"Investment in the Crossfire: Assessing Investor Rights and Protections during Armed Conflict"

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Global Business Law and Regulations LL.M Capstone Thesis

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List of abbreviations

BIT	Bilateral Investment Treaties
ICSID	International Centre for Settlement of Investment Disputes
FPS	Full Protection and Security
FET	Fair and Equitable Treatment
ARS	Articles on the Responsibility of States for Internationally Wrongful Acts
ILC	International Law Commission
VCLT	Vienna Convention on the Law of Treaties

Abstract

Armed conflicts affect every aspect of the state including the economics and legal system. Unfortunately, in the contemporary world, political and international challenges continue to lead to armed conflicts. Investment is important for developing countries, many of which face threats of conflict or are already involved in such situations. These countries need to attract investors and protect the rights of those already invested. Understanding how investor rights are protected and the challenges during conflicts can help investors, and legal professionals manage the complexities of international investments in these conflict zones. This research will be focused on investment during the armed conflict, specifically investor rights and protections. It examines the remedies and protections available to investors and analyses the defence mechanisms that host states can invoke, such as force majeure and necessity, to avoid liability potentially. The thesis seeks to address key questions about the application of investment treaties during armed conflicts, the legal standards that may be breached, and the mechanisms for investor protection. Related issues emerge when exploring the main questions, such as how host states justify their actions and whether these defences are effective. Through analysis of concepts such as Full Protection and Security, Fair and Equitable Treatment, Expropriation, War Clauses, *force majeure,* and necessity. This research analyzes the scope of each standard during armed conflicts.

Keywords: Armed conflicts, host state, international investment, due diligence, investors, investor rights, force majeure, necessity, BIT, FET, FPS.

Acknowledgement

The idea for this topic arose because Georgia has frequently faced the threat of armed conflicts. Despite these challenges, Georgia, being a developing country, desperately needs foreign investments for its economy. Although there are no specific examples from Georgia's arbitration cases, I wrote this thesis to identify gaps and areas for improvement in protecting investors. My goal is to demonstrate that investors' rights will be safeguarded even during armed conflicts, encouraging them to invest in Georgia and support its economic growth.

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Introduction

Throughout history, armed conflicts have impacted economies, societies, and global security in many ways. Discussions about armed conflicts often focus on the human rights violations associated with them, but it's crucial to recognize their broader effects on a nation's economic and political landscape. Given the crucial role of economics and politics in investment decisions, it's clear that armed conflicts can greatly influence investment choices as well.

In today's interconnected world, international investment plays a crucial role in driving economic growth and prosperity, especially in developing countries. To attract foreign investment, countries often establish bilateral investment treaties (BITs) and other international agreements, providing assurances to investors about the protection of their investments. However, during periods of armed conflict or unrest, host states may struggle to fulfil these assurances, leading to complex legal challenges and disputes.

Armed conflicts often raise complex legal questions regarding the application and interpretation of international law, including treaties and customary norms. International investment law aims to protect the rights of investors and provide mechanisms for resolving disputes between investors and host states. Understanding how armed conflicts affect these legal protections is crucial for ensuring that investors receive fair treatment and compensation for any harm suffered as a result of conflict-related actions by host states.

This research aims to address several key questions. Are investment treaties still effective during armed conflicts? What options do investors have for protection? Are there legal frameworks specifically addressing investor rights during armed conflicts? Additionally, the thesis explores which international investment standards may be violated during armed conflicts and the protections available to investors. Furthermore, the effectiveness of defence

mechanisms that host states can employ against investor claims, such as force majeure or necessity, to potentially avoid liability is examined.

Defining key terms and exploring the intersection between armed conflict and investment is very important. The impact of armed conflicts on investment treaties will be analysed and each question systematically addressed. Each analysis will draw from scholarly perspectives, case studies from the International Centre for Settlement of Investment Disputes (ICSID), and tribunal discussions. The chapter about armed conflicts and investments defines key terms such as "*armed conflict",* how negatively armed conflicts affect investment and if investment treaties are applicable during armed conflicts. It analyses how conflicts can influence the applicability of treaty obligations. Key issues include the continuity of treaties and the practical implications of armed conflicts on treaty provisions. During armed conflicts, investors have different protection mechanisms based on the specific rights that were violated like Full Protection and Security, Compensation during Expropriation, Fair and Equitable Treatment, and War Clauses. The chapter discusses how these standards are interpreted and applied by international arbitration tribunals, highlighting specific cases where investor claims were satisfied. The effectiveness of host state defence mechanisms is also discussed, including necessity and *force majeure*. It delves into legal doctrines such as force majeure, and necessity, assessing their effectiveness and limitations through case law and scholarly opinions. The chapter also examines how tribunals weigh these defences in arbitration. The concluding chapter summarizes the main findings of the research, highlights the importance of the study, and discusses the broader implications for international investment law. It emphasizes the necessity for a clear and binding legal framework to govern investment treaties during armed conflicts and suggests areas for future research to address unanswered questions.

1. Armed conflicts and investments

Exploring the complexities of how armed conflicts influence the rights and protections of investors requires a complex understanding of armed conflicts themselves. This includes examining the diverse definitions of armed conflicts, direct impacts on investments, and effect on investment treaties considering the potential risk of suspension or termination of agreements during armed conflicts.

1.1. Definition of Armed Conflicts

In the legal framework, it is not uncommon that universal definitions do not exist. Some very well-known concepts do not have unanimously accepted definitions. For example, *"investment", "justice", "human rights", and "law"* itself. Armed conflicts are not an exception, even though the concept may be associated with many things, armed conflicts do not have one unanimous definition.

Human history is mostly constructed by the conflicts among mankind. The history of armed conflicts is as old as human civilization itself. Armed conflicts reflect the complex interaction of politics, economics, ideology, and human nature. While the nature of warfare has evolved with technological advancements, the fundamental incentives of conflict remain deeply rooted in human society. From the armed conflicts in ancient Mesopotamia world faced two world wars in the twentieth century. World wars significantly reduced the population, and set back social development, but encouraged the development of military technologies. After the Second World War, when people analysed the destructive nature of war with modern technologies, countries decided to create international organizations for peacekeeping missions.

The Geneva Conventions are a set of International treaties that establish the standards of international law for the humanitarian treatment of those affected by armed conflicts. The initial

Geneva Convention was ratified in 1864 to institute the Red Cross symbol, and it aimed to protect wounded soldiers in wartime. The discussions continued in Switzerland and two main conventions were added in 1949 after WW II. The Geneva Conventions officially came into force on 21 October 1950.[1]

Geneva Conventions do not explicitly define armed conflicts but distinguish two categories of armed conflicts – international and non-international. Geneva Convention defines international armed conflict as a conflict *"between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them."*[2] Geneva Convention defines non-international armed conflicts as taking "*place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol*".[3] The classification of armed conflicts does not distinguish the damages they cause. Both international and non-international armed conflicts have drastic effects on the country's or countries' economies.

Armed conflicts, with their historical significance and complicated nature, remain a compound and evolving aspect of human society. Despite the absence of a universal definition, the concept of armed conflicts is already rooted in our minds.

[1] Cornell L. Sch. Legal Info. Inst., Geneva Conventions and Their Additional Protocols, https://www.law.cornell.edu/wex/geneva_conventions_and_their_additional_protocols (last visited June 16, 2024).

[2] Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 2, Aug. 12, 1949, https://ihl-databases.icrc.org/en/ihl-treaties/gciv-1949/article-2?activeTab=undefined (last visited June 16, 2024).

[3] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 1, June 8, 1977, https://ihl-databases.icrc.org/en/ihl-treaties/apii-1977/article-1?activeTab=undefined (last visited Apr. 10, 2024).

1.2. Influence on investments

In times of armed conflict, the rights and protections afforded to investors become significantly dangerous, often overshadowed by immediate security concerns and the conditions of war. This presents a complex challenge as on one hand, investments can be vital for post-conflict reconstruction and economic stability, yet on the other, the safety and security of investors and their assets are not always guaranteed during times of unrest. The problem thus lies in understanding how existing investment laws and mechanisms function, or fail to function, in the context of armed conflict, and how these dynamics impact both the rights of investors and the broader objectives of peacebuilding and sustainable development in conflict-affected regions.

