (ii) whether the obligations undertaken by a state apply also to territory that is not recognised as part of its sovereign territory under international law, but which the respondent state (a) claims to be its territory, or (b) occupies or controls.[48] For example, the territory may have been annexed through the unlawful use of force under international law. In such cases, tribunals may face the difficult task of reconciling investment protection on the basis of authority exercised, and the duty under general international law, not to recognise a situation that results from a violation of a norm of *jus cogens* such as an unlawful annexation of territory.[49]

In some of the cases brought by Ukrainian investors against Russia concerning the latter's annexation of Crimea, tribunals seem to have preferred to side-step the issue of sovereignty

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[46] See MP Beham, 'The Concept of 'Territory' in BITs of Disputing Sovereigns' in Ackermann and Wuschka (n 6), 139.

[47] Libya sought to make a similar argument with respect to the NATO no-fly zones under the 2011 UNSC Resolution 1973 in the *Cengiz v Libya* arbitration (n 13). See *Cengiz v Libya,* Award (7 November 2018) paras 252–60. The tribunal rejected this argument on the basis that "[t]he enactment and enforcement of a no-fly zone does not, under international law, deprive the State of title to its territory. Neither does it give the States enforcing the measure, jurisdiction over the territory over which the no-fly zone is imposed", citing J Crawford, *Brownlie's Principles of Public International Law* (OUP 2012) 209, and *Bankovic and Others v Belgium and others,* App No 52207/99 (ECtHR, 12 December 2001) (Decision on Admissibility) paras 71-82.

[48] For the test regarding the existence of occupation, see Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations concerning the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) 36 Stat 2277 ('Hague Regulations') Article 42; see also *Armed Activities on the Territory of the Congo (DRC v Uganda)* [2005] ICJ Rep 168, para 172.

[49] ARS, Art. 41(2); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Rep 2004, 199–200, paras 157–159.

over the territory, and rather based their assessment that these treaties apply to Russian conduct in Crimea on a finding of "effective control".[50] For the purposes of investment treaty protections, these tribunals concluded that territory of a state is regarded not merely as sovereign territory, but also territory in fact controlled by a state. To the extent that the territorial scope of the treaty obligations of the host state is regarded as extending not only to sovereign territory, but also to territory that is simply under the *de facto* control of that state, there would seem to be no conflict with the duty of non-recognition. This is because application of the treaty on this basis would not recognise as lawful the unlawful occupation or annexation of the treaty.[51] However, the critical question is one of treaty interpretation,

[50] In its non-disputing party submissions, Ukraine also accepted that Russia had effective control over Crimea. See L Rees-Evans, 'Litigating the Use of Force: Reflections on the Interaction Between Investor-State Dispute Settlement and Other Forms of International Dispute Settlement in the Context of the Conflict in Ukraine' in Fach Gomez et al (n 6). See also e.g. *Stabil v Russia*, Award on Jurisdiction (26 June 2017); *Ukrnafta v Russia*, Award on Jurisdiction (26 June 2017). Note that the Swiss Federal Tribunal later refused to set aside the awards in *Stabil* and *Ukrnafta* for lack of jurisdiction – see L Bohmer, 'In Now-Public Decisions, Swiss Federal Tribunal Clarifies Reasons for Dismissing Challenges to Two Crimea-Related Investment Treaty Awards Against Russia' (*IA Reporter,* 16 November 2018) <https://www.iareporter.com/articles/in-now-public-decisions-swiss-federal-tribunal-clarifies-reasons-for-dismissing-challenges-to-two-crimea-related-investment-treaty-awards-against-russia/> accessed 1 April 2023. See also *Everest v Russia*, Award on Jurisdiction (20 March 2017); *Oschadbank v Russia*, Award (28 November 2018) – this award was set aside subsequently by Paris Court of Appeal, but for lack of jurisdiction *ratione temporis*; see D Charlotin, 'Crimea-Related 1 Billion USD Award Against Russia Is Set Aside, as Paris Court Finds That the Tribunal Lacked Jurisdiction' (*IA Reporter,* 30 March 2021) <https://www.iareporter.com/articles/crimea-related-1-billion-usd-award-against-russia-is-set-aside-as-paris-court-finds-that-the-tribunal-lacked-jurisdiction/> accessed 1 April 2023. The awards differed to an extent in how they handled the phrase 'defined in accordance with international law' – this involved an interpretive exercise encompassing also Article 29 VCLT. See, eg, the discussion in Hepburn (n45) and Hepburn and Kabra (n 45); J Braun, '[Updated with a Copy of the Award] tribunal in previously-unseen award against Russia upheld jurisdiction over Crimea-related claims, and awarded over 1.3 billion USD in compensation' (*IA Reporter,* 13 April 2021) <https://www.iareporter.com/articles/uncovered-tribunal-in-previously-unseen-award-against-russia-upheld-jurisdiction-over-crimea-related-claims-and-awarded-over-1-3-billion-usd-in-compensation/> accessed 1 April 2023.

