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**War Clauses In International Investment
Law: A Need For Clarity**

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War Clauses In International Investment Law: A Need For Clarity

Léa Deroche *

What is a war clause ? Is it an effective provision? Can it be used in potential COVID-19 related cases ? After a historical study of the different war clauses, this paper analyses the confusion surrounding this notion in investment arbitration awards. Noting the particularity of cases of armed conflict, this article argues then for the interpretation of investment treaty provisions using concepts developed in international humanitarian law to allow for greater legitimacy of arbitral decisions dealing with the consequences of armed conflict.

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Qu'est-ce qu'une clause de guerre ? Est-ce une disposition efficace pour préserver les droits des investisseurs, notamment dans d'éventuels litiges liés aux aides versées pendant la pandémie ? Après une étude historique des différentes clauses de guerre, cet article analyse la confusion qui entoure ces clauses dans les sentences arbitrales d'investissement et plaide pour une interprétation cohérente de ces dispositions avec les principes du droit international humanitaire.

Introduction

War clauses have always been part of Bilateral Investment Treaty (“BIT”) provisions. The first BIT signed in 1959 between Germany and Pakistan included in its article 3 (3) a non-discriminatory war clause. The use of a similar concept can be traced back to Treaties of Friendship, Commerce, and Navigation (“FCN”). These ancestors of BITs provided for most favored nation (“MFN”) clauses and “generous treatment of neutral shipping in time of war.”¹ The aim was to privilege trade and investment even in wartime and to ensure the supply of food and non-military goods to civilian populations. Nowadays, the rationale behind these clauses is to provide additional protection to investors in times of war, meaning a compensation for losses in times of war.

Since the obligations of BITs are not considered to be suspended in times of war,² this type of provision seems to be a relevant provision to support a claim in the current hectic geopolitical context.³ Even though International Humanitarian Law (“IHL”) generally forbids the destruction of civil property, foreign investments can be turned into military objectives, allowing the host state to legally destroy them in a military attack.⁴ At the same time, investment treaties provide for additional protections in times of war and civil strife through the obligation of full protection and security (“FPS”) and war clauses. Although IHL permits the destruction of property, investment treaties require states to protect that property with – arguably – no exception for civil strife or war. To add to the confusion created by the normative conflict previously described,⁵ the war clauses also called “compensation for losses” clauses, have been recurrently misinterpreted in

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1 Andreas Paulus, “Treaties of Friendship, Commerce and Navigation” in Rüdiger Wolfrum, ed, *Max Planck Encyclopedia of Public International Law*, online ed (Oxford: Oxford University Press, 2011).

2 See “Draft articles on the effects of armed conflicts on treaties” (UN Doc A/66/10) in *Yearbook of the International Law Commission 2011*, vol 2, part 2 (New York: UN, 2011) at 107 [Draft articles]. See also Christoph Schreuer, “War and Peace in International Investment Law” in Katia Fach Gómez, Anastasios Gourgourinis & Catharine Titi, eds, *International Investment Law and the Law of Armed Conflict*, European Yearbook of International Economic Law (Cham: Springer, 2019) at 6–8.

3 See Annyssa Bellal, “The war report, armed conflicts in 2018” (April 2019) at 31, online (PDF): *The Geneva Academy of International Humanitarian Law and Human Rights* <www.geneva-academy.ch/joomlatools-files/docman-files/The%20War%20Report%202018.pdf>.

4 See Jean-Marie Henckaerts & Louise Doswald-Beck, eds, *Customary International Humanitarian Law* (Cambridge: International Committee of the Red Cross and Cambridge University Press, 2005) vol 1 at rules 7, 11, 14–15, 22.

5 See Freya Baetens, “When international rules interact: International investment law and the law of armed conflict” (7 April 2011), online (blog): *International Institute for Sustainable Development* <www.iisd.org/itn/fr/2011/04/07/when-international-rules-interact-international-investment-law-and-the-law-of-armed-conflict/>.

investment arbitration awards.⁶ These awards have conflated the war clauses with the FPS standard or mixed up the characteristics of the different types of war clauses, leading to an overcompensation⁷ in some cases and to an under-compensation of the investor in others.⁸

This article assumes a doctrinal legal research approach to explore war clauses, their origin and their interaction with humanitarian law in international investment arbitration (“IIA”). This research addresses public international law (“PIL”), including customary international law (“CIL”), International Investment Law (“IIL”) and related decisions, as well as the analysis of legal studies.

The purpose of this paper is to provide an overview of war clauses in investment arbitration awards (**I.**) and suggest solutions to enhance clarity in IIL in the context of armed conflicts (**II.**).

Section I.A first sets out the typology of the various war clauses present in BITs and discusses the particularities of the three types of clauses. Subsequently, Section I.B addresses the misapplication of war clauses in various arbitration awards leading to either overcompensation or under-compensation of the investor.

Section II.A aims to clarify the different interactions between war clauses, other treaty standards, and exclusion clauses. Finally, Section II.B proposes the use of systemic integration to end the inconsistency between IIL awards and IHL, the latter being a body of rules known to all regularly constituted armies.

1. Analysis of war clauses in investment arbitration

To conduct this analysis, this section will first study the genesis and the classification of war clauses (**A.**) before focusing on their interpretation by arbitral tribunals (**B.**).

A. Typology of war clauses

Traditionally, according to the typology suggested by Christoph Schreuer, war clauses can be separated into two categories, non-discriminatory war clauses (**1.**) and extended war clauses (**2.**).⁹ Recently, Suzanne Spears and

6 See Suzanne Spears & Maria Fogdestam Agius, “Protection of Investment in War-Torn states in International investment Law and the Law of Armed Conflict” in Katia Fach Gómez, Anastasios Gourgourinis & Catharine Titi, eds, *International Investment Law and the Law of Armed Conflict*, European Yearbook of International Economic Law (Cham: Springer, 2019) at 284.

7 See e.g. *Asian Agricultural Products Ltd (AAPL) v Republic of Sri Lanka*, ICSID Case No Arb/87/3, Final Award, (27 June 1990) at para 70 [AAPL].

8 See *LESI SpA and Astaldi SpA v Republic of Algeria*, ICSID Case No Arb/05/3, Award, (12 November 2008) at para 177 [LESI].

9 See Christoph Schreuer, “The Protection of Investments in Armed Conflicts” in Freya Baetens, ed, *Investment Law within International Law* (Cambridge: Cambridge University Press, 2013) at 12–16.

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Maria Fogdestam Agius in “Protection of Investments in War-Torn states: A Practitioner’s Perspective on War Clauses in Bilateral Investment Treaties” distinguished a third category: strict liability war clauses (3).¹⁰

1. *Non-discriminatory war clauses*

The non-discriminatory war clause is the most frequent type of war clause provided in BITs.¹¹ It simply establishes two kinds of relative standard of treatment,¹² MFN treatment, and national treatment (“NT”) with regard to compensation for losses occurred in armed conflicts and similar factual circumstances such as riots.¹³ Some war clauses only provide for NT¹⁴ or for MFN.¹⁵

The non-discriminatory clause was already present in the Bases of Discussion drawn up in 1929 by the Preparatory Committee of the Conference for the Codification of International Law.¹⁶

Basis of discussion No. 22 (a)

Nevertheless, a state is responsible for damage caused to the person or property of a foreigner by persons taking part in an insurrection or riot or by mob violence if it failed to use such diligence as was due in the circumstances in preventing the damage and punishing its authors.

Basis of discussion No. 22 (b)

A state must accord to foreigners to whom damage has been caused by persons taking part in an insurrection or riot or by mob violence the same indemnities as it accords to its own nationals in similar circumstances.

¹⁰ Spears & Fogdestam Agius, *supra* note 6 at 289.

¹¹ See *ibid.*

¹² See Schreuer, *supra* note 9 at 12.

¹³ See Sebastián Mantilla Blanco, *Full Protection and Security in International Investment Law* (online ed: Springer, 2019) at 603.

¹⁴ See *Colombia Model BIT* (2008), art 7.

¹⁵ See *Agreement between the Government of the Republic of Belarus and the Government of the Syrian Arab Republic on the Reciprocal Promotion and Protection of Investments*, the Government of the Republic of Belarus and the Government of the Syrian Arab Republic, 11 March 1998, art 4 (entered into force 1 October 1998); *Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the Republic of Yemen on the Reciprocal Promotion and Protection of Investment*, the Government of the Federal Democratic Republic of Ethiopia and the Government of the Republic of Yemen, 15 April 1999, art 5 (entered into force 15 April 2000).

¹⁶ “Bases of Discussions for the Conference drawn up by the Preparatory Committee of the conference for the codification of international law” (UN Doc C.75.M.69.1929.V) in *Yearbook of the International Law Commission 1956*, vol 2 (The Hague: UN, 1930) at 223 (UNDOC. A/CN.4/SER.A/1956/Add.I) (Emphasis added) [Bases of Discussion].

While Basis of Discussion n° 22.a can be related to the FPS standard, as it provides for the responsibility of the state in the event that it fails to exercise due diligence to prevent damage, basis 22.b is clearly a non-discriminatory war clause. The scope of this war clause was, however, limited to damage caused by persons taking part in an insurrection or riot or by mob violence.¹⁷ In this initial reflection on the war clauses, the specific attribution of the action causing the damage was determinant and the war clause was linked to the FPS standard contained in the Basis 22.a.

