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The Termination and Suspension of Bilateral Investment Treaties due to an Armed Conflict

Josef Ostřanský*

ABSTRACT

The article looks at the protection of investment during armed conflicts from the perspective of the law of treaties. It assesses the impact that an armed conflict has on international investment agreements (IIAs) and evaluates whether the emergence and continuation of an armed conflict affects the operation of an investment treaty such that the treaty can be unilaterally terminated or suspended. The article thus critically examines the much-understudied Draft Articles on the Effects of Armed Conflicts on Treaties on the case study of IIAs. It argues that it may be possible to lawfully suspend some of IIAs' provisions once an extensive armed conflict emerges. Although this option might be limited, the article presents arguments why such a course of action might be legally preferable over other alternatives, such as relying on the circumstances precluding wrongfulness from the law of state responsibility.

1. INTRODUCTION

The occurrence of an armed conflict is a temporary phenomenon, which is unpredictable and often remains unaddressed when a treaty is drafted. Only recently has the question of the application of international investment agreements (IIAs) during an armed conflict became a subject of scholarly debate.[1] The attention to the topic can be explained by the increased frequency of armed conflicts, particularly of non-international nature, following the Arab Spring, such as the Syrian conflict, by the emerging hostilities and insurgencies in countries like Mali or Nigeria, and lastly by the recent Ukraine crisis.

* Graduate Institute of International and Development Studies, Geneva; CIDS (Geneva Center for International Dispute Settlement). Email: josef.ostransky@graduateinstitute.ch

1 See Ch Schreuer, 'The Protection of Investments in Armed Conflict' (2012) 3 Transnatl Disp Mgmt; F Baetens, 'When International Rules Interact: International Investment Law and the Law of Armed Conflict' (2011) 3(1) Invest Treaty News 1, 11; GI Hernández, 'The Interaction Between Investment Law and the Law of Armed Conflict in the Interpretation of Full Protection and Security Clauses' in F Baetens (ed), *Investment Law Within International Law: Integrationist Perspectives* (CUP 2013) 21; O Mayorga, 'Arbitrating War: Military Necessity as a Defense to the Breach of Investment Treaty Obligations' Harvard University Program on Humanitarian Policy and Conflict, Policy Brief (August 2013).

To take the example of Syria, the country is party to 17 bilateral investment treaties (BITs) both with developed and developing countries.[2] Although no claims have been filed as yet, such action is by no means precluded, as more and more cross-border economic actors are aware of the possibilities that BITs offer; to wit, of receiving monetary compensation for prejudices suffered in the host state.[3] At the same time, the possibility of invocation of extensive investment protection standards in the context of an armed conflict, when the state may have little or no control over its affairs, raises important considerations about the fairness and appropriateness ofthe current international investment regime.[4] Yet, BITs are primarily an instrument for providing a means of protection for investors and their property, which is particularly vulnerable during an armed conflict. Thus, one can argue that these treaties should operate especially when the investment is endangered the most, and therefore, should be applicable during the time of hostilities and armed insurrections.

This article looks at the protection of investment during armed conflicts from the perspective of the law of treaties, a view that has not received much scholarly attention.[5] It assesses the impact of an outbreak of war or armed conflict on BITs, in particular, whether the emergence and continuation of armed conflict affects the operation of an investment treaty in such a way that the treaty can be terminated or suspended. This contribution thus critically examines the so far understudied International Law Commission's (ILC's) Draft Articles on the Effects of Armed Conflicts on Treaties (Draft Articles)[6] on the case study of IIAs. It argues that, contrary to what the Commentary on the Draft Articles and the doctrine suggest, it may be possible to lawfully suspend some IIAs' provisions once an extensive armed conflict emerges. Although this option might be limited, it may still relieve the state from suffering yet further consequences of war.

Schreuer, in his article on investment protection in armed conflicts is so far the only contribution, which has addressed the application of the Draft Articles to BITs.[7] His brief analysis of the provisions of the Draft Articles leads him to an unambiguous answer: 'As a rule, treaties dealing with the protection of foreign investment, such

2 Azerbaijan, China, Czech Republic, Egypt, France, Germany, Greece, India, Indonesia, Jordan, Lebanon, Morocco, Pakistan, Russia, Spain, Switzerland, UAE. Source: *UNCTAD Investment Instruments Online* Database.

3 There is general scarcity of investment arbitration cases that deal with measures adopted during an armed conflict. The only case dealing with such situation was the very first BIT arbitration, the case of *Asian Agricultural Products Ltd (AAPL) v Sri Lanka,* ICSID Case No ARB/87/3, Award of 27 June 1990.

4 See Mayorga (n 1).

5 Most of the literature that deals with the topic of termination of BITs elaborates either on the effect of termination and survival clauses, or on the mutual termination by agreement; J Harrison, 'The Life and Death of BITs: Legal Issues Concerning Survival Clauses and the Termination of Investment Treaties' (2012) 13 JWIT 928; T Voon, A Mitchell and J Munro, 'Parting Ways: The Impact of Mutual Termination of Investment Treaties on Investor Rights' (2014) 29 ICSID Rev 2, 451; A Tzanakopoulos, 'Denunciation of the ICSID Convention under the General International Law of Treaties' in R Hofmann and CJ Tams (eds), *International Investment Law and General International Law: From Clinical Isolation to Systemic Integration?* (Nomos 2011) 75.

6 ILC, 'Draft Articles on the Effects of Armed Conflict on Treaties, with Commentaries' (2011) UN Doc A/66/10 (Draft Articles). The article does not intend to analyse to what extent are the Draft Articles a proper reflection of customary international law.

7 Schreuer (n 1).

as bilateral investment treaties, continue to apply after the outbreak of armed hostilities.'[8] He adds that this is particularly so where BITs include clauses addressing consequences of hostilities.[9] We argue that this applies indeed merely 'as a rule'. A more nuanced assessment of the Draft Articles, different BITs and their various provisions yield a conclusion that this rule has some important exceptions. The article discusses precisely these exceptions.

Our argument is that some of the BIT provisions can be lawfully suspended, pending an armed conflict. The article presents arguments why such a course of action may be preferable over other alternatives, such as relying on the circumstances precluding wrongfulness from the law on state responsibility. The article also evaluates the impact of the host state's obligations that are incumbent upon it independently of the treaty obligations; that is, customary international law obligations pertaining to the protection of foreign investment. Last but not least, we address the interplay between the ground for termination and suspension presented in the Draft Articles and BITs termination and survival clauses.

The article proceeds as follows. After introducing legal rules relating to the operation of treaties in situations of changed circumstances, it addresses the specific rules applicable to the termination and suspension of treaties as a result of armed conflict. Then, it applies this normative framework to investment treaties. One remark must be added right at the beginning. Due to their overall similarity, BITs are often approached as a coherent body of law. Although this can be maintained when one speaks generally about the investment regime and applicable substantive standards, the issue of termination and suspension of BITs due to an armed conflict is inappropriate to such generalizations. The article argues that whether a treaty, or some of its provisions, can be terminated or suspended is to a large extent a matter of concrete provisions it contains. The article takes as a reference BITs concluded by the Syrian Arab Republic. It must be noted that the scope of the article is limited to the analysis of the effect of non-international armed conflicts, as it uses the conflicts such those in Syria or Central African Republic as examples.[10]

2. THE OPERATION OF TREATIES IN SITUATIONS OF CHANGED CIRCUMSTANCES

In 2005, the ILC started to work on the Draft Articles on the Effects of Armed Conflicts on Treaties under the then Special Rapporteur, the late Sir Ian Brownlie.

8 ibid 3.

9 ibid.

10 Specific treaty provisions relevant for assessing applicability of a BIT during armed conflict may lead to different results depending on whether the conflict is international or non-international. A provision that can come into play during a typical international armed conflict is, for instance, a 'denial of benefits' clause, which allows a contracting party to deny investment protection to the investors of the other contracting parties that are controlled by third-party national, the nationals of a party with which the host country does not maintain normal economic relations, eg the enemy State. See eg art 12 of the Agreement on the Mutual Promotion and Protection of Investments (India–Syria) (18 June 2008). Also a situation of an act of aggression by one party to the BIT against the other is governed by different legal considerations. Furthermore, limiting considerations to the non-international armed conflict leaves analysis of art 60 of the VCLT ('Termination or suspension of a treaty as a consequence of its breach') out of our framework; similarly as it does *vis-à-vis* art 63; VCLT (1969) 969, 1155 UNTS 331 (Vienna Convention, VCLT).

After Sir Ian's untimely departure, the work was taken over by Prof Lucius Caflisch and culminated in the adoption of the final version of the Draft Articles in 2011.[11] In this regard, it must be noted that the Vienna Convention on the Law of Treaties (VCLT) in its Article 73 states that '[t]he provisions of the present Convention shall not prejudge any question that may arise in regard to a treaty . . . from the outbreak of hostilities between States.'[12] The ILC Draft Articles, therefore, aspire to complement the VCLT by providing for additional grounds for termination or suspension during an armed conflict.[13] However, this does not mean that Article 73 excludes the use of VCLT during the time of armed conflict; it only suggests that the armed conflict may create additional legal repercussions. In this sense, the grounds for termination and suspension in the VCLT certainly remain applicable, as far as their conditions are met.[14] Two of the VCLT grounds are relevant during the time of war or insurrection: the supervening impossibility of performance under Article 61, and the fundamental change of circumstances (*rebus sic stantibus*) under Article 62.