Armed conflicts always bring significant economic disruptions. The destruction of critical infrastructure, such as roads, ports, and utilities, limits the ability of businesses to operate effectively. Moreover, the uncertainty surrounding the duration and outcome of conflicts makes investors hesitant to commit capital, fearing unpredictable market conditions. For instance, the Syrian civil war, now in its fourteen years, has devastated the country's economy and decreased investments by almost 80%.[4] In Iraq, for example, the ISIS insurgency led to the destruction of housing stocks worth IQD 18.7 trillion (US$ 16.1 billion), and oil refineries and pipelines sector damage is calculated to be approximately IQD 5 trillion (US$ 4.3 Billion). It impacted both local and foreign investors in the country's vital oil industry.[5]

[4] World Bank, The Toll of War: The Economic and Social Consequences of the Conflict in Syria, https://documents1.worldbank.org/curated/en/116851499698680259/pdf/117331-WP-v1-Sria-ESIA-Material-for-Arabic-Translation.pdf (last visited June 16, 2024).

[5] World Bank, Iraq Reconstruction and Investment, https://documents1.worldbank.org/curated/en/600181520000498420/pdf/123631-REVISED-Iraq-Reconstruction-and-Investment-Part-2-Damage-and-Needs-Assessment-of-Affected-Governorates.pdf (last visited Apr. 10, 2024).

Other than physical safety, the political Instability Inherent in armed conflicts Introduces a range of regulatory risks for investors. Governments may enact emergency measures, change investment policies, or even expropriate assets in the name of national security. This unpredictability creates a challenging environment for investors seeking stable and predictable regulatory frameworks. Venezuela's political and economic crisis serves as a stark example, with the government nationalizing industries and imposing stringent currency controls, deterring foreign investment by more than 20% by 2021.[6]

Conflicts disrupt not only physical assets but also human capital. Skilled workers, professionals, and managers often flee conflict zones, leaving businesses without essential talent. This displacement hampers the operations and productivity of enterprises, affecting their long-term viability. In Afghanistan, the prolonged conflict has resulted in a brain drain, with many skilled professionals seeking refuge abroad, leaving a skills gap that businesses struggle to fill.[7] Investments started increasing after 2020, but before that, it was drastically decreased.[8]

1.3. The Effects of Armed Conflict on Treaties

Investments become appealing due to the assurance they provide in terms of protection and rights for investors. International investment law safeguards the investor's rights, yet the best guarantee for the investor to be protected is the investment treaty. Consequently, the impact of armed conflicts on investment treaties becomes a significant consideration. The question of

[6] FocusEconomics, Investment Forecasts and Outlook for Venezuela, https://www.focus-economics.com/country-indicator/venezuela/investment/#:~:text=Investment%20forecasts%20and%20outlook%20for%20Venezuela&text=Venezuela%20recorded%20an%20average%20growth,in%20Venezuela%20was%20%2D3.0%25 (last visited Apr. 10, 2024).

[7] Diplomat, The Economic Toll of Afghanistan's Refugee Crisis, The Diplomat (Aug. 2016), https://thediplomat.com/2016/08/the-economic-toll-of-afghanistans-refugee-crisis/ (last visited June 16, 2024).

[8] World Bank, Foreign Direct Investment, Net Inflows (% of GDP) – Afghanistan, https://data.worldbank.org/indicator/BX.KLT.DINV.WD.GD.ZS?end=2021&locations=AF&start=2014 (last visited Apr. 10, 2024).

how armed conflicts influence treaties overall and whether there exist mechanisms to regulate state conduct during such conflicts remains to be examined.

Other than the Geneva Convention armed conflicts are defined in the Draft articles on the effects of armed conflicts on treaties. This is the UN document adopted by the International Law Commission. Draft Articles define armed conflict as a *"situation in which there is resort to armed force between States or protracted resort to armed force between governmental authorities and organized armed groups."*[9] So, it excludes instances of violent conflicts involving organized armed groups within a single country. Draft Articles define "*Treaty*" as "*an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation and includes treaties between States to which international organizations are also parties."*[10]

Even though Draft Articles is not a binding document, it serves as an important guideline on how armed conflicts affect treaties. The general principle in the Draft Articles would be Article 3 which establishes that simply the existence of armed conflict does not *ipso facto* suspend or terminate the treaty. It is supposed to be the guarantee of the continuation and stability.[11] But evidently, it does not even have the affirmative formulation.

By Article 4 of the Draft Articles treaties are given priority if they have a provision about armed conflicts[12]. Draft Article gives us the factors for termination of the treaty.[13] Factors considered include the nature of the treaty (subject matter, object, purpose, content, number of parties) and characteristics of the armed conflict (territorial extent, scale, intensity, duration, outside

[9] ILC, Draft Articles on the Effects of Armed Conflicts on Treaties, with Commentaries, in Yearbook of the International Law Commission, 2011, vol. II, art. 2(b).

[10] Ibid., art. 2(a).

[11] Ibid., art. 111.

[12] ibid., art. 4.

[13] ibid., art. 6.

involvement in non-international conflicts). According to Article 5, the rules of international law concerning treaty interpretation are to be utilized to determine whether a treaty might be subject to termination, withdrawal, or suspension due to the effects of an armed conflict.[14]

When analysing the Draft Articles on the effects of armed conflicts on treaties it is evident that the language is open-ended and non-definitive. Moreover, the language of the provisions is ambiguous and too broad. Take as an example Article 5, which gives international law *"the right"* to interpretation when it comes to the termination of the treaty.[15] International law is a very broad concept and the term itself can be interpreted in different ways. The commentary of the article says that it was meant to be interpreted as it is in the Vienna Convention, but the draft articles did not do so, as not all the Member States are signatories to the Vienna Convention.[16] The language of the article and the draft itself leave language for different ways of interpretation and it can provoke disputes between states.

Throughout human history, we have accumulated vast knowledge and understanding of treaties, dating back to ancient times such as the peace treaty of Kadesh in 1269 BC.[17] The origins of contemporary treaty regulations regarding foreign investment can be traced back to the eighteenth century when the United States and France finalized their initial commercial treaty. This was further developed in the nineteenth century with treaties between the United States and its European allies and the emerging Latin American States.[18] Therefore, investment

[14] ibid., art. 5.

[15] Ibid

[16] ibid., art. 112.

[17] United Nations Gift, Replica: Peace Treaty between Hattusilis and Ramses II, https://www.un.org/ungifts/replica-peace-treaty-between-hattusilis-and-ramses-ii#:~:text=This%20Kadesh%20Peace%20Treaty%20is,Ramses%2C%20Pharaoh%20of%20the%20Egyptians (last visited Apr. 10, 2024).

[18] Rudolf Dolzer, Christoph Schreuer & Ursula Kriebaum, The Evolution of Investment Protection Treaties, in Principles of International Investment Law ch. (d) (3d ed. 2022), (subchapter (d) The evolution of investment protection treaties)

treaties are relatively new, and there has been minimal analysis of their fate during armed conflicts. The International Law Commission affirmed that BITs are intended to fall within the scope of treaties categorised as treaties of friendship, commerce, and navigation and similar agreements concerning private rights.[19] This acknowledgement by the ILC implies that the Draft Article also applies to investment treaties. The treaties may have clauses indicating that the treaty is applicable even during armed conflicts.

https://ceulearning.ceu.edu/pluginfile.php/659497/mod_resource/content/0/Principles%20Chapter%201.pdf (last visited June 16, 2024).

[19] Lucius Caflisch, First Report on the Effects of Armed Conflicts on Treaties, U.N. Doc. A/CN.4/627 & Add.1, at 94, (2009),(https://legal.un.org/ilc/documentation/english/a_cn4_627.pdf (accessed June 16, 2024).