In current versions of the non-discriminatory war clause, the question of the specific responsibility for the losses is irrelevant.¹⁸ This means that there is no need for the investor to prove that the state is responsible for the destruction or damage to the property. The only thing that has to be proven is the treatment accorded to different categories of investors *ex-post*.¹⁹ The tribunal in the *Impregilo* case rightly stated that: “The plain meaning of the provision is that the standards of treatment of the BIT – national and most-favored-nation treatment – have to be applied when a State tries to mitigate the consequences of a situation of war or other emergency.”²⁰ Thus, the clause is only triggered if the state compensates its nationals or other foreign investors²¹ but the state remains free not to compensate.

Article 12 (1) of the Canadian Model BIT (2004) is a typical example of a non-discriminatory war-clause:²²

Article 12

Compensation for losses

Each Party shall accord to investors of another Party, and to covered investments, non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments

¹⁷ See *ibid*.

¹⁸ See Schreuer, *supra* note 9 at 12.

¹⁹ See *ibid*.

²⁰ *Impregilo SpA v Argentine Republic*, ICSID Case No Arb/07/17, Award, (21 June 2011) at para 341 [*Impregilo*].

²¹ See Mantilla Blanco, *supra* note 13 at 604; Jeswald Salacuse, *The Law of Investment Treaties* (Oxford: Oxford University Press, 2015) at 369 .

²² Foreign Affairs and International Trade Canada (DFAIT), “Canada’s FIPA Model,” 20 May 2004, online: <www.dfait-maeci.gc.ca/tna-nac/what_fipa-en.asp#structure> [Canadian FIPA Model]. See also *Agreement between the Federal Republic of Germany and the Socialist People’s Libyan Arab Jamahiriya concerning the encouragement and reciprocal protection of investments*, 15 October 2004, UNTS 2692, art 4.3 (entered into force 14 July 2010, “Investors of either Contracting Party whose investments suffer losses in the territory of the other Contracting Party owing to war or other armed conflict, revolution, a state of national emergency, or revolt, shall be accorded treatment no less favourable by such other Contracting Party than that which the latter Contracting Party accords to its own investors as regards restitution, indemnification, compensation or other valuable consideration. Such payments shall be freely transferable”).

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in its territory owing to armed conflict, civil strife or a natural disaster.

Non-discriminatory war clauses in European BITs such as Article 6.6 of the Kenya-France BIT are slightly different as they offer a choice to the investor:

Les investisseurs de l'une des Parties contractantes dont les investissements sur le territoire de l'autre Partie contractante ont subi des pertes dues à la guerre ou à tout autre conflit armé, état d'urgence national, révolte, insurrection ou émeutes survenus sur le territoire de la Partie contractante en question, bénéficient de la part de cette dernière, en ce qui concerne la restitution, l'indemnisation, la compensation ou autre règlement, d'un traitement non moins favorable que celui accordé par cette Partie contractante à ses propres investisseurs ou à ceux de la nation la plus favorisée, le plus avantageux de ces deux traitements, selon l'investisseur, étant retenu.²³

The scope of the clause is defined in its wording and can encompass riots, civil strife, etc. Such terms, however, are not as precise as they appear and investors may seek to expand their meaning. Tribunals seem, however, reluctant to accept a broad interpretation. In *Consortium RFCC*, the Tribunal held that although article 4(1) of the Treaty refers to an obligation to provide compensation in the event of war, armed conflict, state of emergency, or other similar situations, understood to be analogous to war, armed conflict, or a state of emergency of a political nature, “inclement weather, however exceptional, does not constitute war, armed conflict, or a state of emergency, nor does it present any analogy with such events.”²⁴

One emerging question in the context of COVID-19 is whether a global

²³ *Accord entre le Gouvernement de la République française et le Gouvernement de la République du Kenya sur l'encouragement et la protection réciproques des investissements* 4 December 2007, art 6.6 (entered into force: 26 May 2009) “Investors of one of the Contracting Parties whose investments in the territory of the other Contracting Party have suffered losses due to war or any other armed conflict, national emergency, revolt, insurrection or riot occurring in the territory of the Contracting Party in question shall benefit from the latter, with respect to restitution, compensation, set-off or other settlement, treatment no less favourable than that accorded by that Contracting Party to its own investors or those of the most-favoured-nation, whichever is the more favourable of these two treatments, depending on the investor” [translated by author].

²⁴ *Consortium RFCC v Royaume du Maroc*, ICSID Case No Arb/00/6, Award, (22 December 2003) at para 80: in the original language: les « intempéries, même exceptionnelles, ne constituent ni des guerres, ni des conflits armés ni un état d'urgence et ne présentent point d'analogie avec de tels événements. » [*Consortium RFCC*].

pandemic could fall within the scope of the war clauses. The answer seems to be positive if the clause includes the terms “national emergency” and “similar situations,” but it will be up to the Tribunals to decide. That being said, in the context of a non-discrimination clause, the more serious question is to find out what constitutes treatment and whether the state has compensated national companies placed in the same situation. The question remains unanswered for the time being, but it seems to boil down to a question of evidence as well as political concerns.

The success of the invocation of non-discriminatory clause lies in the nature of the evidence presented to the arbitral tribunal. The claimant has to prove that other investors have been compensated, which can be difficult when compensation is not granted through legislation but through negotiations.²⁵ The claimant must also prove that its situation is similar to that of the investors who have been compensated. The date of the destruction of the investment can play a determining role. Moreover, this provision raises the classical questions related to MFN provisions of what is “treatment” and what is encompassed in the term “losses.” Regarding the “treatment” of investors, it was argued that it could encompass monetary compensation but also offer “to selected investors of renewed investment contracts on favourable terms.”²⁶ Concerning the interpretation of the term “losses,” a piece of information can be found in Article 31 “Damages for Destruction of and Damage to Property” of the 1961 Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens.²⁷ This article provides that the compensation shall include the amount of the fair market value of the property destroyed and if applicable the loss of the use of the property.

2. *Extended war clauses*

The extended war clause provides for remedies in case of requisition and unnecessary destruction of the investor’s property.²⁸ It should be underlined that most extended war clauses contain a non-discriminatory war clause followed by an additional layer of protection to investors when the responsibility of the state for damage can be established.²⁹ Contrary to the non-discriminatory clause, the claimant has to prove that the losses were due to state actions.³⁰ The need for a specific attribution of the damage to the

25 See *BG Group Plc v The Republic of Argentina* (2007) at para 382 (United Nations Commission on International Trade Law) (Arbitrators: Alejandro M. Garro, Albert Jan van den Berg, Guillermo Alguilar Alvarez) [BG Group] “Applying the interpretive principles of Article 31 of the Vienna Convention, this Tribunal concludes that article 4 of the BIT does no more than ensure that the State does not treat the foreign investor less favorably.”

26 Spears & Fogdestam Agius, *supra* note 6 at 291.

27 Louis B Sohn & BB Baxter, “Draft Convention on the International Responsibility of States for Injuries to Alien” (1961) 55:3 AJIL 548 at 582.

28 See Schreuer, *supra* note 9 at 13–14.

29 See *ibid.*

30 *Ibid.*; Mantilla Blanco, *supra* note 13 at 608.

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state in the case of an extended war clause was already present in the basis of discussion n°21 of the Preparatory Committee of the Hague Conference in 1930³¹ which reads as follows:

E. Damages resulting from insurrections, riots or other disturbances

Basis of discussion No. 21

A state is not responsible for damage caused to the person or property of a foreigner by its armed forces or authorities in the suppression of an insurrection, riot or other disturbance.

The state must, however:

(1) Make good damage caused to foreigners by the requisitioning or occupation of their property by its armed forces or authorities;

(2) Make good damage caused to foreigners by destruction of property by its armed forces or authorities, or by their orders, unless such destruction is the direct consequence of combatant acts;

(3) Make good damage caused to foreigners by acts of its armed forces or authorities where such acts manifestly went beyond the requirements of the situation or where its armed forces or authorities behaved in a manner manifestly incompatible with the rules generally observed by civilized states;

(4) Accord to foreigners, to whom damage has been caused by its armed forces or authorities in the suppression of an insurrection, riot or other disturbance, the same indemnities as it accords to its own nationals in similar circumstances.

The 1961 Harvard Draft Convention³² makes a further distinction between the destruction and the taking of foreign property in two articles, both of which are extended war clauses. Concerning the destruction of property the article reads as follows:

Article 9

(Destruction of and Damage to Property)

³¹ Bases of Discussion, *supra* note 16 at 223 [Emphasis added].

³² Sohn & BB, *supra* note 27 at 551–54.

1. Deliberate destruction of or damage to the property of an alien is wrongful, unless it was required by circumstances of urgent necessity not reasonably admitting of any other course of action.