[51] For a discussion of these issues, D Costelloe, 'Treaty Succession in Annexed Territory' (2016) 65 ICLQ 348; S Wuschka, 'Procedural aspects of the Obligation of Non-Recognition before Investment Tribunals' in K Fachs Gomez et al (n 6) <https://link.springer.com/chapter/10.1007/978-3-030-10746-8_7>; K de Vriese, 'That Other Crisis: Extraterritorial Application of Investment Standards During Occupation and Annexation' Kluwer Arbitration Blog (30 June 2020) <https://arbitrationblog.kluwerarbitration.com/2020/06/30/that-other-crisis-extraterritorial-application-of-investment-standards-during-occupation-and-annexation/>; R. Happ & S Wuschka, 'Horror Vacui: Or Why Investment Treaties Should Apply to Illegally Annexed Territories' (2016) 33 Journal of International Arbitration 245.

and that of whether the treaty should be regarded as applicable to territory only under *de facto* control as opposed to sovereign territory.

In some ways, the application of a BIT to extraterritorial conduct taken by a state in territory over which it exercises effective control might be regarded as similar to developments in international human rights law. Human rights tribunals have applied human rights treaties extraterritorially, and held that those treaties impose obligations on states with respect to how they treat persons in territory under the effective control of that state, whether or not the state has sovereignty over the territory.[52] However, there is a significant difference between human rights law in this regard and investment agreements. Under the relevant international human rights treaties, the obligations are owed to persons within the "jurisdiction" of a state rather than to persons within the "territory" of a state. Thus, human rights tribunal are simply holding that a person within territory that is under the effective control of a state is within the jurisdiction of a state and do not have to find that the territory concerned is the territory of that state.

c. Effect of an Armed Conflict on the Substantive Protections Provided in the Investment Treaties

Let me now turn to the third question that arises once it is considered that an investment treaty is applicable to a dispute despite the occurrence of armed conflict: what are the substantive protections owed by the host state to the investors in the context of an armed conflict? The aim here is not to cover all the substantive protections that may be applicable

[52] This analogy has been drawn by some of the tribunals in cases concerning the annexation of Crimea. See e.g. *Everest v Russia* (n 50)*;* see also Hepburn (n45).

but to deal with the types of clauses that have particular relevance to situations of armed conflict.

i. War Clauses

First, we turn to so-called "war clauses"[53] that are often contained in investment treaties.[54] There are generally two types of war clauses which provide for different types and degrees of protection. First, there are those which set out non-discrimination guarantees with respect to compensation for losses or harm during war, emergencies, and other similar circumstances and typically provide that, with regard to such compensation, the investor is to be accorded treatment no less favourable on an Most-Favoured Nation (MFN) or national treatment standard.[55] These clauses typically do not create autonomous substantive rights or any other protection, and their content depends on how host states treat their own nationals or those of a third state in the context of an armed conflict.[56]

The second type of war clause contains, in addition to the non-discrimination obligation, specific guarantees of compensation with respect to the requisitioning or destruction of investment by the state's forces which was not caused by combat action or not required by

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[53] These may also be referred to as "compensation for losses clauses'".

[54] e.g. Art. 5 of the 2009 Turkey-Libya BIT.

[55] e.g. Art. IV(3) of the Turkey-Syria BIT which was under consideration in the *Güriş v Syria* arbitration reads: "Investors of either Party whose investments suffer losses in the territory of the other Party owing to war, insurrection, civil disturbance or other similar events shall be accorded by such other Party treatment no less favourable than that accorded to its own investors or to investors of any third country, whichever is the most favourable treatment, as regards any measures it adopts in relation to such losses."; see also Art. 5 of Libya-Turkey BIT: "Investors of either Contracting Party whose investments suffer losses in the territory of the other Contracting State owing to war, insurrection, civil disturbance or other similar events shall be accorded by such Contracting Party treatment no less favourable than that accorded to investors of any third country, whichever is the most favourable treatment, as regards any measures it adopts in relation to such losses." Losses were interpreted by the Tribunal in *Güriş v Syria* to mean "physical destruction or loss of property as well as lesser forms of harm." See paras 227 - 228.