2. Investor Protections During Armed Conflicts

Protecting investors during wars is crucial for both sides in BITs and the broader international community. As mentioned earlier, wars greatly impact economies, which can endanger investments and expose foreign investors to various risks. The difficulties posed by wars in the context of international agreements have been well-documented.

One immediate and evident consequence of wars is the physical harm caused to property, infrastructure, and assets. This includes the destruction of factories, offices, equipment, and other tangible investments. The aftermath of wars often leaves behind widespread damage, which slows down economic activity and puts investments at risk.

Investors working in areas affected by conflicts face a significant threat of losing their entire investment due to expropriation or nationalization. International Investment law has some standards that need to be followed in the investment such as Fair and Equitable Standards of Treatment, Full Protection and Security, and expropriation.

2.1. War Clauses

Model BITs like the UK, US and European model BITs have *"war clauses*" that ensure compensation for the investors if they suffer any losses during the armed conflict in the countries. "*War Clauses*" can be the basic ensuring payment of indemnities for losses sustained by investors in a situation of conflict and advance, going a step further, foreign investors are granted a significant entitlement to receive reimbursement or payment for damages caused by the actions of the host state's forces or authorities, such as seizing or damaging the investor's property without necessity.[20] The provision from the US model BIT specifies that it applies to

[20] Jure Zrilič, 'Investment Treaty Protections against Conflict-Related Injuries', The Protection of Foreign Investment in Times of Armed Conflict (Oxford, 2019; online edn, Oxford Academic, 21 Nov. 2019), https://doi.org/10.1093/oso/9780198830375.003.0004, accessed 6 June 2024.

losses suffered by investments in the territory of the Party due to armed conflict or civil strife.[21] The provision about the remedies of armed conflict is the sub-article of the Minimum Standard Treatment clause. The emphasis is on the requirement for each Party to accord non-discriminatory treatment to investors and investments of the other Party. This means that the treatment provided should not favour domestic investors over foreign investors in similar situations. The US Model BIT emphasizes non-discrimination and national treatment, ensuring that affected investors receive treatment at least equal to that of domestic investors. The European Model and UK Model BITs add a *"most favoured nation"* approach, providing an additional layer of protection by comparing treatment to that of investors from any non-party.[22] The European Model introduces flexibility with the formulation *"whichever is more favourable"*, allowing for a comparison between the treatment of the Party's investors and investors of any non-Party and putting investors in a more beneficial situation.[23] It is apparent, that The European model BIT stands out due to its thorough structure, which carefully considers each scenario of armed conflict. It acknowledges the potential breaches of national treatment and MFN, offering flexibility that can be advantageous for investors, particularly in terms of compensating for any losses incurred.

If a war clause applies, the investor loses the protection of the BIT, including the full protection and security standard.[24] Hence, they can use the FPS clauses to argue for violating international investment law standards, investor rights.

One important case highlighting the application of "*war clauses"* in practice is USA v. Zaire. Tribunal discusses that Article IV(1)(b) of the BIT addresses compensation for damages to

[21] US Model BIT Art.5.4 (2012)

[22] UK Model BIT, Art. 4, (2008)

[23] EU Model BIT, Art. Compensation for Losses, (2023)

[24] Viacheslav Liubashenko, Treatment of Foreign Investments during Armed Conflicts: The Regimes, 21 J. Conflict & Security L. 162 (2018).

investments caused by events such as revolution, state of national emergency, revolt, insurrection, riot, or acts of violence in the territory of the host country. The clause stipulates that nationals or companies of either party whose investments suffer such damages are entitled to compensation. The Tribunal found that the damages suffered by AMT during the events of September 1991 and January 1993, which involved riots and acts of violence, fall squarely within the scope of Article IV(1)(b). This means Zaire is obligated to compensate AMT for the losses incurred as a result of these events, regardless of the specific perpetrators of the violence (whether state actors or other parties).[25] This case illustrates how *"war clauses"* in BITs safeguard investors during conflicts. These clauses ensure that investors receive compensation if their rights are violated, even amid unrest. The tribunal's decision emphasizes that despite chaotic events like riots and violence, the host state is accountable under international law to compensate affected investors. This underscores the principle that states have a responsibility to protect foreign investments as stipulated in their international commitments.

2.2. Full Protection and Security

One of the standards to protect investors in international investment law and BITs is Full Protection and Security. Full Protection and Security is frequently used in the literature as just protection and security. Foster when defining protection and security uses the *"ordinary meaning"* method from the Vienna Convention of the Law of Treaties Framework and dictionaries. The Oxford English Dictionary describes protection as the state or condition of being safeguarded; providing shelter, defence, or preservation from harm, danger, or damage,

[25] ICSID Award, American Manufacturing & Trading, Inc. (USA/Zaire) v. Republic of Zaire, paras 6.12-6.14, (1997)

including guardianship and care.[26] Hence, protection is focused on the object that needs to be preserved. The same dictionary defines security as the state or condition of being safeguarded from or not exposed to danger, ensuring safety. It further explains security as being secure, which includes freedom from danger, care, anxiety, apprehension, uncertainty, doubt, and material or financial need, as well as stability. [27] Several scholars raise a question of the scope of FPS. Some think that it is only limited to physical protection, while others think that legal protection is also guaranteed by the FPS. In the case of National Grid v. Argentina, the tribunal determined that a provision in the UK-Argentina BIT which demanded *"protection and constant security"* included both legal and physical forms of security. The tribunal reasoned that the terms *"protection" and "security*" could extend to include non-physical harms, and the treaty did not limit the standard to solely physical protection.[28] In the case, Azurix v. Argentina, the tribunal highlighted that the ordinary meanings of the terms used are broad and can encompass more than just physical damages, the word "*full*" is the implication for that.[29]

According to the Giuditta Cordero Moss FPS is a responsibility of a host state to ensure the safety and security of foreign investments within its jurisdiction. He mentions that the majority of clauses related to FPS in investment treaties do not explicitly outline the type of protection

[26] Oxford English Dictionary (3d ed., 2007), cited in George K. Foster, Recovering Protection and Security: The Treaty Standard's Obscure Origins, Forgotten Meaning, and Key Current Significance, 45 VAND. J. TRANSNAT'l L. 1106 (2012). ALWD 7th ed.

[27] ibid

[28] Nat'l Grid P.L.C. v. Argentina, Case 1:09-cv-00248-RBW, Award, 187-89 (UNCITRAL Arb. Trib. 2008), cited in George K. Foster, Recovering Protection and Security: The Treaty Standard's Obscure Origins, Forgotten Meaning, and Key Current Significance, 45 VAND. J. TRANSNAT'l L. 1107 (2012). ALWD 7th ed.

[29] Azurix Corp. v. Argentine Republic, ICSID Case No. ARB/01/12, Annulment Proceeding, 408 (July 14, 2006), cited in George K. Foster, Recovering Protection and Security: The Treaty Standard's Obscure Origins, Forgotten Meaning, and Key Current Significance, 45 VAND. J. TRANSNAT'l L. 1107 (2012). ALWD 7th ed.

required, commonly using the general term *"protection and security*".[30] Yet in some BITs or tribunal decisions, like in UK-Argentina BIT, is mentioned as *"protection and constant security"*.[31] Giuditta suggests that FPS entails two main types of protection for investors. Firstly, there's physical protection and security, which involves safeguarding investors and their physical assets from harm like damage, destruction, occupation, or other forms of interference. Secondly, there's legal protection, which includes access to legal remedies and legal action by the state when necessary.[32]

When talking about FPS Wena Hotels Ltd. V. Arab Republic of Egypt Case is worth mentioning. The dispute arose from long-term agreements to lease and develop two hotels located in Luxor and Cairo, Egypt. These agreements were made between Wena Hotels Ltd. (a British company) and the Egyptian Hotels Company (EHC). On April 1, 1991, the Egyptian Hotels Company seized the two hotels in a manner described as violent and disorderly, involving physical aggression and property damage. Eyewitness accounts reported that individuals associated with EHC entered the hotels, forcibly removed staff and guests, and caused significant disruption. When discussing FPS tribunal referenced the bilateral investment treaty between Zaire and the United States, highlighting that the host state must take all necessary measures to ensure the full enjoyment of protection and security of investments. This duty of vigilance means that the state should not use its legislation to undermine its obligation to provide protection and security to foreign investments. The Tribunal clarified that the obligation of FPS isn't absolute and doesn't mean strict liability. This means the host state isn't

[30] Guiditta Cordero, Full Protection and Security, in August Reinisch (ed.), Standards of Investment Protection (Oxford University Press, 2008), p. 133, online edn, Oxford Academic, Mar. 22, 2012.