In the explanatory note, the drafters of the Harvard Draft Convention explain that “the destruction of property in actual combat operations during an international conflict or the destruction or damaging of property of an alien in order to interdict its use by the enemy typify legitimate destruction of property in time of war.”³³ The exception of military necessity often contained in current versions of extended war clause is already present in this draft through the words “actual combat operations”³⁴ and “destruction (...) to interdict its use by the enemy.”³⁵ If the destruction or the damage is not seen as required “by circumstances of urgent necessity not reasonably admitting of any other course of action,”³⁶ damages should be awarded. Pursuant to Article 31,³⁷ damages shall include an amount equal to the fair market value of the property prior to the destruction and payment, if appropriate, for the loss of use of the property.

Article 10 of the Harvard Draft Convention, which relates to the taking of foreign property, provides that:³⁸

Article 10

(Taking and Deprivation of Use or Enjoyment of Property)

1. The taking, under the authority of the state, of any property of an alien, or of the use thereof, is wrongful:

(a) if it is not for a public purpose clearly recognized as such by a law of general application in effect at the time of the taking, or

(b) if it is in violation of a treaty.

2. The taking, under the authority of the state, of any property of an alien, or of the use thereof, for a public purpose clearly recognized as such by a law of general application in effect at the time of the taking is wrongful if it is not accompanied by prompt payment of compensation

³³ *Ibid* at 551–52.

³⁴ *Ibid* at 551.

³⁵ *Ibid* at 551–52.

³⁶ *Ibid* at 551.

³⁷ See *ibid* at 582.

³⁸ *Ibid* at 553 [emphasis added].

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in accordance with the highest of the following standards: (...).

5. An uncompensated taking of property of an alien or a deprivation of the use or enjoyment of property of an alien which results from the execution of the tax laws; from a general change in the value of currency; from the action of the competent authorities of the state in the maintenance of public order, health, or morality; or from the valid exercise of belligerent rights; or is otherwise incidental to the normal operation of the laws of the state shall not be considered wrongful, provided:

(a) it is not a clear and discriminatory violation of the law of the state concerned;

(b) it is not the result of a violation of any provision of Articles 6 to 8³⁹ of this Convention;

(c) it is not an unreasonable departure from the principles of justice recognized by the principal legal systems of the world; and

(d) it is not an abuse of the powers specified in this paragraph for the purpose of depriving an alien of his property.

This article states the wrongfulness of the taking of foreign property and the necessity for a prompt compensation unless the taking results from “the valid exercise of belligerent rights.”⁴⁰ One can assume that the “belligerent rights” refer to IHL, which raises the question of when a taking is inconsistent with IHL.⁴¹ Another interesting point to note is that the taking of property during wartime, which encompasses requisitions, is mentioned in the same article as expropriation. This may explain why compensation is always due in the current versions of extended war clauses when it comes to requisition, whereas compensation for destruction is due only if it was not militarily necessary.⁴² Thus, Article 32 of the 1961 Harvard Draft Convention provides that in case of a wrongful taking, the property shall, if possible, be restored to the owner and damages shall be paid for the use thereof.⁴³ If the restitution is not possible, the investor shall be compensated.

A current formulation of an extended war clause provision can be found

³⁹ *Ibid* at 550–52, art 8.

⁴⁰ *Ibid* at 554, art 10.5.

⁴¹ See II-B, below, for more on this topic.

⁴² See Schreuer, *supra* note 9 at 14.

⁴³ See Sohn & BB, *supra* note 27 at 582.

in article 4(2) of the UK Model BIT of 2008:

Without prejudice to paragraph (1) of this Article,⁴⁴ nationals or companies of one Contracting Party who in any of the situations referred to in that paragraph suffer losses in the territory of the other Contracting Party resulting from: (a) requisitioning of their property by its forces or authorities; or (b) destruction of their property by its forces or authorities, which was not caused in combat action or was not required by the necessity of the situation, shall be accorded restitution or adequate compensation. Resulting payments shall be freely transferable.

Such a clause seems difficult to be usefully invoked in the context of COVID-19 since the investor will have to prove either a requisition of his property or the – physical – destruction of his property due to the actions of the state. Furthermore, the impact of a potential “essential security clause” would have to be carefully studied.⁴⁵

3. *Strict liability war clauses*

As far as strict liability war clauses are concerned, such provisions are rare. Article 4 (1) of the Syria-Italy BIT is one of the few examples:

“Should investors of either Contracting Parties [sic] 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 made freely transferable as provided for in article 8 of this Agreement. The investors concerned shall receive the same treatment as the nationals of the other Contracting Party and, at all events, no less favourable treatment than investors of Third states.”

Italy seems to be the only country to provide for this kind of war clause⁴⁶ but it is worth being mentioned as it seems possible to import a more favorable war clause via an MFN clause. To import a provision through an MFN clause,

⁴⁴ *UK Model BIT*, art 4.1 (provides for non-discriminatory war clause).

⁴⁵ See I II.A.2, below, for more on this topic.

⁴⁶ See Spears & Fogdestam Agius, *supra* note 6 at 297.

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the imported clause and the clause deemed to be replaced have to belong to the same subject category.⁴⁷ The extended war clause and the strict liability war clause both provide for an absolute obligation – the compensation of the investor - and the latter seems *a priori* more favorable than the former. Thus, the importation of a strict liability war clause to replace an extended war clause seems to fulfill the *ejusdem generis* principle.⁴⁸ However, the question remains concerning the non-discriminatory clause. The non-discriminatory clause only provides for a relative standard of treatment triggered by the action of the state to compensate, even when no compensation is due under international obligations.⁴⁹ The non-discriminatory war clause being itself an MFN clause, one could wonder if it can be replaced by a clause providing for a substantive obligation, like a strict liability clause. Some authors seem to think that it could be possible.⁵⁰

This analysis of the genesis and the typology of war clauses is useful to understand why arbitral tribunals are said to have misapplied them, and it shows the close link between war clauses and IHL.

B. Misapplications of war clauses in investment arbitration

Although the primary purpose of war clauses has been to reassure investors in times of war,⁵¹ various arbitration decisions have caused confusion.⁵² Some authors have even wondered what the point of such a clause was.⁵³ Others went so far as to say that these clauses, far from offering additional protections to investors, were the only provisions applicable in the event of war, thus depriving investors of the other protections provided for in the BIT.⁵⁴

The present section will deal with the few key investment arbitration cases related to war clauses in armed conflicts and civil strife namely: *Asian Agricultural Products Ltd (“AAPL”) v Republic of Sri Lanka*, *American Manufacturing & Trading, Inc (“AMT”) v Republic of Zaire* and *LESI SpA and Astaldi SpA (“LESI”) v Republic of Algeria*. The purpose is to highlight inconsistencies in decisions with the ultimate aim of clarifying the use of war clauses in IIL. Cases are divided between those that led to an overcompensation of the claimant (1.) and those that led to an under-

47 See UNCTAD, “Most-Favored Nation Treatment” in *UNCTAD Series on International Investment Agreements II* (New York and Geneva: UN, 2010) at 24–25.

48 See *ibid.*

49 See Salacuse, *supra* note 21 at 369.

50 See Spears & Fogdestam Agius, *supra* note 6 at 298–99.

51 See Spears & Fogdestam Agius, *supra* note 6 at 288.

52 See *ibid* at 300–305.

53 See Salacuse, *supra* note 21 at 369.

54 See *LESI*, *supra* note 8 at para 177.

compensation (2.).

1. *Overcompensation of the investor*

a. *AAPL v Republic of Sri Lanka (1990)*⁵⁵

The AAPL case is symptomatic of the difficulty for arbitral tribunals to apply war clauses. It should be noted that these are early cases and that the humanitarian law applicable to internal conflicts was not as developed as it is today.⁵⁶

AAPL, a Hong Kong company, held shares in a Sri Lankan state-owned shrimp production and export company, Serendib Seafoods Ltd (“Serendib”). Serendib’s main facility was a shrimp farm established in 1986. Shortly afterward the area became the scene of the Tamil insurgency and in January 1987 the farm was destroyed in an attack by Sri Lankan forces. AAPL started arbitral proceedings the same year against Sri Lanka on the ground of the violation of the FPS obligation⁵⁷ and alternatively on its right to compensation for losses⁵⁸ occurred during war and civil disturbance, as provided for in the UK-Sri Lanka BIT.⁵⁹ Article 4 of the BIT contains a non-discriminatory war clause (article 4.1) and an extended war clause (article 4.2).

First, the tribunal correctly stated that to obtain a remedy under the provisions of the extended war clause, the claimant has to prove that government forces caused the destruction.⁶⁰ But then, the tribunal conflated the non-discriminatory war clause with the due diligence standard provided in the FPS clause.⁶¹ Yet, the two provisions are triggered differently. The non-discriminatory war clause only intervenes if the state decides to compensate investors for losses occurred during armed conflicts and civil disturbance. The FPS clause aims to protect foreign investments from state and private violence.⁶² The consequence of this conflation is that when the

⁵⁵ *AAPL*, *supra* note 7 at paras 65–67.

⁵⁶ See e.g. *Prosecutor v. Dusko Tadić*, IT-94-1-T, Opinion and Judgment (7 May 1997) (International Criminal Tribunal for the former Yugoslavia), online: *ICTY* <www.icty.org/en/case/tadic> [*Tadic*].