[56] R Dolzer, U Kriebaum, C Schreuer, *Principles of International Investment Law* (3rd edn, OUP 2022) 306; T Ackermann, *The Effects of Armed Conflicts on Investment Treaties* (CUP 2022) 119.

the necessity of the situation.[57] Within this category of "extended" war clauses, there also are some clauses that do not seem to make the duty to award compensation for losses in armed conflict dependent on whether such losses or harm were caused by the forces of the state nor do they restrict the obligation to pay compensation to cases where the harm arises out of conduct that was not required by the necessity of the situation.[58]

A key question that arises in the interpretation of these clauses is whether the presence of such a clause means that an investor may not refer to any other clause, such as those providing for Full Protection and Security or the general MFN treatment, to ground compensation for losses covered by the war clause. The answer that has been given by most tribunals in the cases brought against Libya is that the war losses clause is not *lex specialis*,[59] and therefore its existence in the treaty or its application does not exclude the application of

[57] e.g. Art. 5 of Austria-Libya BIT under which the *Strabag v Libya* case was brought. Art. 5(1) provides for a non-discrimination obligation, and Art. 5(2) provides: "An investor of a Contracting Party who in any of the events referred to in paragraph (I) suffers loss resulting from: (a) requisitioning of its investment or part thereof by the forces or authorities of the other Contracting Party, or (b) destruction of its investment or part thereof by the forces or authorities of the other Contracting Party, which was not required by the necessity of the situation, shall in any case be accorded by the latter Contracting Party restitution or compensation which in either case shall be prompt, adequate and effective and, with respect to compensation, shall be in accordance with Article 4(2) and (3)." The provision cross-references the conditions for paying compensation for lawful expropriation.

[58] Art. 4 of the Italy-Syria BIT which was discussed in the aforementioned *Güriş v Syria* arbitration is an example in this regard. The provision reads: "Should investors of either Contracting Parties incur losses or damages on their investments in the territory of the other Contracting Party due to war, other forms of armed conflict, a state of emergency, civil strife or other similar events, the Contracting Party in which the investment has been effected shall offer *adequate* compensation in respect of such losses or damages. Irrespective of whether such losses or damages have been caused by governmental forces or other subjects, compensation payments shall be freely transferable as provided for in article 8 of this Agreement." As the tribunal observed, the provision creates an obligation to compensate "without stipulating that such 'losses or damages' must result from conduct attributable to the host State. Indeed, the clause is quite deliberately worded to be triggered solely by an objective occurrence, 'losses or damages . . . due to' circumstances of war, etc". See *Güriş v Syria*, para. 284. In *Güriş v Syria* the question also arose as to whether 'adequate compensation' under Art. 4 is to be equated with the "prompt, adequate and effective compensation" standard provided for under the expropriation provision of that treaty, and whether both standards are to be regarded as the same as the standard of compensation under the law of state responsibility.

[59] See e.g. in *Cengiz v Libya* (n 13), the Claimant invoked Full Protection and Security, Fair and Equitable Treatment and the war clause contained in the Turkey-Libya BIT, see paras 353-358.

other provisions, such as the FPS standard,[60] or even, the general MFN clause.[61] It has been stated, persuasively, that all of these provisions regulate distinct matters and cannot be interpreted as derogations requiring the sole application of the war clause under the *lex specialis* principle.[62] However, there is at least one case in which the tribunal adopted the opposing view.[63]

ii. Full Protection and Security Clauses

A second set of substantive protections that are of particular relevance during an armed conflict are accorded through Full Protection and Security (FPS) clauses. These "oblige the host state to provide a legal framework that grants security and protects the investment against adverse action by private persons as well as state organs".[64] As the ICJ recently put it, "the core of the obligation to afford the most constant protection and security … concerns the protection of property from physical harm."[65]

There are two issues that arise when examining the application of these clauses during conflict situations:

