PART I

International investment and armed conflict

1

The protection of investments in armed conflicts

CHRISTOPH SCHREUER

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

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

A Treaties in times of armed conflict

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

[1] Libya is not a party to the Energy Charter Treaty, signed 17 December 1994, entered into force 16 April 1998, OJ L380/24.
[2] UN ILC Draft Articles on the Effects of Armed Conflict on Treaties, A/65/10.

The Draft Articles define 'armed conflict' as armed force between states or protracted armed force between government authorities and organised armed groups.[3] Therefore, international as well as non-international armed conflicts are covered. As far as non-international armed conflicts are concerned, these would have to be more than merely sporadic.

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

Termination or suspension of a treaty in times of armed conflict would be subject to certain formalities. An intention by a state party to terminate or suspend requires notification; a state party thus affected may object. This procedure would lead to the obligation to resort to dispute settlement. The rights and obligations of states with regard to dispute settlement, as far as they have remained applicable, despite the existence of the armed conflict, under other provision of the Draft Articles, remain unaffected

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

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

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

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

by a notification of termination or suspension.[7] Even where suspension or termination takes place the treaty may contain clauses that are separable.[8] Obligations existing under international law independently of a treaty are unaffected by a termination or suspension as a consequence of an armed conflict.[9] Therefore, as a rule, treaties dealing with the protection of foreign investments, such as BITs, continue to apply after the outbreak of armed hostilities. This is particularly so where these treaties address the consequences of armed conflicts.

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

BITs may contain several types of clauses dealing with violent situations, including armed conflict. These treaty provisions safeguard the interests of investors even in situations of armed conflict. Some of these treaty clauses have been interpreted and applied by investment tribunals. The most common provision of this kind that may be found in most BITs is a clause guaranteeing full protection and security (section B, below). In addition, some BITs contain clauses that specifically address wars and other armed conflicts. One type of these 'war clauses' merely promises non-discrimination in the treatment of losses incurred through armed conflict and similar situations (section C.1, below). The other type goes further and

[7] Draft Article 8: 'Notification of intention to terminate, withdraw from or suspend the operation of a treaty: 1. A State engaged in armed conflict intending to terminate or withdraw from a treaty to which it is a party, or to suspend the operation of that treaty, shall notify the other State party or States parties to the treaty, or its depositary, of that intention … 3. Nothing in the preceding paragraphs shall affect the right of a party to object, in accordance with the terms of the treaty or applicable rules of international law, to termination, withdrawal from or suspension of the operation of the treaty … 4. If an objection has been raised within the prescribed time limit, the States parties concerned shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations. 5. Nothing in the preceding paragraphs shall affect the rights or obligations of States with regard to the settlement of disputes insofar as they have remained applicable, pursuant to draft articles 4 to 7, despite the incidence of an armed conflict.'

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

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

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

B Full protection and security

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

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

1 *Violence by state organs*

Clauses guaranteeing protection and security have been applied in a number of cases. In some of these cases the violent action came from

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

[11] Article 1105(1) North American Free Trade Agreement, adopted 17 December 1992, entered into force 1 January 1994, 32 *ILM* 289 (1993).

[12] For the historical origin of the concept, see A. Newcombe and L. Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Alphen aan den Rijn: Kluwer Law, 2009), pp. 307–8; J. D. Salacuse, *The Law of Investment Treaties* (Oxford University Press, 2010), pp. 208–10.

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

[14] *PSEG* v. *Turkey*, Award, 19 January 2007, at paras 257–9; *Enron* v. *Argentina*, Award, 22 May 2007, paras 284–7; *BG Group* v. *Argentina*, Award, 24 December 2007, paras 323–8; *Sempra* v. *Argentina*, Award, 28 September 2007, paras 321–4; *Plama* v. *Bulgaria*, Award, 27 August 2008, para. 180; *Rumeli* v. *Kazakhstan*, Award, 29 July 2008, para. 668; *Saluka Investments BV (The Netherlands)* v. *The Czech Republic*, Partial Award, 17 March 2006, paras 483, 484; *Eastern Sugar* v. *The Czech Republic*, Partial Award, 27 March 2007, para. 203; *Parkerings* v. *Lithuania* , Award, 11 September 2007, para. 355.