⁵⁷ See *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Democratic Socialist Republic of Sri Lanka for the Promotion and Protection of Investments*, United Kingdom of Great Britain and Northern Ireland and the Government of the Democratic Socialist Republic of Sri Lanka, 13 February 1980, art 2(2) (entered into force 18 December 1980).

⁵⁸ See *ibid*, art 4.1.

⁵⁹ See *AAPL*, *supra* note 7 at paras 7–9.

⁶⁰ See *ibid* at paras 58–60.

⁶¹ See *ibid* at para 70.

⁶² See Schreuer, *supra* note 9 at 6.

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tribunal analyzed the non-discriminatory war clause, it decided that the clause was only triggered by the presence of “*losses suffered*”⁶³ and not by a compensation of others investors since the latter is obligatorily due because of the violation of the FPS standard.⁶⁴ Yet, as seen previously, in order to successfully invoke a non-discriminatory clause, the claimant has to prove that other investors were granted compensation.⁶⁵ The tribunal was also criticized for having second-guessed the military necessity of the destruction using the same standard as in civil disturbance.⁶⁶

In this confusion, the claimant argued that, because of the war clause, the Sri Lanka-UK BIT was less favorable than Sri Lanka-Switzerland BIT which does not contain such a clause.⁶⁷ AAPL postulated that without a war clause, the FPS standard imposes strict liability on the state, which is false. The tribunal rightly dismissed the argument.⁶⁸

*b. AMT v Republic of Zaire (1997)*⁶⁹

AMT, incorporated in Delaware, held 94% of the shares of a Zairian company, Société Industrielle Zairoise (“SINZA”), which specializes in the production and sale of automotive batteries and the import and resale of goods.⁷⁰ In 1991, the Zairian armed forces destroyed SINZA’s industrial complex and looted SINZA’s commercial complex and stores. The commercial complex definitively closed down after further destruction in 1993. AMT filed a request for arbitration against Zaire for breach of obligations under the US-Zaire BIT.⁷¹ The tribunal found a violation by Zaire of the FPS clause and the war clause.⁷²

In this case, the war clause at stake was a non-discriminatory war clause⁷³ completed with an extended war clause.⁷⁴ When analyzing the non-discriminatory part of the clause, the tribunal considered that it reinforced

⁶³ AAPL, *supra* note 7 at para 65.

⁶⁴ See *ibid* at paras 66–67.

⁶⁵ See I-A above for more on this topic.

⁶⁶ See Ofilio Mayorga, “Arbitrating War: Military Necessity as a Defense to the Breach of Investment Treaty Obligations” (2013) at 1, online: *Harvard Program on Humanitarian Policy and Conflict Research* <[www.hpcrresearch.org/sites/default/files/publications/081213%20ARBITRATING%20WAR%20\(final\).pdf](http://www.hpcrresearch.org/sites/default/files/publications/081213%20ARBITRATING%20WAR%20(final).pdf)>.

⁶⁷ See AAPL, *supra* note 7 at para 26.

⁶⁸ See *ibid* at para 54.

⁶⁹ *American Manufacturing & Trading, Inc (AMT) v Republic of Zaire* (1997), 36 ILM 1534 (International Centre for Settlement of Investment Disputes) (Arbitrators: Sompong Sucharitkul, Heribert Golsong, Kéba Mbaye) [AMT].

⁷⁰ See AMT, *ibid* at para 1.01.

⁷¹ See *ibid* at para 1.05.

⁷² See *ibid* at paras 6.11, 6.19.

⁷³ See *Treaty between the United States of America and the Republic of Zaire Concerning the Reciprocal Encouragement and Protection of Investment*, the United States of America and the Republic of Zaire, 3 August 1984, art 4(1) (entered into force 28 July 1989).

⁷⁴ See *ibid.*, art 4.2.

the FPS clause provided for in Article 2 of the BIT.⁷⁵ In the tribunal's view, the war clause claim was dependent upon the FPS claim. As previously seen,⁷⁶ a non-discriminatory war clause is not dependent upon a FPS claim as it only provides for a relative standard of treatment triggered by the action of the state to compensate, even when no compensation is due. The conflation made by the tribunal between the FPS clause and the war clause led the tribunal, in analyzing the FPS clause, to reject the argument that, in the absence of compensation given to the other investors, Zaire was not required to compensate the claimant. However, as demonstrated above, the non-discriminatory part of the war clause is only triggered if other investors have been compensated.⁷⁷ The reasoning is different for Article IV.2, where the demonstration of a requisitioning of property made by the host State or of a destruction of property caused by the host State not in combat actions makes it possible to obtain compensation. In these circumstances, it must be shown that the damage was caused by the host state, which was not proved in the AMT case.⁷⁸

2. *Under-compensation of the investor: LESI v Republic of Algeria (2008)*⁷⁹

LESI and ASTALI, two Italian companies, entered in 1993 into a contractual relationship with the National Dams Agency ("NAD") for the construction of a hydraulic dam. Due to the civil war, the construction encountered difficulties and, after 10 years of delay, an amendment was signed. However, the African Development Bank, which financed the project, refused to give the required authorization to continue the project. The NAD terminated the contract and the consortium, created for the project, filed a first request for arbitration for violation of the provisions of the Algerian-Italian BIT.⁸⁰ The tribunal held that it did not have jurisdiction, as the consortium was not the investor and invited the Italian founding companies of the consortium to file a new request for arbitration.⁸¹ In 2008, the tribunal dismissed all claims.⁸²

The tribunal used the *lex specialis - lex generalis* principle based on the maxim *lex specialis derogat legi generali*. As a consequence, the tribunal held that the application of the war clause excluded the application of a more general obligation, the FPS standard.⁸³ This reasoning transforms an additional protection for investors in wartime into an exception clause.

⁷⁵ See *AMT*, *supra* note 69 at para 6.14.

⁷⁶ See I-A above for more on this topic.

⁷⁷ See *AMT*, *supra* note 69 at para 6.14.

⁷⁸ See *AMT*, *supra* note 69 at para 6.13.

⁷⁹ *LESI*, *supra* note 8.

⁸⁰ See *ibid* at paras 3–55.

⁸¹ See *ibid* at para 60.

⁸² See *ibid* at para 188.

⁸³ See *ibid* at para 177.

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This reasoning stands in opposition to the conflation traditionally made by tribunals between the FPS standard and the non-discriminatory war clause. However, it goes too far in asserting the character of an exception clause, since the FPS clause, which is an obligation of due diligence, does not prevent the state from deciding to compensate the affected investors.⁸⁴

This brief overview of some arbitral cases dealing with war clauses in armed conflicts shows the need for a clear structuring of claims under the war clauses provisions.

II. Suggestions to enhance the clarity of IIL in armed conflict-related cases

First, there is a need for clarity concerning the relationships between war clauses, other treaty clauses and customary international exceptions (A.). Second, the IIL should be nurtured, in the interpretation of investment cases dealing with armed conflicts, with principles developed in IHL (B.).

A. The complementary nature of war clauses

As previously seen, some arbitral tribunals have conflated FPS provisions with war clauses.⁸⁵ These misinterpretations created unnecessary confusion. Yet, war clauses are complementary to the FPS clause (1.) and provide for robust protection against defenses and exceptions (2.).

1. Complementary to the FPS standard

The FPS clause aims to protect foreign investments from state and private violence.⁸⁶ A key aspect of this standard is the prevention of damage to investor property. The state shall spare foreign investments from its violence and protect them from violent actions by private parties.⁸⁷ Thus, the state has a positive duty to exercise due diligence in the protection of foreign investments.⁸⁸ In the event of a breach of this obligation, the investor is entitled to obtain damages.

a) Non-discriminatory war clauses and FPS standard

Non-discriminatory war clauses are additional to FPS provisions.⁸⁹ They cannot be considered as *lex specialis* to the FPS standard as the aim of the provision is not the same.⁹⁰ The tribunal in *EDF v Argentina*⁹¹ correctly stated

84 See Mantilla Blanco, *supra* note 13 at 197–98; See II-A-1-a below for more on this topic.

85 See I-B above for more on this topic.

86 See Schreuer, *supra* note 9 at 6.

87 See Schreuer, *supra* note 9 at 20.

88 See Mantilla Blanco, *supra* note 13 at 197–98.

89 See *ibid* at 604–605.

90 See Spears & Fogdestam Agius, *supra* note 6 at 301–305.

91 *EDF International SA, Saur International SA and Leon Participaciones Argentinas SA v Ar-*

that the non-discriminatory war clause⁹² “serves as a non-discrimination provision, not as a shield against host state liability for treaty violation.”⁹³

States cannot use this clause to escape their treaty obligations such as the prohibition of illegal expropriation, or the violation of fair and equitable treatment, or the violation of the FPS standard.⁹⁴

Thus, war clauses create a separate duty: “if the State accords measures to protect its own investors or investors of a third party to compensate losses from war or civil disturbances, such treatment must be extended to the investor protected by the BIT.”⁹⁵ More precisely, non-discriminatory war clauses provide for non-discriminatory treatment of the investor at the stage of compensation. They even cover cases where there is no breach of international obligations, but the host state still wants to compensate investors for the damage that occurred.⁹⁶ This position was supported by the tribunal in the *Total v Argentina* case, where the war clause was described as “granting to the investments [...] an additional guarantee in respect of situations in which the host state, even if not internationally obliged to do so, has provided for compensation for the losses suffered due to certain events to its own nationals or investors of third states.”⁹⁷ Consequently, war clauses are an autonomous cause of action. They do not rely on FPS obligations and can even succeed where an FPS claim will not. The tribunal in the *El Paso* case⁹⁸ held that “[t]he plain meaning of the provision is that the standards of treatment of the BIT – national treatment and most favored nation treatment – have to be applied when a state tries to mitigate the consequences of war or

gentine Republic, ICSID Case No Arb/03/23, Award, (11 June 2012) [EDF].