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[60] See e.g., *Way2B v Libya,* discussed in LE Peterson, 'Way2B v Libya Tribunal Finds That BIT's War-Losses Clause Does Not Exclude Operation of Other BIT Protections (Including Full Protection & Security), but Foreign Investor Fails to Meet Evidentiary Burdens' (*IA Reporter*, 8 January 2019) <https://www-iareporter-com/articles/tribunal-finds-that-bits-war-losses-clause-does-not-exclude-operation-of-other-bit-protections-including-full-protection-security-but-foreign-investor-fails-to-meet-evidentiary-burdens/> accessed 1 April 2023; *Strabag v Libya,* paras 224-228; *Cengiz v Libya,* paras 353-358 (n 13); *Güriş v Libya,* discussed in D Charlotin, 'Analysis: Tribunal In Guris V Libya Award Draws Contrast With Cengiz Award On FPS Interpretation And Sides With Majority Of Prior Libya Awards With Respect To War Losses Clause' (*IA Reporter*, 5 March 2020) <https://www-iareporter-com/articles/analysis-tribunal-in-guris-v-libya-award-draws-contrast-with-cengiz-award-on-fps-interpretation-and-sides-with-majority-of-prior-libya-awards-with-respect-to-war-losses-clause/> accessed 1 April 2023.

[61] See *Güriş v Syria* (n 2) paras 256-262, 279.

[62] See *Cengiz v Libya* (n 13) paras 353-358.

[63] *Öztaş v Libya*, ICC Case No 21603/ZF/AYZ, Final Award (14 June 2018) para 167.

[64] *Frontier Petroleum v Czech Republic,* UNCITRAL, Final Award (12 November 2010) para 296.

[65] *Certain Iranian Assets (Islamic Republic of Iran v United States of America)* (Judgment) [2023] ICJ Rep 2023, para 180.

The first issue relates to the standard of conduct that such clauses require of the host state. A series of arbitrations starting with *AAPL v Sri Lanka* (or perhaps even with the *Spanish Zone of Morocco*[66] arbitration!) have found that the Full Protection and Security clause does not establish "strict liability", but rather an obligation of due diligence for the state to employ reasonable efforts to safeguard the physical security of the investment.[67] This point was recently confirmed by the International Court of Justice.[68] In ascertaining the right standard of due diligence, certain tribunals, most prominently sole arbitrator Paulsson in *Pantechniki*,[69] have given weight to the circumstances of the particular state and its available resources.[70] In particular, it has been held that the same standard cannot be applied under a full protection and security clause during an armed conflict as in peace time.[71] Nonetheless, it is accepted that the state conduct vis-à-vis investors "must not be inferior to the minimum standard of vigilance and care required by international law".[72] In this regard, it is possible to conclude that the standard of due diligence has an objective and a subjective aspect – with the

[66] *British Claims in the Spanish Zone of Morocco* (1925) 2 RIAA 615.
[67] *AAPL v Sri Lanka* (n 15) paras 45-53. See also e.g., *Pantechniki S.A. Contractors & Engineers (Greece) v The Republic of Albania,* ICSID Case No. ARB/07/21, Award (30 July 2009); *L.E.S.I. S.p.A. and ASTALDI S.p.A. v République Algérienne Démocratique et Populaire*, ICSID Case No. ARB/05/3, Award (12 November 2008) para 175; *Ampal-American Israel Corporation and others v Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss (21 February 2017) paras 241 et seq; *Cengiz v Libya*, para 406 (n 13); *Güriş v Libya*, discussed in Charlotin, 'Analysis: Tribunal In Guris V Libya Award Draws Contrast With Cengiz Award On FPS Interpretation And Sides With Majority Of Prior Libya Awards With Respect To War Losses Clause' (n 39); *Strabag v Libya* (n 2), paras 234-235.
[68] "Each Contracting Party has an obligation to exercise due diligence in providing protection from physical harm to the property of nationals and companies of the other Contracting Party within its own territory." *Certain Iranian Assets (Islamic Republic of Iran v United States of America)* (Judgment) [2023] ICJ Rep. 2023, para 190.
[69] *Pantechniki v Albania* (n. 67), para. 77.
[70] K Fortin, 'State Responsibility and Rebels – an interview with Kathryn Greenman' (*Armed Groups and International Law,* 30 May 2022) <https://www.armedgroups-internationallaw.org/2022/05/20/state-responsibility-and-rebels-an-interview-with-kathryn-greenman/> accessed 1 April 2023, in that respect.
[71] *Strabag v Libya*, ICSID Case No ARB (AF)/15/1, Award (29 June 2020) paras 234-236.
[72] *American Manufacturing & Trading Inc v Zaire*, ICSID Case No ARB/93/1, Award (21 February 1997) para 6.06.

objective aspect imposing a standard applicable to all, and the subjective aspect imposing obligations that are established by reference to the position of the particular state.[73]

The second issue is whether the full protection and security clause only imposes positive duties to protect, i.e is only applicable to situations where the state has failed to take action to protect against harm caused by third parties Or does the clause also impose negative obligations on the state to refrain from taking action that occasion loss on the part of the investor? In the context of armed conflict, the critical question is whether the clause also applies to harm that arises from actions of state's own forces or organs (in addition to imposing the due diligence obligation to protect).