It does not amount to more than a platitude to say that *pacta sunt servanda* is the basic principle of the law of treaties. The core status of the principle is reflected in virtually all aspects of the modern law of treaties. This is particularly with respect to the treaty termination and suspension as a result of change in the factual status quo. Therefore, the underlying foundation of both the VCLT and the Draft Articles is to favour legal stability and continuity of treaty relations.[15] This explains the very high threshold for invocation of the grounds for termination and suspension in Articles 61 and 62 of the VCLT.

An exhaustive exploration of the Vienna Convention's grounds for termination and suspension and their overlaps with the ground exemplified in the Draft Articles falls outside the scope of this contribution.[16] Although this piece focuses on the analysis of the Draft Articles, the following points regarding Articles 61 and 62 merit mentioning.

Article 61, dealing with the supervening impossibility of performance, is in all probability not applicable in the context of IIAs discussed here, as the article connotes material impossibility.[17] When drafting the Vienna Convention, the United Nations

11 Draft Articles (n 6). The ILC used as a broad basis the Helsinki Resolution of the Institut de droit international, 'The Effects of Armed Conflicts on Treaties' 28 August 1985.

12 Vienna Convention (n 10) art 73.

13 One should add that developing rules on armed conflict in relation to treaties is, nevertheless, difficult to reconcile with the Vienna Convention's attempts to create a closed system in its art 42. The ambiguous mechanisms chosen to close off the Vienna Convention from the temporal aspects (art 31(3)c) and in regard to the invalidity and termination (art 42) are already eroded by the exceptions included in art 73. For an excellent exposition of the problem, arguing that art 42 could never really be expected to work as a *Grundnorm* of international law, although its literal reading suggests such an ambition, see J Klabbers, 'Reluctant *Grundnormen:* Articles 31(3)c and 42 of the Vienna Convention on the Law of Treaties and the Fragmentation of International Law' in M Craven and others (eds), *Time, History and International Law* (Martinus Nijhoff Publishers 2007) 141.

14 See also art 18 of the Draft Articles (n 6).

15 Draft Articles, Commentary (n 6), para 5; also art 42 of the Vienna Convention (n 10).

16 This contribution does not attempt to analyse the Vienna Convention grounds for termination and suspension. First, there is a plenty of literature analysing the issue, and secondly, our analysis does not show that they are applicable in the armed conflict when it comes to BITs anyway.

17 '1. A party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a

Conference made a conscious choice to relate material impossibility to natural events that cause 'the permanent disappearance or destruction of an object indispensable for the execution of the treaty'.[18] As BITs have the protection of investments as one of their objects, the conception of impossibility adopted in Article 61 does not give much support to the claim that a BIT can be terminated on this ground.[19]

Analysis of Article 62 is more complex and cannot be fully exposed here.[20] What can be said with a degree of confidence, however, is that Article 62 as well evinces a very high threshold that will not in all probability be reached when assessing the termination and suspension of a BIT during an armed conflict. This, for a situation of peace, will rarely be viewed as essential to the consent of the parties to a BIT. Negative formulation of the rule also suggests narrow interpretation, which is confirmed by judicial practice, doctrine and the *travaux préparatoires*.[21] In any event, even if the possibility to terminate a BIT under Article 62 remains open, this does not undermine the main thrust of this article; to wit, a BIT can exceptionally be terminated or suspended as a result of the armed conflict applying the rules codified in the Draft Articles.[22]

The termination and suspension are never automatic by the operation of law. This is the case both under the VCLT and the Draft Articles. This stems clearly

ground for suspending the operation of the treaty. 2. Impossibility of performance may not be invoked by a party as a ground for terminating, withdrawing from or suspending the operation of a treaty if the impossibility is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.'

18 art 61(1), Vienna Convention (n 10); ILC, 'Draft Articles on the Law of Treaties with Commentaries' (1966) UN Doc A/6309/Rev 1.

19 As long as foreign investors have investments in the country, the impossibility does not come in question. Even their disappearance, with a stretch of imagination, cannot ever be claimed as permanent, making the invocation of the impossibility, simply, impossible. The fact that art 61 allows for suspension due to the temporary impossibility does not change much. This conclusion is reinforced by the understanding of the concept 'object indispensable for treaty's execution' as narrower than the 'object of the treaty'. Generally see ME Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff Publishers 2009) 754ff; P Bodeau-Livanec and J Morgan-Foster, 'Article 61' in O Corten and P Klein (eds), *The Vienna Conventions on the Law of Treaties: A Commentary* (OUP 2011) 1382.

20 '1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless: *(a)* The existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and *(b)* The effect of the change is radically to transform the extent of obligations still to be performed under the treaty. 2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty: *(a)* If the treaty establishes a boundary; or *(b)* If the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty. 3. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty.'

21 See eg *Case concerning the Gabčíkovo-Nagymaros Project* (1997) ICJ Rep 7, para 104: 'The negative and conditional wording of Article 62 of the Vienna Convention on the Law of Treaties is a clear indication moreover that the stability of treaty relations requires that the plea of fundamental change of circumstances be applied only in exceptional cases.' For more details see, eg ILC, 'Draft Articles on the Law of Treaties with Commentaries' (1966) UN Doc A/6309/Rev.1, commentary to art 59; Villiger, 'Commentary to the Vienna Convention' (n 13) 769 and the following; MN Shaw and C Fournet, 'Article 62' in O Corten and P Klein (eds), *The Vienna Conventions on the Law of Treaties: A Commentary* (OUP 2011) 1411.

22 Considerations of potential overlaps with the circumstances precluding wrongfulness are addressed later in the text, in the Section 7.

from the formulation of the provisions as grounds that *may* be invoked.[23] Hence, it may be securely said that the termination of a treaty for a subsequent factual change is highly exceptional in practice.[24] However, a situation of armed conflict cannot be considered a common daily occurrence either.

3. DRAFT ARTICLES ON EFFECTS OF ARMED CONFLICTS ON TREATIES—THE NORMATIVE FRAMEWORK

The Draft Articles are meant to apply both to international and non-international armed conflicts.[25] Although the Commentary suggests that the typical non-international armed conflict will not, in principle, call into question the treaty relations,[26] the current situation in Syria, and in the countries like Central African Republic, Ukraine and Mali, rather calls into question what should be understood as the typical non-international armed conflict.[27] A full-fledged civil war where the government loses all effective control over certain parts of its territory does not differ too much in its effects from the traditional armed conflict between two States. The Draft Articles focus on the effects of the conflict on the application and operation of the treaty, rather than on the treaty itself.[28]

The Draft Articles proceed from a basic presumption in favour of the continuity of treaty relations to sequential steps in which one assesses elements determinative of whether the treaty or its parts are susceptible to termination or suspension.

First, one refers to the treaty itself to find express provisions relating to armed conflicts (Article 4).[29] In the absence of such provisions, resort to interpretation of the treaty in accordance with the general rules of treaty interpretation follows (Article 5).[30] If this is still inconclusive, contextual consideration extraneous to the treaty, in particular the characteristics of the conflict, conclude the determination (Article 6).[31] This means that the determination under Articles 4 and 5 is made without any account of the nature and extent of the intervening armed

23 ILC, 'Draft Articles on the Law of Treaties with Commentaries' (n 21) commentary to art 58, para 5.

24 One of the few cases dealing with the termination for a subsequent change in circumstances is Case 162/96 *Racke v Hauptzollamt Mainz,* [1998] ECR I-3655, we analyse the case below. We are, obviously, leaving aside the termination by consent under art 54(b) of the Vienna Convention. See eg Voon, Mitchell and Munro, 'Parting Ways' (n 5) 451.

25 Draft Articles (n 6) art 2(b). The provision reflects the definition of an armed conflict adopted in the International Criminal Tribunal for Former Yugoslavia *Tadić* decision (*Prosecutor v Duško Tadić,* (Appeals Chamber) IT-94-1-A-A72 (2 October 1995) and states that an 'armed conflict means 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'.

26 Draft Articles, Commentary (n 6) to art 1, para 5.

27 At the same time the Commentary (n 6) to art 2, somewhat contradictorily, notes in para 8 that non-international conflicts could affect the operation of treaties as much international ones.

28 Draft Articles, Commentary (n 6) to art 2, para 5

29 'Where a treaty itself contains provisions on its operation in situations of armed conflict, those provisions shall apply.'

30 'The rules of international law on treaty interpretation shall be applied to establish whether a treaty is susceptible to termination, withdrawal or suspension in the event of an armed conflict.'

31 'In order to ascertain whether a treaty is susceptible to termination, withdrawal or suspension in the event of an armed conflict, regard shall be had to all relevant factors, including: (a) the nature of the treaty, in particular its subject matter, its object and purpose, its content and the number of parties to the treaty; and (b) the characteristics of the armed conflict, such as its territorial extent, its scale and intensity, its duration and, in the case of non-international armed conflict, also the degree of outside involvement.'

conflict. Focus on the treaty characteristics and its provisions before considering the characteristics of the situation of an armed conflict is understandable as the law of treaties prioritize the continuity of conventional relations.[32]

External considerations of the facticity 'on the ground' come into play only under Article 6, when the previous steps have not yielded a conclusive outcome. Still under Article 6(a), the nature of treaty, its subject matter, object and purpose, and the number of parties, feed into the equation. Lastly, the Draft Articles contain an indicative list of treaties annexed to Article 7, arranged according to their subject matter that suggests their continuing operation.[33]

Procedurally, Article 9 prescribes a procedure of notification, which is modelled on Article 65 of the VCLT and which reflects the urgency of the situation of an armed conflict.[34] This provision—a product of progressive development of law by the ILC—requires the suspending state to notify the other party/parties to the treaty. The notified party may object 'within a reasonable time' and upon unsuccessful resolution of the dispute the parties shall seek dispute settlement in accordance with Article 33 of the UN Charter. Article also leaves provisions in the treaty relating to dispute settlement, if they exist, unaffected. This is reinforced by the inclusion of treaties relating to dispute settlement in the annex to Article 7. All in all, Article 9 creates a rather burdensome procedural obstacle to the treaty suspension, once again reflecting the priority of legal stability of treaty relations.[35] The next sections apply this legal framework on BITs.