92 See *Agreement on the reciprocal promotion and protection of investments*, Government of France and Argentina, 3 July 1991, art 5(3) (entered into force 3 March 1993).

93 EDF, *supra* note 91 at para 1157.

94 See *Bernardus Henricus Funnekotter and others v Republic of Zimbabwe*, ICSID Case No Arb/05/6, Award, (22 April 2009) at para 104 [Bernadus]. *Enron Corporation and Ponderosa Assets LP v Argentine Republic*, ICSID Case No Arb/01/3, Award, (22 May 2007) at paras 320–21 [Enron]; *Enron Corporation and Ponderosa Assets LP v Argentine Republic*, ICSID Case No Arb/01/3, Decision on Annulment, (30 July 2010) at paras 396–98 (refusing to annul the Award on this ground).

95 *Cengiz İnşaat Sanayi v Ticaret AŞ v The State of Libya*, ICC Case No 21537, 2018, Award, at para 370 [Cengiz].

96 Michael Schmid, “Switzerland” in Chester Brown, ed, *Commentaries on Selected Model Investment Treaties* (Oxford: Oxford University Press, 2013) at 651, 678; Walid Ben Hamida, “Investment Treaties and Democratic Transition: Does Investment Law Authorize Not to Honor Contracts Concluded with Undemocratic Regimes?” in Stephan Schill, Christian Tams & Rainer Hoffmann, eds, *International Investment Law and Development: Bridging the Gap* (Northampton: Edward Elgar Publishers, 2015) at 309–310 ; Rudolf Dolzer & Yun-i Kim, “Germany” in Chester Brown, ed, *Commentaries on Selected Model Investment Treaties* (Oxford: Oxford University Press, 2013) at 289, 311.

97 *Total SA v Argentine Republic*, ICSID Case No Arb/04/1, Decision on Liability, (27 December 2010) at para 230 [Total].

98 *El Paso Energy International Co v Argentine Republic*, ICSID Case No Arb/03/15, Award, (31 October 2011) [El Paso].

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another emergency”⁹⁹ and that a war clause “applies to measures adopted in response to a loss, not to measures that cause a loss.”¹⁰⁰

b) Extended war clauses and FPS

The extended war clauses find their origin in the expropriation provisions, as previously stated.¹⁰¹ They require the state to compensate foreign investors in specific situations linked to wartime and civil unrest. They provide an additional layer of protection against state actions in hectic circumstances. This additional layer can be found in the reasoning of the Tribunal in the *Bernhard von Pezold* case where it stated that “article 6(1) recognises compensation for expropriation, while Article 7(1), like Article 4(3) of the German BIT, goes further in recognising the possibility for restitution.”¹⁰²

The state is required to provide compensation only if the destruction or damage to the investor’s property is caused by state action.¹⁰³ Contrary to the FPS standard, there is no positive obligation to prevent the harm but rather to compensate the investor afterward.¹⁰⁴ One can object that in case of a violation of the FPS provision, the state has to mitigate the damage, which can overlap with compensation provided for in extended war clauses. This issue is, however, a matter of quantum and arbitral tribunals usually follow the principle of full compensation of damage stated in the *Chorzow* decision.¹⁰⁵

2. War clauses, essential security clauses and necessity defense

War clauses have to be distinguished from essential security clauses. The latter are designed to deprive the foreign investor of the BIT’s protection in extreme circumstances.¹⁰⁶ Article XI of the US-Argentina BIT, which has been discussed in many cases,¹⁰⁷ is an example of an essential security clause:

This Treaty shall not preclude the application by either

99 *Ibid* at 559.

100 *Ibid*.

101 See I-A, *above*.

102 *Bernhard von Pezold and others v Republic of Zimbabwe*, ICSID Case No Arb/10/15, Award, (28 July 2015) at para 713 [*Bernhard von Pezold*].

103 See I-A *above*.

104 See Mantilla Blanco, *supra* note 13 at 604.

105 *Chorzow Factory Case (Germany v Poland)* (1928), PCIJ (Ser A) No 17 at 21 [*Chorzow*]; see II-B below for more on this topic.

106 See Spears & Fogdestam Agius, *supra* note 6 at 307.

107 See *LG&E v Argentine Republic*, ICSID Case No Arb/02/1, Decision on Liability, (3 October 2006) at 61–80; *Sempra Energy International v Argentine Republic*, ICSID Case No Arb/02/16, Award, (28 September 2007) at paras 364–95 [*Sempra*]; *Continental Casualty Company v Argentine Republic*, ICSID Case No Arb/03/9, Award, (5 September 2008) at 103–04.

Party of measures necessary for the maintenance of public order, the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the Protection of its own essential security interests.”

First, concerning the relationship between the essential security clause and the non-discriminatory clause, the aim of the war clause is to ensure that, in the event that the state compensates investors for damage occurred during wartime or civil unrest, the compensation shall be granted to investors without discrimination. The clause intervenes *ex-post* in the treatment of the investors after the decision of the state to compensate investors, that is to say, even if the mechanism of the essential security clause precludes wrongfulness and allowed the state to not compensate investors: “the plain meaning of the Article is to provide a floor treatment for the investor in the context of the measures adopted in respect of the losses suffered in the emergency, not different from that applied to nationals or other foreign investors. The Article does not derogate from the Treaty rights but rather ensures that any measures directed at offsetting or minimizing losses will be applied in a non-discriminatory manner.”¹⁰⁸

Second, as far as extended war clauses are concerned, most of them already contain an exception for military necessity in relation to the destruction of investments by state forces.¹⁰⁹ This raises the question of the extent to which the concepts of essential security and military necessity overlap in practice and whether a war situation may involve an essential security interest that does not also imply military necessity. The answer to this question may be found in the chronology of the events: the essential security clause precludes wrongfulness of “necessary measures” taken for the maintenance of peace and public order but the extended war clause provides for the restitution of requisitioned investments and for the compensation *ex-post* of an investment whose destruction was “not required by the situation.”

This exception can also be found outside the treaty, in secondary norms such as the circumstances precluding wrongfulness provided in chapter V of the Articles on State Responsibility.¹¹⁰ The exception contained in Article 25 establishes that the act in question must be the only way for a state to

¹⁰⁸ *CMS Gas Transmission Company v Argentine Republic*, ICSID Case No Arb/01/8, Award, (12 May 2005) at para 375 [*CMS Gas*].

¹⁰⁹ See *ibid* at para 292; Schreuer, *supra* note 9 at 14.

¹¹⁰ “Articles on the Responsibility of States for Internationally Wrongful Acts” (UN Doc A/56/10) in *Yearbook of the International Law Commission 2001*, vol 2, part 2 (New York: UN, 2001) [*Articles on State Responsibility*].

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safeguard an essential interest against a grave and imminent peril.¹¹¹ This article is strictly interpreted in customary international law.¹¹² Moreover, this exception cannot be invoked if the state has contributed to the situation of necessity. Cumulatively, Article 25 provides that the applicable investment treaty must not preclude the defense of necessity. Thus, if the treaty provides for a war clause applicable during wartime, it would seem that the treaty drafters did not expect customary-based necessity defense to apply.

Finally, Article 27.b of the Articles on State Responsibility provides that raising such necessity exception is without prejudice to “compensation for any material loss caused by the act in question.”¹¹³ This sentence illustrates the fact that the compensation and the wrongfulness of an act are separate issues. In the presence of a non-discriminatory war clause, a customary-based necessity defense will not impair the war clause; if the state nonetheless decides to compensate the investors, it shall do so without discrimination. If the treaty contains an extended war clause, the clause is also likely to play out as the compensation is due when the destruction was “not required by the situation” that is to say that it was not “the only way for a state to safeguard an essential interest.”¹¹⁴

Scholars seem to agree on the fact that war clauses form an autonomous, complementary and robust cause of action.¹¹⁵ Later cases also confirm a shift in the manner of applying war clauses.¹¹⁶ However, none of these cases were dealing with an armed conflict situation but with civil unrest. This distinction may make a difference in the interpretation of the provisions, in particular with regard to the specificity and corpus of the law applicable to armed conflicts.¹¹⁷

B. Application of IHL in cases related to armed conflicts

The inconsistencies between IIL awards and IHL notions has adverse consequences for the legitimacy of IIL (1.). This issue could be resolved through the use of IHL concepts and principles as an interpretive reference in investment awards, through a “Systemic Integration,” a method of treaty

¹¹¹ See *ibid*, art 25.

¹¹² See *semptra, supra* note 107.

¹¹³ *Articles on State Responsibility, supra* note 110, art 27.b.

¹¹⁴ *Ibid*, art 25.