In the Certain Iranian Assets case, the ICJ stated that the clause "is of particular practical significance and relevance in the form of protection of protection from physical harm *from third parties*."[74] However, this is not to say that the clause is only relevance in such situations. Most tribunals seem to have taken the view the full protection and security clause does impose a negative obligation of result for the state to abstain from conduct that violates the full protection and security standard.[75] As the tribunal held in *Cengiz v Libya*:[76]

> In the most basic formulation, the purpose of the FPS standard is to protect the physical integrity of an investment against interference by use of force. The perpetrator of such interference is irrelevant: it could be the State itself, (including agencies, groups, entities or other organs whose actions can be attributed to the

[73] P Dumberry, 'Host States' Due Diligence Obligation Towards Foreign Investors in the Context of Rebellions and Civil Wars' (2021) 22 Journal of World Investment and Trade 705, 720.
[74] *Certain Iranian Assets (Islamic Republic of Iran v United States of America)* (Judgment) [2023] ICJ Rep 2023 para 190 (emphasis added).
[75] Although not related to armed conflict, see *El Paso Energy International Company v The Argentine Republic*, ICSID Case No. ARB/03/15, Award (31 October 2011) para 524; *Oxus Gold v Republic of Uzbekistan*, UNCITRAL, Final Award (17 December 2015) para 353. cf e.g. *Técnicas Medioambientales Tecmed, S.A. v The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award (29 May 2003) para 175; *Biwater Gauff (Tanzania) Ltd v Tanzania*, ICSID Case No ARB/05/22, Award (24 July 2008) para 730.
[76] *Cengiz v Libya* (n 13), para 403.

State), or any other third party. FPS thus entails a two-fold obligation for the host State:

- A negative obligation to refrain from directly harming the investment by acts of violence attributable to the State, plus

- A positive obligation to prevent that third parties cause physical damage to such investment.

However, it is important to recognise that there is no "strict liability" under the full protection and security clause for conduct of state forces or organs which may result in physical damage to the investment of the investor. It is well recognised that not every harm caused by the State to the investor results in the breach of the full protection and security standard. [77]

iii. Essential Security Interest Clauses

A third category of clause of particular relevance during an armed conflict are *essential security interest clauses.* In contrast to the clauses discussed above which provide particular protections to the investor during armed conflict, this clause operates to limit the protection that an investor would be entitled to. Typically, these are clauses allow the host state to take measures that are *necessary* to protect its essential security interests, or measures which *it considers necessary* for this purpose. It is not difficult to imagine that such a clause might be invoked in situations arising out of armed conflict. A series of questions arise as to the operation of these clauses. First, it may be asked whether the effect of the invocation of the clause in a dispute before a tribunal deprives the tribunal of jurisdiction to decide the case.

[77] See *Belenergia v Italy*, paras 620-623 and *AES Summit Generation Limited and AES-Tisza Erömü Kft. v Hungary*, ICSID Case No. ARB/07/22, Award (23 September 2010) para 13.3.2; where it was stated that 'Reasonable exercise of the right to regulate' will not result in a breach; also *Biwater Gauff v Tanzania* (n 75), para. 731, where it was stated that 'unnecessary and abusive' State action will result in a breach'; *Saluka Investments BV (The Netherlands) v Czech Republic*, UNCITRAL, Partial Award (17 March 2006) para 490, which stated that legitimate concerns behind state action may justify the measures and preclude the violation of the FPS standard.

Second, to the extent that the invocation of the clause is not jurisdictional, and the question of whether a given measure is necessary to protect security interests can be decided on the merits, the question arises whether these clauses are self-judging. If they are, does the host state concerned get to decide, with binding effect, whether the measure it has taken falls within the clause and may be justified under it?