[31] UK-Argentina BIT, Art. 2(2), (1190)

[32] Guiditta Cordero, Full Protection and Security, in August Reinisch (ed.), Standards of Investment Protection (Oxford University Press, 2008), p. 138-143, online edn, Oxford Academic, Mar. 22, 2012.

responsible for all damages suffered by foreign investors automatically; it's not like being an insurer or guarantor of their investments. Instead, the state is obligated to take reasonable steps to protect investments, without accepting absolute responsibility for all harm to foreign investors. In the specific case discussed, the Tribunal found Egypt failed to meet its FPS obligation. Egypt knew about EHC's plans to seize Wena's hotels but didn't take preventive measures. Furthermore, after the seizures occurred, Egyptian authorities, including the police and Ministry of Tourism, didn't promptly take action to return control of the hotels to Wena. Egypt also didn't impose significant penalties on EHC or its officials, indicating implicit approval of the actions against Wena.[33] Three main problems highlighted by the tribunal were neglecting to prevent the seizure of the hotels (the Minister of Tourism was aware of the potential risk of the hotels being seized by the EHC); Failing to provide police protection (there was no action taken to remove EHC employees from the premises); Omitting to offer basic legal protection (lack of compensation, failure to prosecute and penalize EHC directors). The government's inability to provide police protection can be viewed as a violation of its duty to ensure full protection and security. This duty includes using police and public authorities to maintain public order and safety, particularly to protect investments from physical damage.[34] The case PSEG V. Turkey reinforced the concept that the obligation involves preserving public order and ensuring physical safety through police intervention.[35] As for omitting to offer basic legal protection providing basic legal protection is linked to the need to keep the legal and business environment stable and predictable. This is important for treating investments fairly.

[33] Wena Hotels Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/98/4, 900-914 Award (Dec. 8, 2000)

[34] Guiditta Cordero, Full Protection and Security, in August Reinisch (ed.), Standards of Investment Protection (Oxford University Press, 2008), p. 138, online edn, Oxford Academic, Mar. 22, 2012.

[35] PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Electrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey, ICSID Case No. ARB/02/5, cited in Guiditta Cordero, Full Protection and Security, in August Reinisch (ed.), Standards of Investment Protection (Oxford University Press, 2008), p. 138, online edn, Oxford Academic, Mar. 22, 2012

Major changes in the legal environment can be viewed as breaking protection rules.[36] Therefore, the Wena Hotels case award is important as it talks about the principles that are important in international investment law to protect investors and deepen the understanding of FPS.

Mostly, in model BITs FPS is in the clauses along with the FET standard. In the UK Model BIT FET and FPS are not separated at any level and they are in the Promotion and Protection of Investment chapter in the same clause. *"Investments of nationals or companies of each 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. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of nationals or companies of the other Contracting Party."*[37] This provision aims to prevent the host state from taking actions that unjustifiably harm the investment. Unreasonable measures refer to actions lacking a rational basis or fairness. Discriminatory measures refer to differential treatment based on nationality or other unjustified criteria. In this or any other clause in the UK Model BIT FPS standard scope is not specified. Hence, it creates a question of whether the traditional scope or extended scope is implied. In the EU Model BIT Article Treatment of Investors and of Covered Investments FET and FPS are in one clause, but afterwards, they are separately defined and scoped. Part 4 suggests that "*for greater certainty, "full protection and security" refers to the Party's obligations to ensure the physical security of investors and covered investments. "* [38] By explicitly mentioning *"physical security"*, the clause appears to limit the FPS obligation to the protection against physical threats. This includes protection against

[36] Ibid, p.143

[37] UK Model BIT, Art. 2(2), (2008)

[38] EU Model BIT, Art. Treatment of Investors and of Covered Investments part 4, (2023)

violence, sabotage, and other physical harms to the investor and the investment. The clause does not mention legal, regulatory, or administrative protection. Investors under the EU Model BIT are assured protection against physical threats but cannot rely on FPS for protection against legal or regulatory issues. They may need to look to other provisions within the BIT, such as FET or specific clauses related to expropriation, for legal security. This reduces the burden on host states concerning legal and regulatory frameworks under the FPS clause. This means that in the EU Model BIT FPS is mentioned in the traditional scope only with the physical safety and not extended scope with legal safety as well. US Model BIT mentions FPS in Article 5 Minimum Standard of Treatment. This clause outlines the obligations of each party to provide minimum standards of treatment to covered investments, including the principles of FET and FPS, by customary international law. The clause clarifies that FET and FPS do not extend beyond customary international law, limiting the scope of these protections. According to Article 5 Section 2. B *"full protection and security" requires each Party to provide the level of police protection required under customary international law."*[39] FPS is specified as the level of police protection required under customary international law, highlighting physical security.

Therefore, in the model BITs either the scope of FPS is traditional or not specified. Yet in the case Azurix Corp. v. Argentine Republic tribunal recognized that failing to provide basic legal protection interrelates with failing to offer fair and equitable treatment, suggesting that both obligations are often breached together when the state fails to protect the legal interests of the investment.[40] The Siemens (German company) v. Argentina tribunal questioned how FPS

[39] US Model BIT, Art. 5.2(b), (2012)

[40] Azurix Corp. v. The Argentine Republic, ICSID Case No. ARB/01/12, cited in Guiditta Cordero, Full Protection and Security, in August Reinisch (ed.), Standards of Investment Protection (Oxford University Press, 2008), p. 135, online edn, Oxford Academic, Mar. 22, 2012)

applies to intangible assets, concluding that a broader interpretation including legal security was necessary.[41] This shows that the text of the model BITs should be interpreted contextually considering any agreement between the parties or implied scope of the international law according to the Vienna Convention on the Law of Treaties.[42]

During armed conflicts destruction is very common therefore FPS standard is exactly the standard investors need to protect their interests. Saluka v. Czech Republic case mentions that FPS is intended to cover losses from civil strife and physical violence, aligning with the traditional understanding of the standard.[43] In the case of Eastern Sugar v. Czech Republic, the tribunal noted that FPS aims to protect against physical violence, reinforcing the scope of the standard in conflict situations.[44] As mentioned above BITs have war clauses so it raises a question about the necessity of using FPS standards during armed conflicts. FPS and war clauses have different protected legal subjects. In the case, CMS Gas Transmission Company v Argentine tribunal highlights that the main purpose of the war clause in US-Argentine BIT is to ensure that investors are treated fairly when measures are taken to address losses during emergencies. This treatment should be at least as good as that given to nationals or other foreign investors. The Article doesn't take away any rights from the Treaty but guarantees that any

[41] Siemens A.G. v. The Argentine Republic, ICSID Case No. ARB/02/8, cited in Jure Zrilič, Investment Treaty Protections against Conflict-Related Injuries, in The Protection of Foreign Investment in Times of Armed Conflict (Oxford University Press, 2019) 94, online edn, Oxford Academic, Nov. 21, 2019.