¹¹⁵ See Spears & Fogdestam Agius, *supra* note 6 at 284; Salacuse, *supra* note 17 at 367–70.

¹¹⁶ See for instance *Total, supra* note 97 at 230; *El Paso supra* note 98 at para 559; *EDF supra* note 91 at para 1157; *Bernardus, supra* note 94 at para 104; *Enron, supra* note 94 at paras 320–21; *Suez, supra* note 94 at paras 270–71; *National Grid, supra* note 94 at 253.

¹¹⁷ See Teerawat Wongkaew, “The Cross-Fertilisation of International Investment Law and International Humanitarian Law: Prospects and Pitfalls” in Katia Fach Gómez, Anastasios Gourgourinis & Catharine Titi, eds, *International Investment Law and the Law of Armed Conflict*, European Yearbook of International Economic Law (online ed: Springer, 2019) at 395.

interpretation provided for in Article 31.3c of the Vienna Convention on the Law of Treaties (2.).

1. *Presentation of IHL and the interactions between IHL and IIL*

The aim of the beginning of this section is to present the principles of IHL that are relevant to IIL (a.), to highlight the dangers of fragmentation between IHL and IIL (b.) before discussing the benefit of systemic integration of IHL in IIL (c.).

IHL governs the principles applicable in international or internal armed conflicts. The term “armed conflict” appears in Article 2 of the Fourth Geneva Convention of 1949.¹¹⁸ Its definition has evolved over the course of the twentieth century to include situations of internal conflict.¹¹⁹ In 2011, the International Law Commission¹²⁰ defined it as a “situation in which there is resort to armed force between states or protracted resort to armed force between governmental authorities and organized armed groups.” IHL is therefore limited to a context: an armed conflict, but it applies to all states as international customary law.¹²¹ Conversely, obligations present in BITs apply between the contracting states, and war clauses are applicable without having to verify that the situation does indeed constitute an armed conflict.

a. The principles of IHL

IHL provides for three principles: the distinction between civilians and combatants, the principle of military necessity, and the principle of proportionality. These rules and principles are known by every regular army in the world.¹²²

According to the distinction principle,¹²³ attacks against civilians and civilian objects are prohibited. On the contrary, it is lawful to use lethal force against combatants and destroy military objectives in accordance with the principles of precaution and proportionality.¹²⁴ It should be noted that civilian and civil objects can lose their protection. Attacks may be indeed lawfully directed against civilians directly participating in hostilities¹²⁵ and

118 See *Geneva Convention Relative to the Protection of Civilian Persons in Times of War*, 12 August 1949, 75 UNTS 287, art 2 [Geneva IV].

119 See *Tadic*, *supra* note 56.

120 Draft Articles, *supra* note 2, art 2.b.

121 *Nota bene*: terrorism, organized crime are not considered as situations of armed conflicts.

122 See Henckaerts & Doswald-Beck, *supra* note 4 at rule 142.

123 See *Protocol Additions to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts*, 8 June 1977, 1125 UNTS 3, art 48 [Protocol I]; Henckaerts & Doswald-Beck, *supra* note 4 at rules 1–3.

124 See Henckaerts & Doswald-Beck, *supra* note 4 at rules 14–24.

125 See Protocol I, *supra* note 123, art 51.3; *Protocol II Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts*, 8 June 1977, 1125 UNTS 609, art 13.3.

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against civilian objects that become military objectives.¹²⁶ The status of opposition fighters and non-state armed groups as combatants or civilians directly participating in hostilities is blurry. Yet, the distinction is essential as combatants are targetable at all time,¹²⁷ whereas civilians are only targetable when participating in the attack. It is the opinion of Michael Schmitt that members of non-state armed groups are combatants.¹²⁸ Similarly, military objectives are defined as objects that contribute to military action. There are three ways¹²⁹ for a civilian object to be considered a military objective: its location (1), its purpose which relates to the possible future use of the object¹³⁰(2) and its use by enemy forces (3).

The destruction of a military objective must confer a military advantage to be justifiable.¹³¹ The attack should comply with the proportionality principle, which aims to limit collateral damage.¹³² Hence, excessive collateral damage is prohibited. Excessiveness is evaluated according to the military advantage anticipated.

Finally, IHL imposes a duty of constant care¹³³ upon combatants while planning the attack.¹³⁴ Combatants should do everything feasible to verify that they are targeting military objectives and suspend the attack if this not the case. They should choose their means and methods of warfare to minimize collateral damage to civilians and civilian objects.¹³⁵ They must give warnings of the attack to the civilian population when possible.¹³⁶

b. The danger of the inconsistencies between IIL and IHL

In the last decades, investment arbitration has surprisingly become an effective way to obtain compensation for the destruction of an investment in an armed conflict.¹³⁷ According to Article 3 of the Hague Convention (1907):¹³⁸ “A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible

126 See Henckaerts & Doswald-Beck, *supra* note 4 at rule 8.

127 Except when “*hors de combat*”; see Henckaerts & Doswald-Beck, *supra* note 4 at rule 47.

128 See Michael N. Schmitt, “The Status of Opposition Fighters in a Non-International Armed Conflict” in Kenneth Watkin and Andrew J Norris, eds, *Non-International Armed Conflict in the Twenty-first century*, International Law Studies, vol 88 (Newport: Naval War College, 2012) at 137.

129 See Protocol I, *supra* note 123, art 52.2.

130 Typical examples are civil airports.

131 See Protocol I, *supra* note 123, art 52.2.

132 See *ibid*, art 57.2.b.

133 See *ibid*, art 57.1.

134 See Henckaerts & Doswald-Beck, *supra* note 4 at rules 15–21.

135 See *ibid* at rules 11–14.

136 See *ibid* at rules 15–24.

137 See Mayorga, *supra* note 66 at 1, 9.

138 *Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land*, 18 October 1907, art 3.

for all acts committed by persons forming part of its armed forces.” Despite this clear mandate, IHL does not provide for direct enforcement of its rights. In investment claims, the investor has individual procedural means at his disposal to obtain compensation for his damage, without “the need to exhaust local remedies or without the intervention of this home state.”¹³⁹ Moreover, IHL focuses more on the protection of the livelihood of the population than on the protection of the economic interests of investors.¹⁴⁰ However, scholars repeatedly point out that the decisions of the arbitral tribunals related to armed conflicts are not consistent with IHL.¹⁴¹

This phenomena can be explained by the “fragmentation of law” where “law-making treaties are tending to develop in a number of historical, functional and regional groups which are separate from each other and whose mutual relationships are in some respects analogous to those of separate systems of municipal law.”¹⁴²

One of most famous examples of inconsistency between IHL and IIL is the AAPL case.¹⁴³ The tribunal, in that case, found that the state of Sri Lanka had violated the obligation of FPS provided in the UK-Sri Lanka BIT. They considered that the due diligence obligation was violated by the armed forces of the state, second-guessing that the attack could have been avoided. Yet, according to Sri Lanka, rebel forces “Tamil tigers” were hidden in the farm. This circumstance made the attack lawful, according to IHL, as it was directed toward a military target by use of the enemy.¹⁴⁴ Thus, the interpretation of the due diligence standard made by the tribunal is not in accordance with the military necessity and the principle of due diligence developed in IHL.¹⁴⁵ This discrepancy harms the predictability of the law and in the same way the legitimacy of arbitral tribunals to judge the consequences of armed conflicts. Ofilio Mayorga submits that the decoupling of humanitarian law and IIL may even lead armed groups to use foreign investments as a “shield” thus increasing the risk of attacks by armed groups on foreign property.¹⁴⁶

This previous example is not the only one, and the interpretation of extended war clause also reveals contradictions between IIL and IHL as some extended war clauses contain the term “military necessity.” According

139 Mayorga, *supra* note 66 at 1.

140 See Lea Brilmeyer & Geoffrey Chepiga, “Ownership or use? Civilian property interests in international humanitarian law” (2008) 49:2 Harv Intl LJ at 427–32.

141 See Mayorga, *supra* note 66 at 1, 9; Spears & Fogdestam Agius, *supra* note 6 at 295; Wong-kaew, *supra* note 117 at 387.

142 Clarence Wilfried Jenks, “The Conflict of Law-Making Treaties” (1953) 30 BYBIL at 403. See also *Study Group on Fragmentation of International Law*, UNGAOR, 55th Sess, Supp 10, UN Doc A/CN.4/L.682 (2002), online: <legal.un.org/ilc/documentation/english/a_cn4_l682.pdf>.

143 See AAPL, *supra* note 7.

144 See Mayorga, *supra* note 66 at 3.

145 See *ibid* at 2-4.

146 See *ibid* at 2.

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to Christoph Schreuer, military necessity is only relevant regarding the destruction of foreign assets but not for requisition which should be compensated in any case.¹⁴⁷ This view is understandable as most of the clauses link military necessity to destruction, not to requisition.¹⁴⁸ Knowing that destruction in case of military necessity allows the state not to compensate the investor, the question remains as to how to interpret military necessity. IIL lacks a robust basis for analyzing the concept of military necessity as only a few cases deal with that notion.¹⁴⁹ Military necessity should be then assessed according to the principles of IHL. The 1961 Harvard Draft Convention and its explanatory note may provide a useful context to support this view. The Draft Convention contains IHL notions, such as the “destruction or damaging of property of an alien in order to interdict its use by the enemy.”¹⁵⁰ This sentence relates indeed to the concepts of military objectives and the military necessity to legitimate the destruction of foreign property in time of war. When reading this provision, one can assume that legitimate destruction precludes wrongfulness and compensation.