32 This means that in most cases the analysis of whether a treaty or its provisions can be terminated or suspended may be carried out by analysing solely the treaty provisions without taking into account any factual elements of the supervening armed conflict.

33 'An indicative list of treaties the subject matter of which involves an implication that they continue in operation, in whole or in part, during armed conflict, is to be found in the annex of the present draft articles . . . Indicative list of treaties referred to in article 7: (a) Treaties on the law of armed conflict, including treaties on international humanitarian law; (b) Treaties declaring, creating or regulating a permanent regime or status or related permanent rights, including treaties establishing or modifying land and maritime boundaries; (c) Multilateral law-making treaties; (d) Treaties on international criminal justice; (e) Treaties of friendship, commerce and navigation and agreements concerning private rights; (f) Treaties for the international protection of human rights; (g) Treaties relating to the international protection of the environment; (h) Treaties relating to international watercourses and related installations and facilities; (i) Treaties relating to aquifers and related installations and facilities; (j) Treaties which are constituent instruments of international organizations; (k) Treaties relating to the international settlement of disputes by peaceful means, including resort to conciliation, mediation, arbitration and judicial settlement; (l) Treaties relating to diplomatic and consular relations.'

34 '1. A State intending to terminate or withdraw from a treaty to which it is a Party, or to suspend the operation of that treaty as a consequence of an armed conflict, shall notify the other State Party or States Parties to the treaty, or its depositary, of such intention. 2. The notification takes effect upon receipt by the other State Party or States Parties, unless it provides for a subsequent date. 3. If an objection has been raised in accordance with paragraph 3, the States concerned shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations. 4. 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. 5. Nothing in the preceding paragraphs shall affect the right of a Party to object within a reasonable time, in accordance with the terms of the treaty or applicable rules of international law, to termination, withdrawal or suspension of its operation.'

35 Further provisions of the Draft Articles elaborate on the effects of the exercise of the right to self-defence and prevent the benefit of the suspension due to armed conflict by the aggressor. Draft Articles, Commentary (n 6) to arts 14–16.

4. DRAFT ARTICLES AND BITS

A. Specific Provisions of BITs Addressing Armed Conflicts and the Analysis under Articles 4 and 5 of the Draft Articles

According to the Draft Articles, the first resort shall be had to the treaty itself and its provisions. Some BITs include substantive provisions that suggest they are intended to be applicable during the time of war and armed conflict. The most common is an obligation to accord 'full protection and security'.[36] A typical full protection and security clause uses the following language:

1. Investments by nationals or companies of either Contracting Party shall enjoy full protection in the territory of the other Contracting Party.[37]

The first very BIT case applied the full protection and security provision of the UK–Sri Lanka BIT to a situation of a governmental counter-insurgent operation during which claimant's shrimp farm was destroyed.[38] The tribunal reiterated what is the standard of liability of a state during an armed conflict and what are the conditions of application of full protection and security clause. It suffices to summarize that full protection and security standard prescribes a state to act with due diligence in providing sufficient physical security from violence committed by state as well as non-state actors.[39] Beyond full protection and security, some treaties include a so-called 'compensation for losses clause',[40] and also 'essential security and emergency clauses'.[41] We refer to these three types of clauses hereinafter as 'armed-conflict-oriented provisions'.

Compensation for losses clauses prescribe a non-discrimination obligation as far as national schemes for restitution or reparation of losses due to the war or other hostilities.[42] Their extended version addresses the situation of requisitioning or destruction of property by forces of the host state, which was not mandated by the military necessity. A typical

36 art 4(1) of the Agreement Concerning the Encouragement and Reciprocal Protection of Investments (Germany–Syria) (2 August 1977): 'Investments by nationals or companies of either Contracting Party shall enjoy full protection in the territory of the other Contracting Party.'

37 art 4(1), Germany–Syria BIT, very often the obligation is mentioned in the same provision as obligation to accord fair and equitable treatment. For example, art 2(2), Agreement on the Promotion and Reciprocal Protection of Investments (Czech Republic–Syria) (21 November 2008), 'Investments of investors of either Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party.'

38 The *AAPL v Sri Lanka* case remains the only investment arbitration case dealing with application of BIT provisions during an armed conflict (n 3).

39 This article is not a place to analyse the content of the standard in any detail. For comprehensive treatment see eg GK Foster, 'Recovering "Protection and Security": The Treaty Standard's Obscure Origins, Forgotten Meaning, and Key Current Significance' (2012) 45 Vbilt J Transl L 1095; Ch Schreuer, 'Full Protection and Security' (2010) 1 JIDS 353; GI Hernández, 'The Interaction Between Investment Law and the Law of Armed Conflict' (n 1) 21; HI Bray, 'SOI – Save Our Investments! International Investment Law and International Humanitarian Law' (2013) 14 JWIT 578.

40 What Prof Schreuer labels as 'war clauses'. Scheuer (n 1) 5. See eg art 4(3) of Germany–Syria BIT (n 36): 'Nationals or companies of either Contracting Party whose investment 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 Contracting Party than that Party accords to its own nationals or companies, as regards restitution, indemnification or other valuable consideration.'

41 For example, art 11 Czech Republic–Syria BIT (n 37).

42 The Tribunal in *AAPL v Sri Lanka* also dealt with application of this provision, but *in casu* it found that the Claimant had not established the conditions for its application (n 3) paras 56–64.

clause of this type reads as follows:

> 1. Where investments of investors of either Contracting.Party suffer losses owing to war, armed conflict, a state of national emergency, revolt, insurrection, riot or other similar events in the territory of the other Contracting Party, such investors shall be accorded by the latter Contracting Party treatment, as regards restitution, indemnification, compensation or other settlement, not less favourable than that which the latter Contracting Party accords to its own investors or to investors of any third State.
> 2. Without prejudice to paragraph 1 of this Article, investors of one Contracting Party who in any of the events referred to in that paragraph suffer losses in the territory of the other Contracting Party resulting from:
> /a/ requisitioning of their property by the forces or authorities of the latter Contracting Party, or
> /b/ destruction of their property by the forces or authorities of the latter Contracting Party which was not caused in combat action or was not required by the necessity of the situation, shall be accorded restitution or just and adequate compensation for the losses sustained during the period of the requisitioning or as a result of the destruction of the property. Resulting payments shall be freely transferable in a freely convertible currency without delay.[43]

In such a case, the state shall provide restitution or compensation according to the international standard. There is no doubt that this type of provisions is to be applied during an armed conflict.

'Essential security and emergency clauses', on the contrary, do not impose an obligation on a state. They specify the scope of application of treaty's obligations, as they use the language along the lines of 'nothing in this agreement precludes the application of measures necessary for the protection of essential security interests'.[44] In other words, the treaty is in force during the situation of emergency, under which an armed conflict can be arguably subsumed, but all or some of the substantive protections do not apply by the operation of the treaty itself. A similar mechanism is present under the derogation provisions in human rights treaties or exceptions in the WTO law.[45] The ILC Commentary to the Draft Articles stresses that 'the test of derogability is not appropriate because derogability concerns the operation of the treaty and is not related to the

43 art 4 of the Czech–Syria BIT (n 37).

44 The case law relating to the Argentine crisis has contributed with a great deal of confusion to the proper understanding of security clauses. This is particularly for the tribunals have conflated the treaty exceptions with customary international circumstances precluding wrongfulness. For discussion see eg W Burke-White and A von Staden, 'Investment Protection in Extraordinary Times: The Interpretation of Non-precluded Measure Provisions in Bilateral Investment Treaties' (2008) 48(2) Va J Intl L 307, 320–24; J Kurtz, 'Adjudicating the Exceptional at International Investment Law: Security, Public Order and Financial Crises' (2010) 59(2) ICLQ 325; J Ostřanský, 'How Can States Use Exceptions in Treaties to Defend Tobacco Control Legislation?' (2012) 5 TDM 1.

45 For example, art 18 of International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171; General Agreement on Tariffs and Trade (1947) 55 UNTS 194 (GATT), art XX; O De Schutter, *International Human Rights Law: Cases, Materials, Commentary* (CUP 2010) 306–12.

issue of continuation or termination'.[46] According to the Commission, this type of clause provides evidence that an outbreak of hostilities as such may not affect the continuation of the treaty as a whole. This view is supported here. It makes little sense to insist on the termination or suspension of a treaty when the treaty contains a safety valve to derogate from its substantive obligations or to carve out certain measures that is, moreover, far more lenient than the threshold for termination or suspension. It can be concluded that once the treaty contains a clause of this kind, the possibility of termination or suspension due to an armed conflict will hardly come into play. However, only around 10% of IIAs contain a security and emergency clause.[47]

Coming back to the effect of the other two types of provisions mentioned above, the fact that clauses such as full protection and security or compensation for losses are present in a BIT does not necessarily mean, in the absence of a security and emergency clause, that the treaty *as a whole* was intended to be applied during an armed conflict. Here several interpretations are possible.