[42] Vienna Convention on the Law of Treaties Article 31.3

[43]Saluka Invs BV v. Czech Republic, UNCITRAL, Partial Award, 17 March 2006, paras. 483–84, cited in Jure Zrilič, Investment Treaty Protections against Conflict-Related Injuries, in The Protection of Foreign Investment in Times of Armed Conflict (Oxford University Press, 2019), 94, online edn, Oxford Academic, Nov. 21, 2019)

[44] Eastern Sugar v Czech Republic SCC Case no 088/2004, Partial Award, 27 March 2007, para 203, cited in Jure Zrilič, Investment Treaty Protections against Conflict-Related Injuries, in The Protection of Foreign Investment in Times of Armed Conflict (Oxford University Press, 2019), 94, online edn, Oxford Academic, Nov. 21, 2019)

actions taken to reduce losses will be fair and won't discriminate against anyone.[45] Hence, the FPS provision establishes grounds for state liability, while the armed conflict clause ensures that investors are not discriminated against concerning the payment of conflict-related compensation or indemnities, irrespective of state responsibility.[46] Yet, as in the whole legal realm tribunals have differences here as well. Some tribunals consider the armed conflict clause as an additional ground for the host state's liability, intending to reinforce the FPS clause[47], while others held that the armed conflict clause, as *lex specialis,* excluded the application of the FPS provision in the context of revolution, thereby limiting the state's obligation to provide investors with a national or Most Favoured Nation treatment rather than a superior FPS.[48] According to Jure Zrilic, both the Advanced Armed Conflict Clause and the FPS provision aim to protect investors against physical violence during conflicts. However, the application of the advanced clause is restricted to cases where investment losses are caused specifically by the actions of the host state's forces or authorities.[49] To compare the texts of the FPS and war

[45] CMS Gas Transmission Company v Argentine Republic ICSID Case no ARB/01/8, Award, 12 May 2005, para 375, cited in Jure Zrilič, Investment Treaty Protections against Conflict-Related Injuries, in The Protection of Foreign Investment in Times of Armed Conflict (Oxford University Press, 2019), 110, online edn, Oxford Academic, Nov. 21, 2019)

[46] Jure Zrilič, Investment Treaty Protections against Conflict-Related Injuries, in The Protection of Foreign Investment in Times of Armed Conflict (Oxford University Press, 2019), 121, online edn, Oxford Academic, Nov. 21, 2019)

[47] American Manufacturing & Trading, Inc (AMT) v Republic of Zaire ICSID Case no ARB/93/1, Award, 21 February 1997, para 6.08, cited in Jure Zrilič, Investment Treaty Protections against Conflict-Related Injuries, in The Protection of Foreign Investment in Times of Armed Conflict (Oxford University Press, 2019), 121, online edn, Oxford Academic, Nov. 21, 2019).

[48] LESI SpA and ASTALDI SpA v People's Democratic Republic of Algeria ICSID Case no ARB/05/3, Award, 12 November 2008, para 18, cited in Jure Zrilič, Investment Treaty Protections against Conflict-Related Injuries, in The Protection of Foreign Investment in Times of Armed Conflict (Oxford University Press, 2019), 91, online edn, Oxford Academic, Nov. 21, 2019).

[49] Jure Zrilič, Investment Treaty Protections against Conflict-Related Injuries, in The Protection of Foreign Investment in Times of Armed Conflict (Oxford University Press, 2019), 107, online edn, Oxford Academic, Nov. 21, 2019).

clauses in the model BITs like the UK model BIT, the war clause guarantees compensation and does not explicitly burden the host state to prevent destruction or safeguard foreign investments.[50] Therefore, investors need to have additional sometimes even more effective insurance to protect their investments.

AAPL, a Hong Kong-based company, had invested in a shrimp farm in Batticaloa, Sri Lanka. On January 28, 1987, the shrimp farm was destroyed during a military operation by the Sri Lankan Special Task Force (STF) against the Liberation Tigers of Tamil Eelam (LTTE), a separatist militant organization. During this operation, AAPL's property was allegedly requisitioned and then destroyed by the Sri Lankan forces. The destruction included not only the physical infrastructure of the shrimp farm but also the killing of the farm manager and several permanent staff members. AAPL claimed that the destruction was wanton and not necessary for military purposes. AAPL sought compensation under the Sri Lanka-UK BIT, arguing that Sri Lanka had failed to provide *"full protection and security"* to its investment, as required by Article 2 of the BIT. AAPL claimed that this clause implied strict or absolute liability on the part of Sri Lanka for any damage to its investment, regardless of the circumstances. The Sri Lankan government argued that the destruction was caused by combat action between the STF and LTTE, and hence, it was not liable under the BIT. They contended that the "*full protection and security*" clause did not impose strict liability but rather a duty of due diligence, which they had fulfilled. They also argued that the necessity of the situation justified the destruction. The Tribunal interpreted the treaty provisions to establish a legal regime that would protect investors under the BIT. It was determined that if the destruction of the property was not necessary under the circumstances or did not occur as a direct result of combat operations, Sri Lanka would be liable to provide restitution or adequate compensation

[50] UK Model BIT art. 2 & art. 4.1., (2008)

to AAPL. This case is interesting because in Sri Lanka-UK BIT there are war clauses and FPS clauses and the tribunal discusses both. Firstly, Article 4.1 of the BIT provides compensation to foreign investors for losses due to "*war or other armed conflict, revolution, a state of national emergency, revolt, insurrection, or riot*."[51] It establishes that investors are entitled to the same treatment as nationals of the host state or nationals of any third state, whichever is more favourable. Article 4.2 extends the protection by covering losses resulting from the requisitioning of property by the host state's forces or authorities. Additionally, it covers the destruction of the property by the host state's forces or authorities, which was not caused in combat action but was unnecessary. Article 2 of Sri Lanka-UK BIT imposes a general obligation on the host state to ensure that foreign investments enjoy full protection and security.[52] The tribunal recognized that the FPS clause applies even during armed conflicts, requiring the state to take reasonable measures to prevent harm to foreign investments. This includes protection from violence, damage, or loss arising from situations like revolutions, state emergencies, insurrections, etc. The tribunal recognized that the FPS clause applies even during armed conflicts, requiring the state to take reasonable measures to prevent harm to foreign investments. This includes protection from violence, damage, or loss arising from situations like revolutions, state emergencies, insurrections, etc. The tribunal discussed the due diligence obligation of the state, emphasizing that while the FPS clause does not make the state an insurer against all risks, it does require the state to take active steps to prevent foreseeable harm to foreign investments. The tribunal concluded that Sri Lanka failed to meet this obligation. The destruction of Serendib's assets and the inability of the state to provide adequate protection constituted a breach of the "*Full Protection and Security*" clause.

[51] Sri Lanka-UK BIT Article 4.1, (1992)

[52] Sri Lanka-UK BIT Article 2, (1992)

In the legal doctrine *lex specialis* prevails over the general law. As mentioned above FPS clauses cover subject matters more generally, while war clauses are very specific clauses. Arbitrator Asante argued that the armed conflict clause, as *lex specialis*, should prevail in conflict situations.[53] So, it is interesting that while the Sri Lanka-UK Bilateral Investment Treaty (BIT) did contain war clauses (Article 4.1 and 4.2), which typically provide protections for investments during periods of war or armed conflict, the tribunal's focus was primarily on the Full Protection and Security Clause. The tribunal's decision to prioritize the Full Protection and Security Clause over the war clauses indicates the significance of ensuring comprehensive protection for foreign investments. By emphasizing the Full Protection and Security Clause, the tribunal underscored the principle that host states are responsible for safeguarding investments against a wide range of risks, not just those arising from war or armed conflict. The tribunal's prioritization of the Full Protection and Security Clause in this case highlights its importance in shaping the outcome and determining the liability of the host state. It underscores the broader implications of investment protection treaties and the obligations they impose on host states to ensure the safety and security of foreign investments under various circumstances, including armed conflict and other forms of unrest. This case highlights the importance of due diligence by the host state and the causal link between active action or inaction and the result, which brings us to the breach of FPS standards.

[53] Asian Agricultural Products Ltd (AAPL) v Republic of Sri Lanka ICSID Case no ARB/87/3, Award, 27 June 1990, para 85(b), Dissenting Opinion (n 23) 584, cited in Jure Zrilič, Investment Treaty Protections against Conflict-Related Injuries, in The Protection of Foreign Investment in Times of Armed Conflict (Oxford University Press, 2019), 123, online edn, Oxford Academic, Nov. 21, 2019).