Article 53 of the Geneva IV,¹⁵¹ relative to protection of civilian persons in time of war, provides for the prohibition of the destruction of private property in occupied territory in international armed conflicts. The article states that “Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons,(...), is prohibited, except where such destruction is rendered absolutely necessary by military operation.”¹⁵² The wording of this clause, and more specifically the reference to military necessity, is reminiscent of the wording of the war clause. It stresses the need to interpret the military necessity provided in the war clause in accordance with the principles of IHL.

Finally, in IHL, the burden of proof of the necessity of the attack is on the state and not on the claimant, contrary to the burden of proof in international arbitration.¹⁵³ The fact that the burden of proof of the violation of FPS standard and the war clauses lies with the claimant puts him in a difficult position since the claimant does not have the tactical information to prove his allegations. This incongruity has been criticized several times by the doctrine.¹⁵⁴ However, in the event that the state raises a defense based on military necessity the onus shifts to the state.

147 See Schreuer, *supra* note 9 at 14.

148 See UK Model BIT, *supra* note 44.

149 See Wongkaew, *supra* note 117 at 395; AAPL, *supra* note 7; AMT, *supra* note 69; LESI, *supra* note 8.

150 Sohn & Baxter, *supra* note 27.

151 See Geneva IV, *supra* note 118, art 53.

152 *Ibid.*

153 See *Strabag SE v Libya*, ICSID Case No Arb(AF)/15/1, Award, (29 June 2020) at para 270.

154 See Spears & Fogdestam Agius, *supra* note 6 at 295.

c. Perspectives of a systemic integration

Examples discussed above illustrate the danger of the fragmentation of the law, a theoretical debate that can have real consequences in the course of conflicts. Beyond the simple avoidance of a danger, systemic integration is an opportunity to go further and to complete the incomplete provisions of treaties. The phase of damage assessment is particularly interesting in this respect.

Jose Gustavo Prieto Munoz¹⁵⁵ underlines that there are two words in IIL that refer to pecuniary remedies: damages “available in cases involving an illegal act”¹⁵⁶ and compensation available in cases involving a lawful act “to offset any disadvantage.”¹⁵⁷ The two notions are often confused.¹⁵⁸ For this reason, Prieto Munoz used them as synonyms in his argumentation. This will also be the case in the present paper.

Traditionally in IIL, compensation is granted according to the principle of full compensation set out in the Chorzow decision.¹⁵⁹ Before moving on to the analysis of this decision through the prism of the IHL, it is appropriate to focus for a brief moment on the 1961 Harvard Draft Convention.

Article 31 and Article 32 of the 1961 Harvard Draft Convention¹⁶⁰ respectively deal with damages due in case of unlawful destruction of alien property and in case of taking and deprivation of use or enjoyment of property. Both provide for a method of calculation, unfortunately this method is not precise and is subject to interpretation.

Article 31

(Damages for Destruction of and Damage to Property)

1. Damages for destruction of property under Article 9 shall include:

(a) an amount equal to the fair market value of the property prior to the destruction or, if no fair market value exists, the fair value of such property; and

¹⁵⁵ See Jose Gustavor Prieto Munoz, “Awarding Damages in Times of Armed Conflict: An Emerging Standard of ‘Economic Capacity’ for the Host State” in Katia Fach Gómez, Anastasios Gourgourinis & Catharine Titi, eds, *International Investment Law and the Law of Armed Conflict*, European Yearbook of International Economic Law (online ed: Springer, 2019) at 363.

¹⁵⁶ Sergey Ripinsky & Kevin Williams, *Damages in International Investment Law* (London: British Institute of International and Comparative Law, 2008) at 4.

¹⁵⁷ Irmgard Marboe, *Calculation of Compensation and Damages in International Investment Law*, Oxford International Arbitration Series (Oxford: Oxford University Press, 2017) at 7.

¹⁵⁸ See Prieto Munoz, *supra* note 155 at 369.

¹⁵⁹ See *Chorzow*, *supra* note 105.

¹⁶⁰ See Sohn & BB, *supra* note 27 at 582.

(b) payment, if appropriate, for the loss of use of the property.

2. Damages for damage to property under Article 9 shall include:

(a) the difference between the value of the property before the damage and the value of the property in its damaged condition; and

(b) payment, if appropriate, for the loss of use of the property.

Article 32

(Damages for Taking and Deprivation of Use or Enjoyment of Property)

1. In case of the taking of property or of the use thereof under paragraph 1 of Article 10, the property shall, if possible, be restored to the owner and damages shall be paid for the use thereof.

2. Damages for the taking of property or of the use thereof under paragraph 2 of Article 10, or under paragraph 1 of Article 10 if restoration of the property is impossible, shall be equal to the difference between the amount, if any, actually paid for such property or for the use thereof and the amount of compensation required by paragraph 2 of Article 10.

Interestingly, the two articles do not seem to take into account the specific circumstances of wartime. Conversely, these circumstances were recognized in the Dissenting Opinion of the AAPL case¹⁶¹ as preventing the granting of “prompt, adequate and effective” compensation. When granting remedies under war clauses claims, some tribunals have taken into account the knowledge of the situation by the investors prior to the investments to reduce the amount.¹⁶² This reasoning can conflict with specific representations made to the investors, which is a violation of the legitimate expectations of the investors protected in the FPS standard.

Jose Gustavo Prieto Munoz advocates for compensation in accordance with the “economic capacity” of the host state, a notion developed in IHL in

¹⁶¹ See *AAPL*, *supra* note 7 at 595–597 (Dissenting Opinion: Samuel K.B. Asante)

¹⁶² See *AMT*, *supra* note 69 at para 7.14.

the Damage Awards of the Eritrea-Ethiopia Claims Commission (“EECC”).¹⁶³ The EECC has a mandate to “decide through binding arbitration all claims for loss, damage or injury by one Government against the other” in relation to the armed conflict between Eritrea-Ethiopia and the “violations of international humanitarian law, including the 1949 Geneva Conventions, or other violations of international law.”¹⁶⁴ In its decision, the EECC refers to the Chorzow decision,¹⁶⁵ widely used in IIL, which provides for a full compensation “as far as possible.” The Claims Commission also underlines the remedial – and not punitive – function of the compensation. Jose Gustavo Prieto Munoz summarizes the EECC damage award as follows: “compensation must be assessed in light of the economic circumstances of the state concerned, and it must be limited if it reaches an amount that: (1) imposes a ‘crippling burden’ on the population of the state, and (2) prevents the state from fulfilling their human rights obligations as recognized in other international treaties.”¹⁶⁶ The notion “crippling burden” is assessed by comparing compensation with the size of the economy of the state.

This approach seems to be reasonable as the limitation of compensation is only applicable in cases grave enough to “prevent the states from fulfilling their human rights obligations” and it could complement the damages calculation method provided by the 1961 Harvard Draft Convention. It would also enhance the legitimacy of arbitral awards rendered in a post-war context.

2. *The legal basis for a systemic integration of IHL and IIL*

Systemic intergration is a treaty interpretation method that finds its origin in Article 31.3.c of the Vienna Convention on the Law of Treaties (**a.**), it has been since used in an increasingly assertive way in PIL case law (**b.**) but also, despite some reluctance, in IIL awards (**c.**).

a. Article 31.3.c of the Vienna Convention on the Law of Treaties

The idea to integrate IHL in investment arbitration is part of the movement towards the interaction of IIL with customary international law, and against the idea of a self-contained regime.¹⁶⁷ This integration is supported by the rules of interpretation of treaties provided in article 31.3.c of the Vienna

163 Prieto Munoz, *supra* note 155 at 376.

164 *Agreement between the Government of the State of Eritrea and the Government of the Federal Democratic Republic of Ethiopia*, UNGASC, Annex, agenda item 27, UN Doc A/55/686 (2000), art 5.

165 *Eritrea’s Damages Claims between the State of Eritrea and the Federal Democratic Republic of Ethiopia*, Eritrea-Ethiopia Claims Commission, Final Award, (2009) at para 26.

166 Prieto Munoz, *supra* note 155 at 375.

167 See Mayorga, *supra* note 66 at 7.

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Convention on the Law of Treaties (“VCLT”)¹⁶⁸ which states that “relevant rules of international law applicable in the relations between the parties” should be taken into account in the interpretation of a treaty provisions.

On a preliminary basis, it should be noted that: “It is always essential to keep in mind that Article 31(3)(c) is only part of a larger interpretation process, in which the interpreter must first consider the plain meaning of the words in their context and in the light of the object and purpose of the provision.”¹⁶⁹ That being said, the issue remains that the interpretation of military necessity in IIL is inconsistent with the notion developed in IHL. It is a rather recurrent concern in international law since this law is fragmented in different sub-areas that do not interact or only slightly with each other.