First interpretation is that the treaty that includes obligations of this kind continues to operate regardless of the armed conflict. This is because the existence of an armed-conflict-oriented provision is taken as evidence that the whole treaty applies. This does not necessarily follow, as the armed-conflict-oriented provisions do not suggest anything about the applicability of other treaty provisions.

Another possible interpretation is that these armed-conflict-oriented obligations provide a special norm relating to an armed conflict to the exclusion of other treaty obligations. Thus, the effect would be that other treaty obligations, such as 'fair and equitable treatment', do not apply by the operation of the armed-conflict-oriented obligations. The armed-conflict-oriented provisions are triggered only when an armed conflict occurs, and in this sense they regulate special circumstances to the exclusion of general standards of protection. One can see that compensation for losses clauses contain less strict obligations than, for instance, provisions on fair and equitable treatment.[48] This can mean that these provisions indeed create obligations that are specifically applicable during an armed conflict instead of general substantive protections. Although, this could be more desirable outcome in the view of the priority and stability of treaty relations, it is difficult to interpret the provisions on their terms to have such an effect. As opposed to security and emergency clauses, nothing in the language of the other two types of armed-conflict-oriented obligations suggests that they are applicable to the exclusion of other treaty standards. It cannot be precluded that different BIT provisions apply independently to a state's conduct during an armed conflict.

Finally, it is plausible that the armed-conflict-oriented provisions simply provide for separate self-standing obligations applicable also, or only, during armed conflicts. They do not imply anything for other provisions appearing in the treaty. This view seems most likely as different substantive provisions of a BIT regulate different types of state conduct.

Depending on whether one adopts one of the first two interpretations or the last one, the termination or suspension of BITs provisions will be either superfluous

46 Draft Articles, Commentary (n 6) to Annex, para 50.

47 Burke-White, von Staden (n 44).

48 They basically prescribe a non-discrimination relative standard.

or potentially desirable conduct respectively. Clearly, in the absence of a compensation for losses clause, the termination or suspension of some BITs provisions still remains an attractive option.

This preliminary conclusion is, however, based on two, yet to be discussed, assumptions. The first is that the principle of separability is indeed applicable to BIT clauses. The second is that the other conditions for successful invocation of the ground for termination or suspension from the Draft Articles are met. We will analyse these two issues in turn.

B. The Principle of Separability and BITs

Principle of separability is included both in the Vienna Convention and in the Draft Articles. It is formulated as an exception to the rule that the termination or suspension of a treaty takes effect with respect to the treaty as a whole. Article 11 reads as follows:

> 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;
> b. it appears from the treaty or is otherwise established that acceptance of those clauses was not an essential basis of the consent of the other Party or Parties to be bound by the treaty as a whole; and
> c. continued performance of the remainder of the treaty would not be unjust.

Commentary states that this principle plays an important role 'by "moderating" the impact of the operation of Articles 4–7 by providing for the possibility of differentiated effects on a treaty'.[49] The structure of Article 11 makes it clear that the three conditions are cumulative. Needless to say, the rule of terminating the whole treaty applies as long as there is no specific provision dealing with the question in the treaty or the parties agree otherwise. Our research has not revealed any such provision in the studied BITs. Article 11 does not include the VCLT's qualification that the ground for termination or suspension shall relate solely to particular clauses of the treaty. This is understandable as Article 44 of the VCLT has a larger scope and deals also with the invalidation of a treaty.

It should be noted that the principle of separability was recognized already in 1912 by the *Institut de droit international* precisely with respect to the effects of the outbreak of war on treaties.[50] The principle was accepted concerning clauses of different nature. McNair, referring to the Harvard Research on Treaties, notes that one should ask a question 'whether the outbreak of war can affect the several provisions of a treaty in different ways'.[51] He goes on to mention state practice confirming that when it comes to the effect of the outbreak of war upon a treaty it is 'necessary to concentrate on the effect upon particular articles of the treaty'.[52]

49 Draft Articles (n 6) Commentary to art 11, para 1.
50 *Annuaire de linstitut de droit international* 25 (1912) 648.
51 A McNair, *The Law of Treaties* (OUP 1961) 476.
52 McNair (n 51) 482.

Subparagraph (a) deals with provisions that can be separated with regard to their application. As a typical BIT contains obligations that can be invoked and applied separately, there seems to be no reason why certain substantive clauses could not be severed. Application of the subparagraph (b) might differ from treaty to treaty. But on the face of it, there is little reason why certain substantive provisions should be viewed as forming an essential basis of the consent. If it can be claimed with regard to some provisions, it would most likely be investor–state dispute settlement, definitions of investment and investor, or some of the typical substantive standards like fair and equitable treatment (FET) or expropriation. Article 11(c) establishes a general rule that protects the other parties to the treaty and prevents a situation when the application of the remainder of the treaty would create an undue imbalance or a significant detriment to the other parties. It will be showed below that foreign investors will not be deprived of the access to the investor-state dispute settlement, and most of the substantive provisions are either not susceptible to the suspension or termination, or do not bring any substantive benefit to the suspending state.

Although separate suspension or termination of a treaty clause is an exception to the rule, our analysis shows that the conditions for the application of the exception can be fulfilled with respect to some BIT provisions. This is even though state practice has dealt with separability almost exclusively with regard to the termination based on a material breach or invalidity.[53] On the contrary, one may object by saying that BITs are generally compact and short treaties dealing with one subject matter that are result of a carefully negotiated bargain.[54] Once this view is adopted, severance of some of the treaty clauses would be difficult to justify. Yet, authorities support differentiated treatment of treaty clauses when the termination or suspension stems from the armed conflict.[55] We now move to the last remaining step in the analysis under the Draft Articles—Articles 6 and 7. The following section will thus deal with the argument that there is something inherent in the nature, subject matter and the object, and purpose of BITs that precludes the termination or suspension due to an armed conflict.

C. BITs in the Light of Articles 6 and 7 of the Draft Articles

As noted above, Article 6 makes reference to several characteristics of the treaty as well as to the circumstances of the armed conflict. For the sake of convenience, it is worthwhile to quote the provision in full:

> In order to ascertain whether a treaty is susceptible to termination, withdrawal or suspension in the event of an armed conflict, regard shall be had to all relevant factors, including:
>
> a. the nature of the treaty, in particular its subject matter, its object and purpose, its content and the number of parties to the treaty; and

53 Villiger (n 19) 561; M Falkowska, M Bedjaoui and T Leidgens in O Corten and P Klein (eds), *The Vienna Conventions on the Law of Treaties: A Commentary* (OUP 2011) 1046, 1050; McNair (n 51) 474–84.

54 McNair mentioned this as one of the arguments against the application of the principle of separability. McNair (n 51) 475.

55 *Techt v Hughes*, 229 NY Ct App 222 (1920); McNair (n 51) 483.

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

The list attached to Article 7 is based on an assessment of state practice and the Commentary recognizes that this is generally sparse, as the modern practice tends to approach the issue through the VCLT's grounds of *rebus sic stantibus* and subsequent impossibility of performance.[56]

Several headings in the annex are relevant for assessment of BITs. Letter (e) of the annex speaks about *treaties of friendship, commerce and navigation (FCNs) and the agreements concerning private rights*. Schreuer, without further analysis, takes this as a conclusive indication that BITs fall within this category and, hence, they cannot be suspended. The Commentary states that the parts of a treaty that relate to the friendship certainly do not continue to operate insofar as between the belligerent contracting parties. Yet, the provisions concerning *status* of individuals continue to apply, as, according to the Commentary, individuals are considered to be third parties to the treaty.[57] It speaks of such provisions as relating to their 'private rights', and it seems to view BITs as treaties containing this type of provisions.[58] A question to ask is whether BITs' provisions can be indeed treated as such. This issue is more complex than it seems on the first sight. First, this is due to the uncertain status of the investor's rights under investment agreements. Secondly, the ILC seems to overlook an important conceptual distinction within the category it entitled 'treaties concerning private rights'. These two issues will be addressed in turn.

(i) The importance of characterisation of the investor's rights

Most scholarly literature and case law, especially in the early investment treaty arbitration cases, have assumed that investors are direct right holders under the treaties, both in substantive and procedural sense.[59] Only recently the question about the nature of investor's rights has become debated in a more detailed and principled manner.[60] The view that investors retain substantive rights, similar to the situation of individuals under human rights treaties, thus has been challenged and different ways

56 This practice reflects almost non-existent instances of successful invocation of the VCLT grounds. One of such examples, particularly related to armed conflicts is the European Court of Justice case *Racke v Hauptzollamt Mainz* (n 24) which relied on the *rebus sic stantibus* ground. The decision is discussed in Section 6.B.

57 Draft Articles, Commentary (n 6) to Annex, para 26.

58 ibid to art 7, para 48.

59 English Court of Appeals in *Occidental Exploration and Petroleum Company v Ecuador* (2005) EWCA Civ 1116 [2006] QB 432; further see eg *CMS Gas Transmission Company v Argentina*, ICSID Case No ARB/01/8, Decision on Objections to Jurisdiction (17 July 2003) para 45; *Corn Products International, Inc v United Mexican States*, ICSID Case No ARB(AF)/04/01, Decision on Responsibility (15 January 2008), paras 169, 173; T Wälde, 'Investment Arbitration under the Energy Charter Treaty' (1996) Arb Intl 429.