2.3. Expropriation

Simply defined expropriation is an act of a government or authority taking private property. Usually, BITs include clauses ensuring fair compensation for expropriation, but there are no definitions of expropriation. How we hear expropriation is that the government takes over private property, but so is described as nationalization. The terminology in International Investment Agreements regarding expropriation is not consistent, with terms like expropriation, taking, nationalization, deprivation, and dispossession being used interchangeably.[54] BITs are very vague sometimes which leaves room for the interpretation of international law or scholars. In the UNCTAD expropriation typically involves property-specific or enterprise-specific takings, with property rights remaining with the state or transferred to other economic operators.[55] There are two types of expropriations direct and indirect. In direct expropriation, there is an open, deliberate, and unequivocal intent, often reflected in formal laws, decrees, or physical acts, to deprive the owner of their property through transfer of title or seizure.[56] Indirect expropriation is very well defined in the Metalclad v. Mexico case where The Tribunal defines an indirect expropriation as an interference *"depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property".*[57] UK Model BIT provision about expropriation suggests that expropriation measures must be satisfied by public purpose, absence of discrimination, and prompt, adequate and effective compensation.[58] The US Model BIT adds a fourth requirement following due process of law and Minimum Standard Treatment.[59] The same four requirements

[54] United Nations Conference on Trade and Development, Expropriation, UNCTAD Series on Issues in International Investment Agreements II, 5 (2012).

[55] Ibid, 6

[56] Ibid, 6-7

[57] Metalclad Corporation v. The United Mexican States, ICSID Case No. ARB(AF)/97/1, para. 103, at 28 (2000).

[58] UK Model BIT, Art. 5.1, (2008)

[59] US Model BIT, Art. 6.1, (2012)

are for the EU Model BIT as well.[60] The public purpose requirement means that expropriation shall benefit the public interest. The non-discrimination requirement suggests that expropriation shall not target a specific investor or category of investors. The requirement of prompt, adequate, and effective compensation requires quick compensation with a currency that has the same effect and adequate amount. As for EU and US Model BITs due process means that expropriation must be conducted following due process of law, ensuring that legal procedures are followed and that the rights of all parties involved are respected.

Expropriation during armed conflicts is a foreseeable risk. When necessary and proportionate, the government may directly or indirectly expropriate an investor's property. In such cases, the remaining requirement is fair compensation for the investor. During armed conflicts, the most probable standards and clauses used by tribunals are the war causes or FPS. The Mitchell Award illustrates the difficulty in balancing investor property rights with state security concerns, especially when tribunals lack comprehensive information on the context of government actions.[61] This award shows how difficult it is to understand the incentives of government for expropriation especially during armed conflicts. Increasingly, international investment law is intersecting with human rights law. Expropriation during armed conflicts often affects not only property rights but also fundamental human rights, such as the right to adequate housing and livelihood. Tribunals are beginning to consider these broader implications, ensuring that expropriation measures do not violate basic human rights principles. To prevent abusive or arbitrary actions, human rights courts incorporate procedural requirements into the proportionality analysis. Competent authorities must implement measures that are overseen by

[60] EU Model BIT, Art. Expropriation, (2023)

[61] Patrick Mitchell v Democratic Republic of Congo ICSID Case no ARB/99/7, Annulment Decision, 1 November 2006, para 52, cited in Jure Zrilič, Investment Treaty Protections against Conflict-Related Injuries, in The Protection of Foreign Investment in Times of Armed Conflict (Oxford University Press, 2019), 125, online edn, Oxford Academic, Nov. 21, 2019).

judicial officials to ensure they follow proper legal procedures.[62] For example, in the ECtHR case, Gogitidze and others v Georgia, the court held that confiscation was part of a broader legislative effort to combat corruption. It had compensatory and preventive aims—restoring unlawfully acquired property to its rightful owner or the State and deterring corruption. The procedure aligned with international standards supporting confiscating unlawfully acquired assets without a prior criminal conviction. Shifting the burden of proof to the respondents in such cases is acceptable.[63]

In the case Pezold v Zimbabwe the claimants made investments in Zimbabwean properties, including large-scale commercial farms and other assets, under BITs with Germany and Switzerland. The Zimbabwean government provided various assurances to the claimants, assuring them that their investments would be protected from expropriation. Despite assurances, the Zimbabwean government expropriated the claimants' properties through a constitutional amendment in 2005. The key criteria for a lawful expropriation under the BITs include public purpose, compensation provided promptly, adequately, and effectively, without delay, non-discriminatory basis (only applicable to the Swiss BIT), and due process. The tribunal assessed whether the actions of the Zimbabwean government met the criteria for a lawful expropriation as outlined in the BITs. They found that the expropriation of the claimants' properties did not meet a few criteria. The expropriation did not serve a public purpose, as it was not conducted for the internal needs of Zimbabwe on a nondiscriminatory basis. Compensation was not provided promptly, adequately, and effectively, nor was it made without delay. Due process was not followed in the expropriation process. Evidence suggests discrimination based on skin colour in the expropriation process, particularly affecting white

[62] Jure Zrilič, Investment Treaty Protections against Conflict-Related Injuries, in The Protection of Foreign Investment in Times of Armed Conflict (Oxford University Press, 2019), 128, online edn, Oxford Academic, Nov. 21, 2019).

[63] Gogitidze and Others v Georgia App no 36862/05, Judgment (ECtHR, 12 May 2015) paras 108–13

landowners. The tribunal finds no evidence that the expropriation served a genuine public interest. The tribunal rejects the application of ECHR jurisprudence to justify the elimination of due process. The tribunal finds that properties not directly expropriated but rendered economically worthless without the Zimbabwean Properties amount to an indirect expropriation. Even though there was a civil war in Zimbabwe the tribunal acknowledges the Claimants' legitimate expectations based on assurances from the Zimbabwean government and officials that their investments would not be subject to expropriation. These assurances were provided through various means, including policy statements, direct assurances from government officials, and legal protections under BITs. The tribunal finds that these assurances created a legitimate expectation that the investments would not be expropriated. Hence, the tribunal affirmed unlawful expropriation during civil unrest in Zimbabwe. [64] The judgment establishes a significant precedent for investors and host states, confirming the continued relevance of bilateral investment treaties even amidst armed conflict. This underscores the reliability and consistency of international investment law, providing investors with reassurance amid uncertain times. The case sheds light on the complexities faced by investors and host states in balancing investor protection and sovereign rights during armed conflict. Despite these challenges, the Tribunal's ruling reaffirms the ongoing validity of legal norms and principles governing expropriation, even in times of conflict. This consistency fosters confidence among investors, reinforcing the importance of the rule of law and bolstering investor trust. Furthermore, the implications of the judgment stretch beyond the specific case, potentially shaping investor perceptions of risk and stability in conflict-affected areas. By upholding investor protection principles in difficult contexts, the Tribunal's decision sends a positive signal to the international investment community, encouraging continued involvement in regions grappling with armed conflict.