[15] For detailed discussion see C. Schreuer, 'Full Protection and Security', *Journal of International Dispute Settlement* 1(1) (2010): 6–10.

state organs. It is clear that the state is responsible for actions perpetrated by its organs.[16] The applicability of a treaty provision on protection and security to direct attacks on the investor's person and property by organs of the host state is beyond doubt. In *Biwater Gauff* v. *Tanzania* the Tribunal said:

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

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

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

[16] See the International Law Commission's Articles on State Responsibility, Article 4: 'Conduct of organs of a State: 1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State. 2. An organ includes any person or entity which has that status in accordance with the internal law of the State.'

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

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

[19] At paras 6.02–6.11.

[20] At para. 6.08.

[21] At para. 6.10.

[22] At para. 6.11.

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

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

2 *Private violence*

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

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

> It is a generally accepted rule of International Law, clearly stated in international arbitral awards and in the writings of the doctrinal authorities, that:
>
> (i) A State on whose territory an insurrection occurs is not responsible for loss or damage sustained by foreign investors unless it can be shown that the Government of that state failed to provide the standard of protection required, either by treaty, or under general customary law, as the case may be; and

[23] *Toto Costruzioni* v. *Lebanon*, Decision on Jurisdiction, 11 September 2009. In its Award of 17 June 2012, the Tribunal decided that Lebanon had not failed to comply with the full protection and security standard.
[24] At paras 110–18. [25] *AAPL* v. *Sri Lanka*, Award, 21 June 1990, 4 *ICSID Reports* 246.
[26] At para. 85(D).

> (ii) Failure to provide the standard or protection required entails the state's international responsibility for losses suffered, regardless of whether the damages occurred during an insurgents' offensive act or resulting from governmental counter-insurgency activities.[27]

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

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

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

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

[27] At para. 72.
[28] At paras 78–86. The Tribunal interpreted the requirement of due diligence as a reference to the minimum standard under customary international law. At paras 67–9.
[29] At para. 85(B).
[30] See also *Elettronica Sicula SpA (ELSI)* (*United States of America* v. *Italy*), *ICJ Reports* 1989, p. 15, paras 105–8; *Técnicas Medioambientales Tecmed SA* v. *The United Mexican States*, Award, 29 May 2003, 43 *ILM* 133 (2004), at paras 175–7; *Noble Ventures Inc.* v. *Romania*, Award, 12 October 2005, paras 164–6; *Pantechniki* v. *Albania*, Award, 30 July 2009, paras 71–84.
[31] *Wena Hotels Ltd* v. *Arab Republic of Egypt*, Award, 8 December 2000, 41 *ILM* 896 (2002).
[32] At para. 84.

> 84. The Tribunal agrees with Wena that Egypt violated its obligation under Article 2(2) of the IPPA to accord Wena's investment 'fair and equitable treatment' and 'full protection and security'. Although it is not clear that Egyptian officials other than officials of EHC directly participated in the April 1, 1991 seizures, there is substantial evidence that Egypt was aware of EHC's intentions to seize the hotels and took no actions to prevent EHC from doing so. Moreover, once the seizures occurred, both the police and the Ministry of Tourism took no immediate action to restore the hotels promptly to Wena's control. Finally, Egypt never imposed substantial sanctions on EHC or its senior officials, suggesting Egypt's approval of EHC's actions.

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

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

3 *Standard of liability*

It is generally accepted that the obligation to provide protection and security does not create absolute liability. Rather, the standard is one of 'due diligence', that is, a reasonable degree of vigilance.[35] In *AAPL* v. *Sri*

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

[34] At para. 172.

[35] *Elettronica Sicula SpA (ELSI)* (*United States of America* v. *Italy*), *ICJ Reports* 1989, p. 15, para. 108. See also *Técnicas Medioambientales Tecmed SA* v. *The United Mexican States*, Award, 29 May 2003, 43 *ILM* 133 (2004), at para. 177; *Noble Ventures Inc.* v. *Romania*, Award, 12 October 2005, para. 164; *Wena Hotels Ltd* v. *Arab Republic of Egypt*, Award, 8 December 2000, 6 *ICSID Reports* 68, para. 84; *Saluka Investments BV (The Netherlands)* v. *The Czech Republic*, Partial Award, 17 March 2006, para. 484; *MCI* v. *Ecuador*, Award, 31