It must be noted that essential security clauses may be worded differently, and this could have an impact on their interpretation. A distinction is to be drawn between those which refer to measures *necessary* to protect essential security interests of the state, and others refer to measures which the state *considers to be necessary*.[78]

The International Court of Justice (ICJ) has held that security clauses that fall within the former category contained in Friendship, Commerce and Navigation Treaties between Nicaragua and the United States, and between Iran and the United States did not preclude the Court from exercising its jurisdiction in the case and the question of the application of the clause was a matter for the merits.[79] A similar approach has been followed by investment tribunals.[80] Even where the clause explicitly speaks of matters which the state "considers to be necessary" to protect its security interests, recent case law of the World Trade Organization - where Article

[78] *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 16, para 282. Tribunals also have noted this distinction in some of the disputes under the Argentina-US BIT. In this vein, see e.g. *CMS Gas Transmission Company v. The Republic of Argentina,* ICSID Case No. ARB/01/8*,* Award (17 May 2005) paras 366-373; *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc .v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability (3 October 2006) paras 207-214.

[79] *Nicaragua v. USA* (n78) paras 222, 282.

[80]

XXI of the General Agreement on Tariffs and Trade contains a similar clause – indicates that this wording should not be taken to deprive the tribunal of jurisdiction.[81]

When considering the application of the clause on the merits, the distinction between the two types of essential security clauses is likely to prove significant.

Although it has been argued otherwise, even those clauses that allow a state to take measures which it "considers to be necessary", are unlikely to be regarded as entirely self-judging. Attention should be paid to the structure of those clauses and to their wording in their entirety. In the first place, tribunals may be entitled to determine whether the conditions indicated in the clause for its invocation do in fact exist as an objective matter. For instance, the security clause in Article 24(3) of the Energy Charter Treaty has some interesting features and questions may arise as to whether the conditions contained therein are met.[82] The WTO dispute settlement panels have held that they are entitled to examine whether action was taken "in time of war or other emergency in international relations" which is a condition for taking measures to protect measures that a WTO member considers to be necessary to protect its essential security interests under Article XXI(b)(iii) of the General Agreement on Tariffs and Trade. Mere invocation of the clause does not debar the WTO panels from examining whether, as an objective matter, those conditions exist, and in some cases refused to accept the situation at stake was an emergency in international relations.[83]

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[81] See *Russia – Measures concerning Transit in Traffic*, WTO Case No. WT/DS512/R, Panel Report (5 April 2019) paras 7.101-7.104; *Saudi Arabia – Measures concerning the protection of intellectual property rights*; *United States – Certain measures on steel and aluminium products*; & *United States – Origin marking requirement*, WTO Case No. WT/DS567/R. See in support of this position, D Akande & S Williams, 'International Adjudication on National Security Issues: What Role for the WTO?', (2003) 43 Virginia Journal of International Law 365.

[82] For a discussion, see Dolzer, Kriebaum, Schreuer (n56) 310.

[83] See the references in n 81.

Also, WTO panels have held that while it is, in general, left to each WTO member to define what it considers to be its essential security interests, "the discretion of a Member to designate particular concerns as 'essential security interests' is limited by its obligation to interpret and apply Article XXI(b)(iii) of the GATT 1994 in good faith."[84]

d. Interaction Between the Law of Armed Conflict/International Humanitarian Law and International Investment Law

A fourth question that arises is how the law of armed conflict or international humanitarian law (IHL) impacts the interpretation of the investment treaty rules when identifying the content of host state obligations. Should tribunals take the law of armed conflict into account in applying investment treaties? For example, the tribunal in *Güriş v Libya* held that the applicable law was "the provisions of the Treaty, Syrian law and such Rules of international law as may be applicable".[85]

States do not frequently, in investment disputes, refer to the rules of IHL to justify their actions in conflict situations. Rather, they tend to prefer to argue the cases on the basis of the investment treaty, and sometimes the defences under the customary law of state responsibility. This may be because states might not want to invoke IHL norms to avoid recognising that they are in a civil war. Also, investment treaties often contain clauses that

[84] *Russia – Measures concerning Transit in Traffic*, WTO Case No. WT/DS512/R, Panel Report (5 April 2019) paras 7.131-7.132. The good faith obligation being derived from Vienna Convention on the Law of Treaties (concluded 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, Arts. 26, 31(1).