[64] Bernhard von Pezold and Others v. Republic of Zimbabwe, ICSID Case No. ARB/10/15, paras 488-521, (2015)

2.4. Fair and Equitable Treatment

Fair and equitable treatment requires host countries to treat foreign investors fairly, impartially and without discrimination. FET is the international investment law standard and is included in the BITs. FET is a very general and broad standard; therefore, it is used in numerous disputes and may be argued along with other standards. UNCTAD describes FET as a relative standard, not absolute. Arbitral tribunals increasingly refer to investors' legitimate expectations, although this concept is not explicitly mentioned in FET provisions. Investor conduct and the expectations of the local community resulting from the investment are relevant factors in interpreting FET. This underscores the importance of considering the broader social and policy context surrounding investments.[65] Technically, there is no such obligation for the states and in no BIT FET is guaranteeing stability, yet there are circumstances where investors have the basis to expect stability. In the Metalclad v. Mexico case, the promises made by the federal government officials led the investor to reasonably expect that there would be no legal barriers to building and running the landfill.[66] As explained by Dolzer, Kriebaum, and Schreuer, fair and equitable treatment safeguards stability and reasonable anticipations, openness, adherence to contract terms, procedural correctness and legal process, honesty, and freedom from pressure and intimidation.[67]

Comparing EU, US and UK Model BITs about FETs the scope is the most relevant part. The EU Model BIT has a broad and detailed scope regarding FET. It explicitly outlines specific actions that constitute a breach of FET, including denial of justice, fundamental breaches of

[65] United Nations Conference on Trade and Development, Fair and Equitable Treatment, UNCTAD Series on Issues in International Investment Agreements II, 5-16, (2012)

[66] Metalclad Corporation v. The United Mexican States, ICSID Case No. ARB(AF)/97/1, 28-44, (2000)

[67] Dolzer, Kriebaum, and Schreurer (n 3) 186–295, cited in Josef Ostřanský, 'Fair and Equitable Treatment', in David Schneiderman & Gus Van Harten (eds), Rethinking Investment Law, 131, (Oxford Univ. Press 2023) (online edn, Oxford Academic Dec. 14, 2023)

due process, manifest arbitrariness, targeted discrimination on wrongful grounds (e.g., gender, race, religious belief), and abusive treatment (e.g., harassment, duress, coercion).[68] The US Model BIT has a narrower scope compared to the EU model. It primarily emphasizes the duty to ensure fairness in criminal, civil, or administrative legal proceedings, adhering to the principle of due process as recognized in principal legal systems worldwide. The UK Model BIT presents a general scope. It mandates that investments must always receive FET and full protection and security. It prohibits unreasonable or discriminatory measures diminish the ability to oversee, maintain, utilize, enjoy, or transfer investments The action must be the sole method for the state to protect a vital interest from a serious and imminent threat.. Additionally, it includes an obligation for each contracting party to honor any specific commitments made regarding investments. The EU Model BIT provides the most detailed scope, outlining specific breaches of FET. On the other hand, FET is a broad standard that encompasses many requirements and criteria. It acts as a gap filler, meaning that if specific rules are not mentioned, FET should be applied to address them. In the UK Model BIT, interpretation plays a significant role, making it easier for the parties to use FET to cover any unspecified issues.

During armed conflicts, the breakdown of legal systems and institutions may lead to foreign investors being denied access to fair and effective dispute resolution mechanisms. This denial of justice can prevent investors from addressing grievances such as expropriation or contract breaches. Governments or armed groups involved in conflicts might discriminate against foreign investors based on nationality or other factors, favoring domestic investors or unfairly targeting foreign-owned businesses through confiscation, harassment, or biased regulation. In such situations, governments or contract parties may fail to fulfill their obligations to foreign investors, such as providing security, making payments, or upholding regulatory commitments. This can result in economic losses and undermine the principles of fair and equitable treatment.

[68] EU Model BIT, Art.Treatment of Investors and of Covered Investments, (2023)

Therefore, during armed conflicts, there is a heightened risk of breaching several components of fair and equitable treatment.

So, the case Pezold v Zimbabwe also is applicable to the FET standard. The Tribunal found that the expropriations violated the BITs due to lack of compensation, absence of legitimate public purpose, discriminatory practices, and denial of due process. FET standard includes protection against arbitrary, grossly unfair, unjust, discriminatory, or idiosyncratic state actions, as well as the protection of legitimate expectations of investors. The Tribunal concludes that the Government's actions breached FET obligations concerning the Zimbabwean Properties, based on the assurances provided to the Claimants that their investments would not be subject to expropriation. Despite these assurances, the 2005 Constitutional Amendment effectively expropriated their properties. The Tribunal noted that the FET standard is substantively similar in both BITs. Jurisprudence supports that FET violations can occur due to state actions that are arbitrary, grossly unfair, discriminatory, coercive, or lack due process. FET also incorporates elements of the minimum standard of treatment under international law. The Tribunal considered whether the Claimants had legitimate expectations based on assurances from Zimbabwean officials. Various assurances were cited, such as promises that their investments would not be expropriated and would be protected under BITs. These assurances led to the Claimants' legitimate expectations that their investments would be safe from the Land Reform Program. The Respondent's defence, based on public security and order exemptions under the German BIT, was dismissed.[69] This case demonstrates that, even during armed conflicts when a country might prioritize security and public interest, the FET standard remains crucial, and violating it carries significant consequences.

[69] Bernhard von Pezold and Others v. Republic of Zimbabwe, ICSID Case No. ARB/10/15, paras 542-56, (2015)

On the other hand, in the case of Gardabani v. Georgia tribunal acknowledges that the FET standard in the Netherlands-Georgia BIT is autonomous and not merely a reflection of the minimum standard of treatment under customary international law. This means that the scope and application of FET can extend beyond what is required by customary international law. Drawing from various arbitral precedents and interpretations under the VCLT the Tribunal identifies 4 core elements of the FET standard protection of an investor's legitimate expectations; protection against arbitrary and discriminatory treatment, obligation of transparency and due process; requirement of good faith in governmental actions. Importantly, the Tribunal notes that a state's legitimate exercise of regulatory authority, including changes in laws or regulations, does not automatically constitute a breach of the FET standard unless there was a prior commitment or legitimate expectation on the part of the investor that such changes would not occur. Similarly, a breach of a contractual obligation by the state does not necessarily amount to a breach of FET unless it meets the broader criteria of unfairness, arbitrariness, or lack of due process.[70]

Both abovementioned cases highlight the importance of legitimate expectations when discussing FET. In the case of Georgia, Silk Road (one of the claimants) was aware of ongoing regulatory reforms. The memorandum of 2013 provided for compensation if legislative changes adversely affected the company's position, indicating that the parties anticipated future regulatory changes. There was another SCC Arbitration between Georgia and Silk Road, where Georgia failed to provide compensation, yet the tribunal still reasoned that a breach of contract is distinct from a breach of the FET standard. Georgia's conduct in contesting Silk Road's interpretation of the 2013 Memorandum and participating in arbitration did not demonstrate bad faith or egregious conduct. The interpretation of the complex provisions of the 2013 Memorandum was contentious and not straightforward, which did not meet the threshold for

[70] Gardabani Holdings B.V. and Silk Road Holdings B.V. v. Georgia, ICSID Case No. ARB/17/29, 498-602, (2022)

breaching fair and equitable treatment.[71] It is interesting to note that in addition to the legitimate expectations of investors, this case highlighted the importance of transparency and predictability when analyzing FET. The Tribunal reviewed the evidence and concluded that any perceived inconsistency or confusion in the adjustment of regulations was primarily due to the complex and ambiguous nature of some provisions in the 2013 Memorandum. It found that Georgia's conduct did not rise to the level of breaching the FET standard. The Tribunal noted that interpreting the complex provisions of the 2013 Memorandum was challenging and subject to different reasonable interpretations. Despite disagreements and disputes over the interpretation of the Memorandum, Georgia engaged in discussions with Silk Road, particularly concerning Telasi's Weighted Average Purchase Tariff (amended regulation in issue) and depreciation of the Georgian Lari. Georgia's Ministry of Energy attempted to address Silk Road's concerns and offered to settle disputes on a commercial basis, demonstrating a willingness to engage in good faith. Ultimately, the Tribunal found that Silk Road's claims regarding Georgia's treatment of its investment in Telasi were not found to be inconsistent, irrational, and non-transparent and failed to establish a breach of the fair and equitable treatment standard.[72]

FET serves as a gap-filling standard in international investment law. Even though it can be interpreted broadly, as seen it remains an objective standard. During armed conflicts, the FET standard becomes especially valuable for investor protection. Armed conflicts don't only bring physical destruction of properties or the need for expropriation of private property. If during armed conflicts host country creates a false legitimate expectation or breaches transparency, investors have FET standards to protect their rights. FET standard breach is very carefully examined by the tribunals and evaluated case by case. But evidently, the most critical aspects

[71] ibid

[72] Ibid

of FET include safeguarding investors' legitimate expectations, protecting against arbitrary and discriminatory actions, ensuring transparency and due process, and requiring governments to act in good faith.[73] These principles are crucial for maintaining trust and stability in investment environments, even during the disruptions caused by armed conflicts.