60 First thorough analysis of the issue have been done by Z Douglas, 'The Hybrid Foundations of Investment Treaty Arbitration' (2009) BYIL 152; see also A Roberts, 'Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System' (2013) 107 AJIL 45; M Paparinskis, 'Investment Arbitration and the Law of Countermeasures' (2008) 79(1) BYIL 264.

of conceptualizing investors' rights have recently occurred. Altogether, there have arisen four different conceptions of investors' rights.

Apart from the just described view that investors are akin to third-party rights beneficiaries similar to those granted to third states under the VCLT (direct rights theory), the second view is that investors are for the convenience's sake only enforcing rights, procedural as well as substantive, belonging to their home state, thus acting as their agents (derivative rights theory).[61] The latter conceptualization is aligned with the traditional law on treatment of aliens and diplomatic protection. Another view is that investors are granted only procedural rights to enforce substantive rights belonging to the states (procedural rights theory). Under this view, investors are invoking responsibility of the state and hence are secondary rights holders, even though the primary obligation, the breach of which they invoke, is not owed to them.[62] Yet another view is that rights under investment treaties are of hybrid nature, such that investors' substantive rights are interdependent upon the states' rights.[63]

Each of these conceptions creates different legal repercussions, ranging from the availability of customary circumstances precluding wrongfulness, such as countermeasures, over the availability of waiver to the investor, allowed means of treaty interpretation, to the lawmaking powers of the states.[64] This article is not a place for analysing all these issues thoroughly.[65] However, one can see that from all the conceptualizations mentioned above only two of them hold that investment treaties create direct substantive rights for investors: the human rights/third-party rights analogy, which supports the direct rights theory, and the hybrid conceptualization. We do not support these conceptions for the reasons below and we propose to read the nature of investor's rights through the prism of the procedural rights theory.

The procedural rights theory holds that substantive investment treaty obligations are rather adjudicative standards for the claimant's cause of action enforced through their direct procedural relationship with the state based on the

61 See eg M Paparinskis, 'Investment Treaty Arbitration and the (New) Law of State Responsibility' (2013) 24 EJIL 617; A Gourgourinis, 'Investors' Rights qua Human Rights: Revisiting the "Direct"/"Derivative" Rights Debate' in M Fitzmaurice and P Merkouris (eds), *The Interpretation and Application of the European Convention of Human Rights* (Brill 2012) 147; J Crawford, 'ILCs Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect' (2002) 96 AJIL 874, 887–88; *Loewen Group and Raymond Loewen v US,* ICSID Case No ARB(AF)/98/3, Award (26 June 2003); *Archer Daniels Midland Co and ors v Mexico,* ICSID Case No ARB(AF)/04/5, Award (21 November 2007).

62 Crawford, 'A Retrospect' (n 61) 888; Z Douglas, 'The Enforcement of Environmental Norms in Investment Treaty Arbitration' in JE Vinuales and P-M Dupuy (eds), *Harnessing Foreign Investment to Promote Environmental Protection: Safeguards and Incentives* (CUP 2013) 415.

63 See A Roberts, 'State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority' 55 (2014) 55 (1) Harv Intl L J, 1.

64 View that once investors are third parties deriving the rights, traditional interpretive powers through eg, subsequent practice of state parties are limited; as well as are the lawmaking powers of states to modify the content of treaty rules. See A Roberts, 'Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States' (2010) 104 AJIL 179, 184–85; Roberts, 'State-to-State Arbitration' (n 63) 22–24.

65 For an excellent exposition of the legal consequences of different conceptions see M Paparinskis, 'Analogies and Other Regimes of International Law' in Z Douglas, J Viñuales and J Pauwelyn (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (OUP 2014).

arbitration agreement.[66] Under this view, BITs are creating certain procedural rights relating to dispute settlement *vis-à-vis* a treaty party.

The view that investors obtain also substantive rights is not supported by this conception. The first reason is textual. BITs are drafted in a clearly different language than human rights treaties (a separate heading in the Draft Articles Annex, see below). Textual formulation of investment obligations does not lend direct support to investors deriving substantive rights. These obligations are, in fact, rarely formulated in terms of rights corresponding to obligations, as is the case with human rights treaties.

Moreover, investment treaties are concluded with instrumental considerations in mind, whereby the treaty is understood as a trade-off: the host state guarantees certain protections to the home state's investors in exchange for the promise of increased investment flows.[67] The investor must have an investment to qualify for the BIT protection. Meanwhile, human rights accrue to individuals by virtue of them being humans. Human rights treaties are generally viewed as 'integral treaties', where reciprocity is not a feature of the regimes they establish, in contradistinction to the traditional type of treaties.[68] Investment agreements are of a clearly reciprocal character.

Douglas argues that the view of investors holding substantive rights from the treaty relies on a domestic contract analogy of third-party beneficiaries, which is based on a fiction that the third party becomes a party to the contract or it is granted the same remedies.[69] It behoves to add that the law of treaties on rights of third-party states replicates this logic to a certain extent. Nevertheless, such an analogy does not fit to investment treaties.

The investor certainly cannot become a party to a treaty, and the treaty parties retain their powers to terminate the treaty according to the general rules of the law of treaties, unaffected by the existence of third parties with protected interest under the treaty.[70] The Vienna Convention regulates only obligations and rights arising to third-party *states*, it does not apply to rights accruing to non-state actors. Although

66 See Z Douglas, *The International Law of Investment Claims* (CUP 2009) 11–38; Douglas, 'Enforcement' (n 61) 415.

67 To what extent this claim holds empirically is an entirely different matter. The evidence is far from conclusive. See eg E Neumayer and L Spess, 'Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?' (2005) 33(10) World Dev 1567; JW Yackee, 'Do IITs Really Work?: Revisiting the Empirical Link between Investment Treaties and Foreign Direct Investment' in KP Sauvant and LE Sachs (eds), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (OUP 2009) 379; M Hallward-Driemaier, 'Do Bilateral Investment Treaties Attract FDI? Only a Bit . . . and They Could Bite' (2003) World Bank Policy Research Working Paper No 3121; UNCTAD, *Bilateral Investment Treaties in the Mid-1990s,* chap IV (United Nations, New York and Geneva 1998).

68 See ILC, 'Third Report on the Law of Treaties' (1958) UN Doc A/CN.4/115, Commentary to art 19; *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)* (1951) ICJ Rep, 23.

69 Douglas, 'Enforcement' (n 61) 420.

70 Draft Articles (n 6), art 8(2); Anthea Roberts mentions possible arguments for challenging the view that states retain their rights to terminate the investment treaty by mutual consent under art 54(a) of the VCLT unaffected based precisely on the characteristics of BITs and the substantive rights investors derive from them; see Roberts, 'State-to-State Arbitration' (n 63) 22. However, Douglas, while not excluding the possibility, argues that it must be done expressly in the treaty. Other scholars also object to such limitation when it comes to investment treaties and point to state practice suggesting the contrary to Roberts' argument. Voon, Mitchell and Munro, 'Parting ways' (n 5) 467–468.

it is undisputed that states may create individual rights for non-state actors under international law,[71] the rules regulating third-party rights and obligations under the VCLT can be only used by analogy; they are not directly applicable. Under Article 36(1) of the VCLT, rights accruing to third-party states under a treaty are presumed to accrue so long as the contrary is not indicated.[72]

Limitations of the third-party states analogy can be showed by reference to different rules of third-party rights that are included in the VCLT between States and International Organizations of 1986.[73] Under this convention, there is no presumption of a right accruing to a third-party international organization unless that organization positively assents to it in accordance with its constituent instruments.[74] The Commentary explains this stricter regime by the fact 'that the international organization has not been given unlimited capacity and that, consequently, it is not possible to stipulate that its consent shall be presumed in respect of a right'.[75] This argument can be *a fortiori* extended to the investor who is not considered a full subject of international law.[76] The importance of positive assent also reinforces the distinction between the procedural right to initiate arbitral proceedings, where consent of the investor is a necessary precondition, and the substantive right potentially accruing to the investor.[77]

A further argument that weighs against the transposition of rules on third-party states to investors can be derived from Article 70 of the VCLT. This article regulates consequences of the termination of a treaty. It states that:

> (1)Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present articles:
>
> a. Releases the parties from any obligation further to perform the treaty;
> b. Does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.

71 *LaGrand Case (Germany v US)*, Merits, ICJ Rep 2001, June 27, para 77–78; *Jurisdiction of the Courts of Danzig*, Advisory Opinion, 1928 PCIJ (series B) No 15, at 17–19.

72 The third party right may not be modified or revoked 'if it is established that the right was intended not to be revocable or subject or to modification'. VCLT (n 10) art 37(2).

73 VCLT between States and International Organizations (signed 21 March 1986, not yet in force).

74 ibid, art 36(2).

75 ILC Draft Articles on the law of treaties between states and international organizations or between international organizations with commentaries (1982) II (2) ILC Ybk 17, 43.

76 Some commentators based their third-party rights argument on art 37(2) VCLT, which concerns non-revocability of a third party right 'if it is established that the right was intended not to be revocable or subject to modification without the consent of the third state'. Harrison, 'The Life and Death of BITs' (n 5) 943. The problem with this line of argument is that it is far from established that investors' rights, if there indeed are substantive rights, are irrevocable. The existence of clauses dealing with the effects of termination on the investment protection (see below) proves that this is not the case. Harrison tries to push his argument by pointing to shaky counterarguments that question the very principle stated in art 37(2). Shaky as these counterarguments may be, they do not provide any positive ground for showing that the investor's rights are irrevocable. They only show that, assuming the rights are irrevocable, the parties to the treaty in question are limited in their lawmaking powers.