[85] *Güriş v Syria* (n 2) para 132. See also the *Cengiz v Libya* award (n 13) para 348: "the dispute should be adjudicated in accordance with the provisions of the BIT, as supplemented by international law. This agreement, with which the Tribunal concurs, reinforces the purpose of investment treaty protection: to grant foreign investors protection grounded on international law and enforced through international arbitration."

mirror IHL norms or concepts, such as military necessity or essential security interests,[86] which might be thought to render reference to IHL unnecessary.

In the context of human rights law, it is sometimes said, including by the ICJ, that IHL is applicable as *the lex specialis,* which is used when interpreting a human rights treaty.[87] More generally, it is accepted that under Article 31(3)(c) of the Vienna Convention on the Law of Treaties that in the interpretation of a treaty account should be taken of the other international law obligations of the parties. Thus, it could be argued that IHL may be used to interpret investment treaties in the same manner that it can be used to interpret human rights treaties. However, this will depend on whether there is scope (a window) to draw IHL into the interpretation of the treaty. Perhaps the opportunities to do this may arise in the full protection and war losses and security clauses.[88] In this vein, the tribunal in one of the Libya cases referred to IHL in considering whether a measure taken was in accordance with the principle of necessity provided for in the relevant war clause.[89] In that same case, the more lax standard of attribution provided for in the First Additional Protocol (1977) to the Geneva Convention was applied.[90]

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[86] Zrilič (n 6), 254.
[87] *Nuclear Weapons* (n 7) paras 24 – 25; *Legality of the Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, paras 106 et seq.
[88] Zrilič (n 6) 254.
[89] Art. 5(2)(b) of the Austria-Libya BIT applied in *Strabag v Libya* (n 13) required the compensation of "destruction of [] investment or part thereof by the forces or authorities of the other Contracting Party, which was not required by the necessity of the situation". In discussing the provision, the Tribunal referred to the concept of necessity throughout the award. The Tribunal also noted that multiple actors may contribute to the loss and this may have an impact on the attributability of conduct which does not involve military necessity to the state. See paras 298, 320-321.
[90] In *Strabag v Libya* (n 13), the tribunal stated that "As a matter of international law, the International Law Commission affirms that the responsibility of a State under Article 91 of Geneva Protocol I - that the State 'shall be responsible for all acts by persons forming part of its armed forces'" which is deemed to cover acts in contravention of state orders. See para. 319. See also ARS (n 26) Commentary to Art. 7, para 4.

IV. Countermeasures Taken Against Investors From Belligerent States

So far, I have spoken about disputes between investors and parties to an armed conflict or a state on whose territory an armed conflict takes place. However, let me conclude by briefly addressing a different scenario, where the dispute is between investors and a state that is not a party to the armed conflict but is rather a third state that has taken measures in response to the armed conflict. Here one may think of potential disputes between States that have taken measures against Russian nationals in response to the war in Ukraine. Questions would arise here as to whether measures such as asset freezes are inconsistent with provisions of applicable BITs, and if so, whether they may be justified as countermeasures under the law of state responsibility. Countermeasures are measures taken by states which would otherwise violate their legal obligations but which are taken in response to prior violations by other states.[91] There are two interesting questions that would arise when states take countermeasures affecting the rights of investors.

First, as a matter of the law of state responsibility, are states entitled to take countermeasures when they are not the state directly injured by a breach of international law but when that breach is of an obligation *erga omnes*, that is, an obligation owed to the international community of states as a whole?[92] This is a matter that was not settled by the International Law Commission when in 2001 it adopted its Articles on State Responsibility.[93] However, it

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[91] ARS (n 17) Art. 22.

[92] *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* [1970] ICJ Rep 3, paras 33-34. *Case Concerning East Timor (Portugal v Australia)* [1995] ICJ Rep 90, para 29; *Nuclear Weapons* (n 7); and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v Yugoslavia)* (Preliminary Objections) [1996] ICJ Rep 595, para 31.