As previously demonstrated,¹⁷⁰ the best way to overcome this inconsistency seems to be the systemic integration approach. For a better understanding of this notion, it is useful to refer to the analysis of Campbell McLachlan who contends that systemic integration has a positive and negative aspect:

But, even when it is not made express, the principle of systemic integration will apply, and may be articulated as a presumption with both positive and negative aspects:

(a) negatively that, in entering into treaty obligations, the parties intend not to act inconsistently with generally recognised principles of international law or with previous treaty obligations towards third states; and,

(b) positively that the parties are to taken ‘to refer to general principles of international law for all questions which [the treaty] does not itself resolve in express terms or in a different way.’¹⁷¹

Thus, according to this theory, the introduction in investment treaties of terms and concepts having a particular meaning in humanitarian law should give rise to a presumption of consistency between these similar notions.

b. Systemic integration in international law

The use of systemic integration in PIL can be usefully illustrated by two decisions: the *Advisory Opinion of the ICJ on the Legality of the Threat or Use of Nuclear Weapons* and the *Oil Platforms* case. In the *Advisory Opinion of the ICJ on the Legality of the Threat or Use of Nuclear Weapons*,

168 *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331, art 31.3 (entered into force 27 January 1980).

169 Campbell McLachlan, “The Principle of Systemic Integration and Article 31(3)(C) of the Vienna Convention” (2005) 54:2 ICLQ at 311.

170 See II-B-1 above for more on this topic.

171 McLachlan, *supra* note 169 at 311.

the Court held that:

The Court does not consider that the treaties in question could have intended to deprive a state of the exercise of its right of self-defense under international law because of its obligations to protect the environment. Nonetheless, states must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives.¹⁷²

This decision was a first step towards greater interaction between the different sub-areas of PIL.

The *Oil Platform* case is all the more interesting as it deals with the notions of use of force and necessity, notions similar to those used in war clauses. In this instance, the Court stated that:

under the general rules of treaty interpretation, as reflected in the 1969 Vienna Convention on the Law of Treaties, interpretation must take into account ‘any relevant rules of international law applicable in the relations between the parties’ (Article 31, paragraph 3(c)). The Court cannot accept that Article XX, paragraph 1(d), of the 1955 Treaty was intended to operate wholly independently of the relevant rules of international law on the use of force, so as to be capable of being successfully invoked, even in the limited context of a claim for breach of the Treaty, in relation to an unlawful use of force. The application of the relevant rules of international law relating to this question thus forms an integral part of the task of interpretation entrusted to the Court by... the 1955 Treaty.¹⁷³

Judge Kooijmans in its Separate Opinion, while disagreeing on some part of the decision still came to accept that: “neither Article XX, paragraph 1 (d), itself nor any other provision of the Treaty contains elements which enable the Court to apply the legality test with regard to the question whether measures, taken to protect the essential security interests, are necessary indeed. The Court, therefore, has no choice but to rely for this purpose on the body of general international law.”¹⁷⁴ The same reasoning can be used by analogy to assert that IHL principles should be used to interpret war clauses and BITs provisions such the FPS Standard.

¹⁷² *Legality of the Threat or Use of Nuclear Weapons Case*, Advisory Opinion, [1996] ICJ Rep 1996 at para 30 [*Legality of Nuclear Weapons*].

¹⁷³ *Oil Platforms (Iran v United States of America)* [2003] ICJ Rep 161 at para 41.

¹⁷⁴ *Oil Platforms (Separate Opinion of Judge Kooijmans)* [2003] ICJ Rep 161 at para 48.

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c. Systemic integration in IIL

The effort to address the fragmentation of investment arbitration is not new.¹⁷⁵ In the *Pope Talbot* damages award,¹⁷⁶ the tribunal relied on the fact that the terms in the treaty had “well-recognised meaning in customary international law, to which the parties can therefore be taken to have intended to refer” to interpret the terms “fair and equitable treatment” and “full protection and security.”¹⁷⁷

The concern to limit the fragmentation of law can even be identified in the AAPL decision where the tribunal noted that:

...the BIT is not a self-contained closed legal system limited to provide the substantive material rules of direct applicability, but it has to be envisaged within a wider juridical context in which rules from other sources are integrated through implied incorporation methods, or by direct reference to certain supplementary rules, whether of international law character or of domestic law nature.¹⁷⁸

However, the tribunal did not interpret the due diligence obligation contained in the FPS clause in accordance with the principle of due diligence developed in IHL.¹⁷⁹ If the AAPL tribunal failed to apply the law of armed conflict it can be explained on one hand by the lack of development in 1990 of the law relating to non-state actors and insurgents and on the other hand by the fact that the tribunal was not convinced that the shrimp farm was a Tamil base.¹⁸⁰

Tribunals seem reluctant to use systemic integration, particularly in cases where the state invokes respect for human rights to justify its actions that have had adverse consequences for investors and thus escapes treaty obligations under the necessity clause.¹⁸¹

These decisions that reinforce the idea of a self-contained regime are not justified. It is only reasonable to draw inspiration from a concept developed by other courts, since courts’ decisions are a source of PIL¹⁸² and “a systematic study of the jurisprudence of international tribunals suggests a strong

175 See McLachlan, *supra* note 169 at 312.

176 *Pope Talbot Inc v Government of Canada*, Award in Respect of Damages, (NAFTA) (31 May 2002) at para 60.

177 McLachlan, *supra* note 169 at 312.

178 AAPL, *supra* note 7 at para 21.

179 See Mayorga, *supra* note 66 at 2–4.

180 See *Ibid*.

181 See *Azurix v Argentine Republic*, ICSID Case No Arb/01/12, Award, (14 July 2006) at para 254; *Siemens AG v Argentine Republic*, ICSID Case No Arb/02/8, Award, (17 January 2007) at para 75; *CMS Gas*, *supra* note 108 at para 121.

182 See *Statute of the International Court of Justice*, 33 UNTS 993, art 38.1.d.

centrifugal tendency to chart a coherent course within international law.¹⁸³ Although the notion of arbitral jurisprudence is much debated, IIL is no exception to this rule since arbitrators still heavily rely on previous decisions when rendering their awards.¹⁸⁴

IHL as recognized in the Hague and Geneva Conventions is customary international law,¹⁸⁵ it also predates a lot of BITs, thus drying up the argument often opposed to systemic integration that the treaty should be interpreted according to the state of the law in force at the time of its entry into force.¹⁸⁶

Interestingly, Teerawat Wongkaew uses the word “cross-fertilization” to describe the use of systemic integration of IHL in IIL.¹⁸⁷ He even defines cross-fertilization of IHL and IIL as “using IHL concepts and principles as the interpretive reference as opposed to direct application of those in IIL.”¹⁸⁸ This approach allows avoiding the pitfall of using the wrong applicable law and thus a possible annulment of the award on the grounds that the tribunal did not respect its mandate.¹⁸⁹ This effort to address the issue of the fragmentation of international law may strengthen the legitimacy of the decisions rendered by arbitral tribunals in situations involving armed conflicts. The use of IHL principles to interpret IIL provisions would indeed ensure a better predictability as the armies behave according to this set of rules.¹⁹⁰ Ofilio Mayorga argues that the systemic integration of IHL in IIL will also ensure that “investment tribunals retain jurisdiction to hear investor-state disputes in wartime”¹⁹¹ as it is an efficient forum for victims to obtain redress.

Conclusion

The genesis of war clauses goes back to the premises of international trade and investment protection. War clauses actually refer to three different types of clauses: a non-discriminatory war clause, an extended war clause, and a strict liability war clause. Over time, arbitration tribunals have conflated FPS provisions with war clauses and mixed up the characteristics of the different types of war clauses. This paper sheds light on the underestimated potential of war clauses. Far from being forgotten, these clauses are still inserted in new treaties such as the CETA¹⁹² and could find a use in potential COVID-19

183 McLachlan, *supra* note 169 at 287.

184 See Ruldolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (Oxford, 2012) at 34.

185 See *Legality of Nuclear Weapons*, *supra* note 172 at para 79.

186 See McLachlan, *supra* note 169 at 316.

187 Wongkaew, *supra* note 117 at 385.

188 *Ibid.*

189 See *ibid* at 388.

190 See McLachlan, *supra* note 169 at 279–320.

191 Mayorga, *supra* note 66 at 7.

192 *Comprehensive Economic and Trade Agreement Between Canada and the European Union*, OJ L 11, 14.1.2017, 23–1079 (partially entered into force 21 September 2017), art 8.11[CETA].

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related cases.

On a broader level, the time has come to interpret the obligations provided in IIL using the principles of customary international law to contextualize the provisions. Considering the lack of legitimacy of international arbitration and in particular, the criticism that IIL is more favorable to investors than to states, an alignment between IHL and IIL would indeed be desirable. As IHL is used by all the armies of the world, it has the advantage of predictability and takes into account military imperatives in determining the protection of civilians and civilian objects. Ofilio Mayorga rightly states that using IHL to interpret IIL provisions strikes a more appropriate “balance between military necessity and humanitarian considerations (...) mitigating its adverse effects on the civilian population—including foreign investors.”¹⁹³ This balance is key to the legitimacy of international investment arbitration awards in post-war contexts.

¹⁹³ Mayorga, *supra* note 66 at 3.