77 This distinction does not mean, however, that the substantive BIT protections are not operative until the investor consents to arbitration. This is because under this conception, substantive protections operate independently on the inter-state level.

> 2. If a State denounces or withdraws from a multilateral treaty, paragraph 1 applies in the relations between that State and each of the other parties to the treaty from the date when such denunciation or withdrawal takes effect.[78]

One can argue that in BITs parties created rights to investors. And these are not affected by termination, except when parties agree or the treaty specifies otherwise. Again, this argument can be dispensed with relatively easily, without even entering into interpretive discussions on the meaning of 'creation through the execution of the treaty'. Commentary to the VCLT makes it clear that 'paragraph 1(b) relates only to the right, obligation or legal situation of the *State* parties to the treaty created through the execution, and is not in any way concerned with the question of the "vested interests" of individuals' (emphasis original).[79]

On balance, the law of treaties on third-party rights does not lend much support to the view that BITs confer rights on investors akin to third-party state rights. Also remedies available to treaty parties under general international law, for example, countermeasures, are not extended to investors.[80] As mentioned above, investment standards are formulated too broadly and in an abstract way, such that they are 'more accurately described as *traits-loi* than *traits-contrat*'.[81]

Douglas concludes that investment treaties resemble more the model of delictual liability (tort for a breach of statutory duty). This understanding of BITs leads to the conclusion that investors certainly hold a right to pursue a remedy to vindicate a breach of an investment obligation by a state (procedural right), while they do not hold direct rights under the BIT's substantive provisions. Following Douglas' tort analogy, the cause of action provided in, for example, a civil code can refer to the statute providing the adjudicative standard, which can be terminated or modified without the individual having any say on this. The procedural right to sue for remedy remains, but the adjudicative standard and cause of action is modified or disappears entirely.[82] Similarly, it is argued, that dispute settlement provisions of the BIT continue operative in the event of an armed conflict. This, however, does not directly imply that the adjudicative standards cannot be modified or, as in this case, terminated or suspended.

78 art 72 VCLT applies to the suspension of a treaty and codifies an almost identical rule: '1. Unless the treaty otherwise provides or the parties otherwise agree, the suspension of the operation of a treaty under its provisions or in accordance with the present Convention: (a) releases the parties between which the operation of the treaty is suspended from the obligation to perform the treaty in their mutual relations during the period of the suspension; (b) does not otherwise affect the legal relations between the parties established by the treaty. 2. During the period of the suspension the parties shall refrain from acts tending to obstruct the resumption of the operation of the treaty.'

79 Draft Articles on the Law of Treaties with commentaries (n 21) 265.

80 Douglas, 'Enforcement' (n 61) 421. He ascribes this to the 'perhaps regrettable' division international law makes between the law of the instrument and the law of obligations set out in that instrument.

81 Douglas, 'Enforcement' (n 61) 420.

82 ibid 422.

If one subscribes to this conceptualization, the question still remains as to whether this means that BITs can be suspended or terminated during an armed conflict. Further, analysis of the Draft Articles is in order.

(ii)Draft Articles and 'treaties concerning private rights'

The Commentary to the Draft Articles, analysing state practice under the category of treaties 'concerning private rights', gives as examples mostly treaties that are *creative* of direct private rights, such as treaties creating a permanent title to land, inheritance, leases or treaties concerning family status.[83] Such rights are also more properly viewed as private rights *stricto sensu.* It can be added that even if one accepts that BITs create substantive rights for investors, these rights would be more properly viewed as international rights of individuals, not private rights of the traditional type invoked by the ILC. However, as we explained above, the BIT obligations create international protection of the private rights already existing on the level of domestic law.

The state practice relating to treaties that merely provide for *standards of protection* of private rights already existing, such as obligations of full protection and security or most-favoured nation treatment rather shows their susceptibility to termination.[84] This suggests, at the very least, that the state practice the ILC piled up under this category of treaties is far from consistent.[85] More importantly, it shows that the ILC does not make a distinction between treaties creating private rights and those creating international standards of protection of private rights.[86] Despite the lack of clear support in state practice, the ILC opines that there is a trend that treaties mentioned under this heading, even when concerning procedural private rights, subsist in armed conflicts.[87] It is difficult to accept this statement, as the practice is generally scarce and the analysis of the existing practice does not lend itself to the conclusion that there is any such trend.

Interestingly, under the heading of treaties 'concerning private rights' there is no explicit mention of BITs. The only mention of BITs appears under the heading of human right treaties, the letter (f), where the ILC claims that 'the human rights protection may be viewed as a natural extension of the status accorded to treaties of FCN and analogous agreements concerning private rights, including bilateral investment treaties'.[88] This strongly suggests that the ILC perceives BIT as belonging to the category of 'treaties concerning private rights'. However, this category, as construed by the ILC, overlooks the above described conceptual distinction between

83 The precedents relied upon in the Commentary are cases that relate to treaties creating permanent rights to property for individuals (eg *Society for the Propagation of the Gospel v Town of New Haven,* US Supreme Court, 1823, AILSC 1783–1968, vol 19; *Sutton v Sutton,* Court of Chancery, 29 July 1830, BILC, vol 4).

84 For example, *Ex Parte Arakawa,* DC, Eastern District of Pennsylvania, *AILC 1783–1968,* vol 19; *Lovera v Rinaldi,* Cour de cassation, 22 June 1949, *AD* 1949, No 130; cited in the Draft Articles Commentary (n 6) para 28–46; *Karnuth v United States,* 279 US 231 (1929); for a similar point see F González de Cossío, 'Investment Protection Rights: Substantive or Procedural?' (2011) 26 ICSID Rev – FIJL 2, 107, 121.

85 After all even the ILC Commentary concedes this point. Draft Articles Commentary (n 6) para 46.

86 See *Island of Palmas case (Netherlands, USA)* 4 April 1928, RIAA, vol II, 845, and the famous distinction between the creation of rights and the continued manifestation of the rights.

87 Draft Articles Commentary (n 6) para 46.

88 ibid, para 48.

treaties creating private rights and treaties creating international standards of protections of private rights. A category this broadly defined brushes aside the differences among state practice that arguably stem from this conceptual difference.

As we hinted at above, it is suggested that the Draft Articles and the Commentary do not adequately analyse differences between various treaties 'concerning private rights'. Although the Commentary refers to McNair, it does not follow his more nuanced categorization of treaties. Lord McNair distinguished between treaties concerning permanent status and rights of nationals to land, treaties vesting property rights and treaties vesting non-proprietary rights.[89] McNair notes that effects of war on the vested rights are more significant than on the treaty. Hence, as unaffected by the war, he mentions only the treaties vesting private property rights.[90] This only reinforces the need to make a distinction between treaties that create private rights, like property rights and those that only create additional international protection to private rights already existing.[91]

Even if the ILC intended to treat investment rights as something akin or analogous to human rights, we have demonstrated above that this view can be for good reasons challenged. Furthermore, viewing human right treaties as developing from FCN and similar commercial treaties is not historically accurate.[92]

Be that as it may, the Draft Articles indicative list under letters (e) and (f) in the end does not shed much light on the status of investment treaties during the outbreak of hostilities. With a closer look at the examples of state practice and with the conception of the investor's rights described above in mind, one can make a strong argument that BITs provisions concerning substantive protections may be terminated or suspended.

(iii) BITs and dispute resolution provisions

Schreuer argues that because the list attached to Article 7 includes 'treaties relating to dispute settlement',[93] it further proves that BITs should continue

89 McNair (n 51) 482–483.

90 ibid 704–714. McNair even argued that the cases mentioned by the ILC as supporting impossibility of suspension during the outbreak of hostilities (n 83), only stand for the proposition that the treaty provisions, which vest property rights before the outbreak of war 'acquire an existence independent of the fate of the treaty'. McNair (n 51) 482.

91 In virtually all cases it is domestic law that creates these rights. This is also the case of BITs, as they do not create property rights, but only provide additional protection to property rights and interests existing on the level of national law. See eg Z Douglas, 'Property, Investment and the Scope of Investment Protection Obligations' in Z Douglas, J Viñuales and J Pauwelyn (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (OUP 2014).

92 The treaty practice on the treatment of aliens and the lawmaking in the field human rights show distinct pedigree regardless their structural similarity. As it is well known, García-Amador's attempt to connect the two fields in the 1960s in the project of codification of the law of state responsibility did not attract much support from states and was quickly abandoned. See eg M Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (OUP, 2013) 74, 77–78. The fact that modern investment treaty cases have started to draw on functionally similar rules of human rights only recently, either as relevant rules of international law for the purposes of interpretation or by analogy, does not support the ILC's view of human rights treaties as extension of FCN treaties. Be that as it may, human rights treaties deserve a separate heading in the list annexed to art 7, due to their distinct nature. This conclusion of the ILC is fully justified.