[93] ARS (n 17) Commentary to Art. 54, para. 6: "As this review demonstrates, the current state of international law on countermeasures taken in the general or collective interest is uncertain. State practice is sparse and involves a limited number of States. At present, there appears to be no clearly recognized entitlement of States

may be argued that there is now sufficient state practice to conclude that so-called third-party countermeasures are permitted in response to breaches of obligations of *erga omnes*.[94]

Second, even assuming that the measure is a valid countermeasure as a matter of international law, the question may arise as to whether a state can plead that it has lawfully taken a countermeasure against a state when responding to a claim brought by an individual. Countermeasures may only be taken against the state that has committed the international wrongful act.[95] It is accepted that countermeasures may *incidentally* affect and cause losses to individuals.[96] However, the ILC seemed to accept that countermeasures may only lawfully affect individuals where those individuals have no right of their own. As such, whether or not countermeasures taken in response to a prior violation of by a state, but which is directed against individuals of that state, can excuse or justify non-performance of obligations under an investment treaty may well depend on the debate whether these treaties confer rights "directly" on individuals or instead those rights belong to the State but are only enforced by individuals.[97] A couple of NAFTA tribunals have held that rights under NAFTA were owed

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referred to in article 48 to take countermeasures in the collective interest. Consequently, it is not appropriate to include in the present articles a provision concerning the question whether other States, identified in article 48, are permitted to take countermeasures in order to induce a responsible State to comply with its obligations. Instead, chapter II includes a saving clause which reserves the position and leaves the resolution of the matter to the further development of international law". For a discussion on standing to take countermeasures against breaches of *erga omnes* obligations, see CJ Tams, *Enforcing Obligations Erga Omnes in International Law* (CUP 2009) 198 et seq.

[94] See, for example, the discussion on the evolution of state practice in light of the events in Libya, Syria, and Ukraine in M Dawidowicz, 'Third-party countermeasures: A progressive development of international law?' (*Questions of International Law,* 30 June 2016) <http://www.qil-qdi.org/third-party-countermeasures-progressive-development-international-law/ > accessed 1 April 2023.

[95] ARS (n 17) Article 49(1). See also *Gabčíkovo Nagymaros Project (Hungary/Slovakia)* (Judgment) [1997] ICJ Rep 7, para 83.

[96] ARS (n 17) Commentary to Art. 49, para 5.

[97] M Paparinskis, 'Investment Treaty Arbitration and the (New) Law of State Responsibility' (2013) 24 EJIL 617.

directly to the private persons, and thus unable to be subject to countermeasures,[98] while one held that, in principle, countermeasures may be relied on vis-à-vis the private party.[99]

If the conclusion were reached that investment treaties in effect precluded states from adopting countermeasures in response to violations of international law, including egregious violations, that conclusion would have pretty serious consequences for the decentralised legal order that is international law. It is a legal order that relies very much on self-help with countermeasures being one of the few peaceful tools for seeking compliance with the law. It may be that answer is not to be found in whether the measure is a countermeasure, but rather in the prior question of whether these sanctions are to be regarded as inconsistent with the state's obligations under the investment treaty in the first place.

V. Conclusion

In this lecture, I sought to set out the range of legal issues that are at play when a dispute between an investor and a host state arises in the context of an armed conflict. The focus on the inquiry was on whether and how the provisions of international investment agreements apply in the context of armed conflicts. As has been seen, analysis of those questions requires examination of some questions of general international law which have not received detailed attention, including, the effect armed conflict on treaties. The topic also demonstrates how it is often impossible to cabin particular areas of international law and how complex problems will often require examination of the relationship between different areas of law – in this

[98] *Corn Products International, Inc v Mexico*, ICSID Case No ARB(AF)/04/1, Decision on Responsibility (15 January 2008); *Cargill, Inc v Mexico*, ICSID Case No ARB(AF)/05/2, Award (18 September 2009).
[99] *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc v Mexico*, ICSID Case No ARB(AF)/04/5, Award (21 November 2007).

case, international investment law and international humanitarian law. In addition, disputes that arise in the armed conflict context will often raise questions about the extent to which tribunals that derive a mandate from international investment treaties are able to decide on questions that are perhaps more politically sensitive, like recognition of governments, or the legality of countermeasures. Finally, investment disputes may operate within a broader framework of "conflict litigation", which results in different dispute settlement bodies deciding on different parts and aspects of a broader conflict between two states.[100] Investment claims may even be used by the investors' home state as another tool in its "fighting kit". As has been reported, for example, Ukraine appears to have encouraged its investors to bring claims against Russia.[101] This type of litigation raises interesting but also difficult questions about procedural and more systemic issues and the role of international courts as actors in the international system.

[100] In procedural terms this will lead to the 'disaggregation' of the dispute. See L Hill-Cawthorne, 'International Litigation and the Disaggregation of Disputes: Ukraine/Russia as a Case Study' (2019) 68 ICLQ 779.
[101] See Rees-Evans (n 50).