93 Draft Articles (n 6) Annex (k).

their operation.[94] However, he overlooks that the Commentary makes it clear that this category of treaties was not listed with investor–state arbitration in mind. The Commentary states that this category relates to conventions on international dispute settlement between subjects of international law and the following indicates that the Commission means the state: '[the category] does not include treaty mechanisms of peaceful settlement for the disputes arising in the context of private investment abroad which may, however, come within group (e) as "agreements concerning private rights".'[95]

The preceding analysis indicates that BITs do not fit neatly into any of the categories in the indicative list. The analysis of the nature of investors' rights illuminated that investors may be validly viewed as holders of a procedural right to pursue remedy for a violation of obligations that are not owed to them directly. The Draft Articles suggest that provisions concerning private procedural rights subsist during the hostilities, while at the same time maintaining that dispute settlement provision between subjects other than states are not included in the indicative list. Therefore, a claim for termination or suspension of substantive BITs provisions can be sustained. The impact of armed conflicts on BITs is, therefore, yet another legal issue upon which the proper characterization of investors' rights has its bearing. It is difficult to predict which conceptualization of investors' rights will prevail in practice. States and tribunals may now take into account what repercussions of their understanding of investors' rights will have on a state's possibility to terminate or suspend investment treaties or some of their provisions due to an armed conflict.

The following section explains what BIT provisions may be suspended or terminated, before explaining some final caveats to the termination and suspension.

5. PROVISIONS OF BITS THAT MAY BE SUSPENDED OR TERMINATED DURING ARMED CONFLICTS

Syrian BITs usually include 'protection and security' together with 'fair and equitable treatment' and provide that such protection should be accorded 'at all times'.[96] This suggests that armed conflict does not affect the operation of this provision. Either way, the end result of suspending the provision on fair and equitable treatment may serve poorly to the suspending state, as the customary international minimum standard of which the FET standard is reflective continues to apply.[97]

94 Schreuer (n 1) 2.

95 Draft Articles Commentary (n 6) para 68. As noted above, we do not object to the statement that IIAs create procedural private rights, once the investor accepts the offer to arbitrate, but we do not agree with the view that they create direct substantive rights.

96 India–Syria BIT (n 10) art 3(1): 'Investments and returns of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy adequate protection and security in the territory of the other Contracting Party.'

97 art 10 of the Draft Articles (n 6), replicating art 43 of the VCLT (n 10), leaves intact the obligations applicable independently of the treaty, ie customary law. However, the suspension may still have impact on the jurisdiction of the investor–state tribunal, if the BIT limits the jurisdiction to violations of the treaty. For example, art 10 of the Agreement on the Promotion and Reciprocal Protection (Greece–Syria) (23 February 2003) is limited to 'disputes between an investor . . . and the other Contracting Party *concerning an obligation of the latter under this Agreement* . . . ' (emphasis added). Paparinskis, *International Minimum Standard* (n 92).

Moving to the provisions that may be susceptible to termination or suspension, the most important obligation that can be affected during the outbreak of hostilities is the obligation of 'free transfer of returns'. For instance, Article 7 of India–Syria BIT obliges the parties that 'each contracting party shall grant investor of the other contracting party the transfer without restriction or delay in a freely convertible currency of the amounts relating to their investments . . . '.[98] It is important to stress that this obligation relates to, for instance, the profits, dividends and other current income derived from the investment, it does not apply only to the compensation for expropriation or for losses suffered during the war. It is easily imaginable that in the situation of a full-blown armed conflict the country's financial and banking system is dysfunctional. Even if investment claims of violation of this obligation are virtually non-existent, as their breach is highly improbable under the normal operation of the state and economy, impossibility of transfer during the hostilities may cause substantial prejudice to foreign investors. Therefore, this provision may be suspended pending an armed conflict.

An argument for suspending national and most-favoured treatment will most probably not make much difference. Although these obligations do not apply independently as part of international minimum standard, the customary obligation prohibiting discrimination may substitute to some extent for their potential suspension. Still, the customary prohibition of discrimination is less strict than national or most favoured nation treatment obligations. For instance, general international law does not prohibit discrimination outright without amounting to arbitrariness, and thus not generally apply to state's exercise of the legislative function.[99] It may, therefore, be possible for a state to terminate BIT provisions obliging it to provide treatment no less favourable, as these obligation go beyond what is required under the customary international law.

6. FINAL OBSTACLES FOR THE TERMINATION AND SUSPENSION OF BIT PROVISIONS

A. Survival Clauses: The Termination and Suspension Distinguished

Specific termination clauses in BITs that state that the provisions of the treaty shall continue to apply in respect of investments made prior to the termination for a certain period after the date of termination are arguably a major obstacle for the termination.[100] Most of the Syrian BITs include provisions for continuous application for 10 years after the date of termination.[101] The VCLT does not preclude termination by treaty parties' consent at any time.[102] Does the peculiar nature

98 Further eg, art 6 of the Agreement Concerning Reciprocal Promotion and Protection (China–Syria) (9 December 1996).

99 T Weiler, *The Interpretation of International Investment Law: Equality, Discrimination and Minimum Standards of Treatment in Historical Context* (Brill 2013) 305.

100 See eg art 13(3) Greece–Syria BIT (n 97): 'In respect of investments made prior to the termination of this agreement, the foregoing articles shall continue to be effective for a further period of ten years after that date.' art 13 of the Czech Republic–Syria BIT (n 37).

101 Czech Republic Syria BIT (n 37) art 13; Greece–Syria BIT (n 97) art 13; India–Syria BIT (n 10) art 15; Switzerland–Syria BIT art 13; China–Syria BIT (n 98) art 11; 15 years of continuous application after the termination is included in France–Syria BIT art 13; Germany–Syria BIT (n 36) art 12.

102 The VCLT (n 10) art 54(b).

of BITs and individual investor rights justify a modification of those rules? This again depends on whether the contracting parties are still viewed as the masters of the treaty in the traditional sense or whether one wishes to prioritize the private right-creative nature of BITs, which imposes limitations on general international rights and powers of sovereign states.[103] For the reasons already presented, we do not endorse the latter position.

When it comes to the termination by agreement, there is a consensus that the parties to a treaty retain the freedom to terminate the treaty consensually at any time, even before the minimum period of application specifically contracted in the treaty.[104] The fact that parties can terminate a treaty by mutual consent at any time and by doing so also terminate the effect of the survival clause, however, does not mean that one party can do the same when relying on the unilateral termination due to an armed conflict.

The so-called survival clauses in BITs regulate the effects of unilateral termination of the treaty prior or after the minimum period of application, if such is specified. The Draft Articles do not regulate the consequences of termination, hence there is a strong argument that a specific provision in the treaty should apply. This would be particularly so when one sees the providing of stable and predictable investment environment as one of BITs' main purposes. The survival clauses are to strengthen precisely this purpose.

The general rule regulating the consequence of the termination is to be found in Article 70 of the VCLT.[105] Thus, in the absence of parties' agreement, provisions of the treaty that specify consequences of the termination apply. This is because Article 70 in its opening paragraph makes clear that an agreement of the parties or the specific treaty provisions apply to the termination under treaties' own provisions as well as to the termination under the VCLT's grounds.

Still the question remains whether the survival clauses can be interpreted as provisions that are to be applied also during an armed conflict and to the termination that uses the armed conflict as a ground. One can argue that the Vienna Convention is without prejudice towards the effects of an armed conflict. Can it be said that the termination due to an armed conflict is a special ground for termination such that the general precepts of the law of treaties regarding the effect of termination from the Vienna Convention do not apply? And by extension, does this

103 Roberts, 'State-to-State Arbitration' (n 63) 24; cf see F González de Cossío, 'Investment Protection Rights: Substantive or Procedural?' (2011) 26 ICSID Rev–FIJL 2, 107.

104 A Aust, *Modern Treaty Law and Practice* (2nd edn, CUP 2007) 288; V Chapaux, 'Article 54 Convention 1969' in O Corten and P Klein (eds), *The Vienna Conventions on the Law of Treaties: A Commentary* (OUP 2011) 1243; ILC, 'Reports of the International Law Commission on the work of the second part of its seventeenth session' (1966) 2 ILC Yearbook 249.

105 '1. Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention: *(a)* Releases the parties from any obligation further to perform the treaty; *(b)* Does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination. 2. If a State denounces or withdraws from a multilateral treaty, paragraph 1 applies in the relations between that State and each of the other parties to the treaty from the date when such denunciation or withdrawal takes effect.'

ground for termination justifies disregarding a specific treaty clause regulating termination?

The Draft Articles rule discussed above,[106] which states that treaty provisions that have been interpreted such that they apply during the armed conflict shall apply, does not help to solve this issue. This is because termination clauses address the termination without any qualification; they do not address an armed conflict. One can argue that the very nature of the termination or suspension of a treaty due to an armed conflict should reflect the special urgency of the situation. After all, this urgency is reflected in Article 9 of the Draft Articles, which provides for a more expedited notification procedure as compared to the one in the VCLT.[107] Such an argument of derogating from survival clauses questions the applicability of Article 70 to the termination based on an armed conflict. However, in the absence of specific provisions regulating consequences of the termination in the Draft Articles, it is difficult to see why would one need to step into a legal vacuum or devise an *ad hoc* rule when the VCLT can be used at least by analogy.

The argument by the special simplified notification in Article 9 does not lend much support either, as in that case the Draft Articles do contain a special provision different from the VCLT. This is not the case when it comes to the consequences of termination. On the contrary, one may argue that neither do the Draft Articles contain a general rule stating that for the matters unregulated thereby the VCLT applies *mutatis mutandis*.

Survival clauses extending the investment protection beyond the date of unilateral termination make it difficult for the terminating state to end the operation of the treaty with immediate effect. However, the presence of such a clause can be implicitly viewed, at least, as replacing the customary doctrine of acquired rights.[108] This further weakens the claim that BITs create private substantive rights to individuals, and also counters the argument that BIT third-party rights (insofar as one insists they exist) are irrevocable. The distinction mentioned above between treaties that create specific private rights in individuals and treaties providing general guarantees of protection of individual rights is once again reinforced.

There is, however, another argument for the non-application of the survival clauses based on a much more solid ground. That is an argument for suspension. This argument takes account of the general rules as codified in the Vienna Convention, as well as of the urgency of an armed conflict. Article 72 of the VCLT regulating consequences of the suspension also, like Article 70, gives preference to specific treaty provisions regulating suspension.[109] It is not unreasonable to hold that

106 Draft Articles (n 6) art 4.

107 See Section 6.B.

108 Voon, Mitchell and Munro, 'Parting Ways' (n 5) 470; H Ascensio, 'Article 70 – Convention of 1969' in O Corten and P Klein (eds), *The Vienna Convention on the Law of Treaties: A Commentary* (OUP 2011) 1585, 1587 para 22.

109 '1. Unless the treaty otherwise provides or the parties otherwise agree, the suspension of the operation of a treaty under its provisions or in accordance with the present Convention: (a) releases the parties between which the operation of the treaty is suspended from the obligation to perform the treaty in their mutual relations during the period of the suspension; (b) does not otherwise affect the legal relations between the parties established by the treaty. 2. During the period of the suspension the parties shall refrain from acts tending to obstruct the resumption of the operation of the treaty.'

treaty provisions concerning termination do not include suspension in their scope. This is because Vienna Convention itself treats the treaty suspension separately, and also the Draft Articles in their Article 13(2) provide a rudimentary rule for the consequences of treaty suspension.[110] The dispositive rule in Article 72 is not replaced by a special treaty provision and hence remains applicable.[111] Thus, the suspension of a BIT due to an extended armed conflict is running contrary to the survival clause or the general rules of the law of treaties. The solution favouring suspension over the termination also reflects the temporary nature of the armed conflict as well as gives effect to the principle of continuity of conventional obligations.

Overall, the most persuasive view is that even when a state is entitled to invoke the grounds from the Draft Articles, survival clauses will apply so far as the termination of the treaty is concerned, unless there is an agreement between the treaty parties to terminate the BIT pending the armed conflict, or the party wishes to merely suspend the BIT's operation. One can still argue that survival clauses are not supposed to apply to the grounds of termination under the Draft Articles; but taking the basic principle of preference of continuity of treaty relations and the general rule regulating the consequences of termination contained in Article 70 of the VCLT into account, it is an argument hard to sell. Thus, the survival provisions appear to be a major obstacle to a successful termination of a BIT due to an armed conflict. Practice will show to what extent the 'without prejudice' nature of the Vienna Convention allows the Draft Articles to deviate from general rules of the law of treaties. Suspension of a BIT due to an armed conflict, however, is not precluded by survival clauses.

B. Notification Procedure

It has been mentioned above that the Draft Articles, similarly as the VCLT, provide for a notification procedure in cases a state wishes to suspend or terminate the treaty or its part. An objection by the other contracting state and unsuccessful resolution of the dispute amicably shall lead to submission to the available dispute settlement mechanism. In the case of BITs, such a mechanism is represented by state-to-state arbitration, which undoubtedly continues to apply.[112] One must also note a possibility of this issue coming up for arbitral determination in investor–state arbitration. In such a scenario, the tribunal would need to decide whether some treaty clauses were lawfully terminated or suspended. As we wrote above, some clauses that are susceptible to termination may include obligations that are incumbent upon the state as customary obligations. In spite of that, depending on a formulation of

110 'The resumption of the operation of a treaty suspended as a consequence of an armed conflict shall be determined in accordance with the indicia referred to in article 6.'

111 '1. Unless the treaty otherwise provides or the parties otherwise agree, the suspension of the operation of a treaty under its provisions or in accordance with the present Convention: (a) releases the parties between which the operation of the treaty is suspended from the obligation to perform the treaty in their mutual relations during the period of the suspension; (b) does not otherwise affect the legal relations between the parties established by the treaty. 2. During the period of the suspension the parties shall refrain from acts tending to obstruct the resumption of the operation of the treaty.'

112 art 9(5) and Annex (k) of the Draft Articles (n 6).

the investor–state dispute settlement clause in the treaty, adjudication of violations of these obligations may not come within the tribunal's jurisdiction. This is because some treaties limit the tribunal's jurisdiction solely to violations of the treaty.[113]

Moreover, Article 9 of the Draft Articles represents a progressive development of law by the ILC, so it may be argued to what extent is the procedure applicable. A case decided by the Court of Justice of the European Union (CJEU) supports a relaxed understanding of the notification procedure.

In the *Racke* case, the Court applied the VCLT *rebus sic stantibus* ground to the termination of a cooperation agreement by the European Council due to the outbreak of war in the former Yugoslavia. This judgment supports the possibility of termination of BIT provisions in several respects. First, the Court dispensed with the requirement of notification, as the European Council had made a public statement to a similar effect and Article 65 of the VCLT was not held representative of an international customary law.[114] Secondly, the treaty in question was an agreement on cooperation in trade, which had conferred certain rights and benefits on individuals and its preamble recitals had greatly resembled those found in a typical BIT.[115] The CJEU did not see a problem in terminating an agreement 'concerning private rights' and even held that a situation of peace was an essential condition for pursuing cooperation under the agreement.[116]

One can certainly object to the relevance of a single judgment of a regional court. The relevance is further diminished as the Court reviewed the decision of the Council from the viewpoint of the EU law, and did not delve deep into the general international law argument. In the end, it stated that the Council was 'not fundamentally wrong' in making the decision to terminate the agreement; nevertheless it did not say the Council's decision was correct. Still, due to the scarcity of state and judicial practice on the matter, the *Racke* decision strikes one as at least a useful point of reference.

7. THE SUSPENSION AND TERMINATION OF BITS AND CIRCUMSTANCES PRECLUDING WRONGFULNESSS

One may wonder why to bother with the grounds for termination and suspension under the law of treaties if states have the circumstances precluding wrongfulness, such as *force majeure* or necessity, always readily available as a fall-back option. This is even more so when their invocation may prove less burdensome. However, the conceptual distinction between the two bears along different legal consequences.

113 See (n 97).

114 *Racke* (n 24) para 58–59.

115 Compare 'to promote the development and diversification of economic, financial and trade cooperation in order to foster a better balance and an improvement in the structure of their trade and expand its volume and to improve the welfare of their populations' of the Cooperation Agreement in question in *Racke* (n 24) para 54, with 'Desiring to intensify their economic cooperation to the mutual benefit of both States on a long term basis, having as their objective to create favourable conditions for investments by investors of either Contracting Party . . . ' of the Greece–Syria BIT (n 97), Preamble.

116 *Racke* (n 24) para 55. Above we argued that the latter argument of the peace being an essential condition is not applicable to the case of BITs. However, the requirement of 'essential condition to consent' applies under art 65 of the VCLT, not under the Draft Articles.

Particularly, Article 27 of the ILC Articles on State Responsibility is of importance here. The provision states that invocation of circumstances precluding wrongfulness is without prejudice to the question of compensation for any material loss caused by the act in question. International authorities suggest that such compensation, although it does not equal to the 'damage' caused by the act, is usually awarded even if the wrongfulness of the act is precluded.[117] It can be argued that the compensation for material loss requirement does not have to apply under all circumstances due to its 'without prejudice' character. International practice, however, supports the obligation to compensate.[118] This leaves circumstances precluding wrongfulness of limited benefit to the host state. Furthermore, the practice of investment treaty tribunals shows reluctance in admitting this type of state's defences.[119]

It is admitted that should the requirement to pay compensation for material loss not be applicable, there would be little reason to argue for the suspension of a treaty obligations due an armed conflict. However, as the requirement seems to apply in the context of investor–state arbitration, suspension of treaty provisions under the VCLT or the Draft Articles appears to be a plausible track to pursue.

8. CONCLUSION

The foregoing analysis have shown that contrary to what suggest the Commentary to the Draft Articles and the literature on the topic, it is possible to lawfully suspend some BIT provisions once an extensive armed conflict emerges. It is true that possible suspension is limited to only a few investment treaty provisions, but even such a course of action may be of relief for a state suffering enough from the harsh consequences of war. This approach can be recommended as it reliefs the state from any potential claims of compensation for breach of the suspended treaty provisions, something that cannot be excluded under circumstances precluding wrongfulness. The notification procedure required for successful suspension does not appear an insurmountable obstacle, considering precedents supporting relaxation of this condition. Even in case of disputes between the contracting parties, the tribunal would be well advised to side with the suspending state, if the conditions analysed in the foregoing are met, particularly if the conflict is of sufficient magnitude. When a treaty includes a survival clause extending the treaty protection beyond the date of termination, a possibility of lawful termination is effectively eliminated. Such a clause, nevertheless, does not preclude the suspension of some treaty provisions with immediate effect pending the duration of the armed conflict.

117 ILC, 'Draft Articles on Responsibility of State for International Wrongful Acts, with Commentaries' (2001) UN Doc A/56/10, art 27, para 4.

118 ibid para 5; *Gabčíkovo-Nagymaros Project* (n 21) para 48; Ch Binder, 'Does the Difference Make a Difference? A Comparison Between Mechanisms of the Law of Treaties and of State Responsibility to Derogate from Treaty Obligations' in M Szabó (ed), *State Responsibility and the Law of Treaties* (Eleven publishing 2010) 1.

119 See n 44.

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