[73] Ibid

3. Host State Defence Mechanisms

Armed conflicts often make host states take special actions to keep order and protect national security, which can affect foreign investments. Investors, however, need guarantees that their rights will be protected, even in tough times. Understanding host state defenses helps identify the limits of these protections and when they can be reasonably restricted. Host states can use various defenses under international law and investment treaties, like force majeure, necessity. Clarifying these defenses helps understand the legal rules for state actions during conflicts. It is important to know when a state can be excused from its duties to investors because of the extreme situations caused by armed conflicts. This also involves looking at how international arbitration tribunals have interpreted and applied these defenses.

3.1. Force Majeure

Force majeure, often translated as "*superior force*," refers to unforeseeable events or circumstances that are beyond the control of the parties and that render the performance of the contract impossible, impractical, or significantly more burdensome. It serves as a contractual mechanism to allocate risk and responsibility in situations where performance becomes impossible due to events such as natural disasters, wars, strikes, or government actions.[74] *Force majeure* is a legal concept that allows states to avoid fulfilling their obligations if they're prevented by exceptional circumstances beyond their control, especially during armed conflicts. To invoke *force majeure*, three conditions must be met nature of the event, control over the event and impact on the performance. The event must either be an irresistible force or an unforeseen occurrence. The irresistible force must be something the state couldn't prevent or counter with its own resources, while the unforeseen occurrence must be something that wasn't predicted or easily foreseeable. The event must be beyond the state's control, though it

[74] Jan M Smits, Contract Law: A Comparative Introduction, 202, (Edward Elgar Publishing 2021).

doesn't have to be entirely external. It can originate within the state, as long as it wasn't caused intentionally by the state. The event must make it physically impossible to fulfil the obligation, not just more difficult. "*Material impossibility*" means it's realistically impossible, which is different from "*absolute impossibility*", where no performance at all is possible.[75] In the abovementioned AAPL v Sri Lanka, case dissenting opinion suggested a *force majeure* situation, but Jure Zrilic considers it inaccurate as the breach involved voluntary state conduct, thus fitting better under the necessity defense.[76] According to the ICC model force majeure clause, force majeure events include armed conflicts or the threat of such conflicts, hostile attacks, military embargoes, blockades, various types of internal conflicts like civil wars and etc.[77]

So, this raises a question, if classified under *force majeure*, might the state be completely excused from liability due to the impossibility of performance?

In the case of Parkerings v Lithuania, the tribunal concluded that the *force majeure* claims and any breaches of the Agreement do not amount to a breach of the BIT, even though Lithuanian courts stated otherwise.[78] This ruling shows that even when force majeure applies, parties are still responsible for their obligations. Even in cases of *force majeure*, international investment principles and standards outlined in BITs must be followed. It's important to note that BITs don't typically include *force majeure* clauses like commercial contracts do. Instead, they aim to safeguard investors and their investments from risks like expropriation, discrimination, and

[75] ILC Commentary to ARS, Article 23, para. 2., cited in Jure Zrilic, Armed Conflict as Force Majeure in International Investment Law, 16 MANCHESTER J. INT'l ECON. L. 28 (2019).

[76] Asian Agricultural Products Ltd (AAPL) v. Republic of Sri Lanka, ICSID Case No. ARB/87/3, Award, 27 June 1990, Dissenting Opinion, at 593, cited in Jure Zrilic, Armed Conflict as Force Majeure in International Investment Law, 16 Manchester J. Int'l Econ. L. 28, 33 (2019).

[77] ICC Force Majeure Clause 2003 - Hardship Clause 2003, ICC Publication 650 (2003), cited in Jure Zrilic, Armed Conflict as Force Majeure in International Investment Law, 16 MANCHESTER J. INT'l ECON. L. 28, 47, (2019).

[78] Parkerings-Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8, paras 310-313, 2007

breaches of contract by the host country. In BIT disputes, arbitration panels may consider general principles of international law, including *force majeure*, when interpreting treaty provisions. If an event is considered *force majeure* under these principles, it may affect how the tribunal interprets the treaty's requirements. But as seen, even during *force majeure* tribunals don't dismiss the liability of the state.

3.2. Necessity

In international law, the concept of *"necessity"* refers to a defense mechanism that allows a state to justify actions that would otherwise be considered wrongful if those actions were the only means to protect an essential interest against a grave and imminent peril. Jure Zrilic talks about the necessity and highlights that the absence of a security exception in an investment treaty prompts states to invoke the plea of necessity under customary international law, as seen in Article 25 ARS.[79]

Mostly BITs exclude liability for breaching FET standards in the BIT in the clauses where FET is discussed. Yet, there are separate clauses of necessity in some BITs ensuring that host states also have the opportunity to prioritize national security. US Model BIT has article 18 of essential security that excludes parties from liability to protect international peace or national security.[80] The provision prioritizes national security concerns over the obligations of the BIT. This reflects a balance between promoting international investment and protecting a country's fundamental security interests. By allowing parties to apply necessary measures for maintaining or restoring international peace and security, or protecting essential security interests, the provision acknowledges that in certain circumstances, national security concerns may override investment protection obligations. This provision could give the state broad discretion in determining what constitutes essential security interests and what measures are

[79] Draft Articles on Responsibility of States for Internationally Wrongful Acts, art. 25 (Int'l Law Comm'n 2001).

[80] US Model BIT, Art. 18, (2012)

necessary to protect them. This discretion could potentially limit the ability of investors to challenge state actions that are justified under these grounds. The language used *("it considers necessary")* gives states significant interpretative flexibility. The exception provision in the UK Model BIT has a bigger scope than just necessity and it also regulates the exclusion of benefits from international agreements, and taxation matters. It clarifies that the treaty's obligations regarding non-discriminatory treatment (not less favorable than that accorded to nationals or companies of any third State) do not prevent a contracting party from adopting or enforcing measures that are necessary to protect national security, public security, or public order.[81] This reflects the recognition that states have legitimate interests that may require measures not consistent with absolute investor protection obligations under the BIT. EU Model BIT has an article on Security Exceptions.[82] It has a more specific formulation. Firstly, as US Model BIT it safeguards sensitive information. It gives the list of actions included in the necessity like measures related to arms production, traffic in arms, and other goods and services intended for military use; concerns relating to nuclear materials and technology, and their derivatives; actions taken during war or other international emergencies, reflecting the need for flexibility in responding to critical security threats. The EU Model BIT's formulation of security exceptions is specific and clear, delineating the scope and conditions under which security-related measures can be justified. This clarity is crucial for both parties to understand their respective rights and obligations. It is also worth mentioning that EU and US Model BITs include international safety in the necessity along with national security. All three BITs recognize the sovereignty of states to protect their essential security interests. However, the extent of flexibility and the specific scenarios covered vary, reflecting different national and regional priorities. The EU Model BIT stands out for its precise formulation and alignment

[81] UK Model BIT, Art. 7, (2008)

[82] EU Model BIT, Art. Security Exceptions, (2023)

with EU legal norms, offering a detailed framework for balancing security and investment considerations. The US and UK BITs provide broader discretion for states to determine what constitutes essential security interests and the measures necessary to protect them. This flexibility can be advantageous in responding to diverse security threats but may also raise concerns about consistency and predictability for investors.

Despite this, successfully invoking necessity in international fora has been rare due to stringent conditions. The measure taken must be the only way for the state to safeguard an essential interest against a grave and imminent peril. The threshold for *"grave and imminent peril"* is high, making it challenging to apply necessity in investment cases.[83] In the Pezold v Zimbabwe case tribunal analyzed the necessity as well. The Tribunal concluded that Zimbabwe could not invoke the necessity defense. It found the argument that Zimbabwe faced an emergency from 2000 to 2013, necessitating the expedited land reform without compensation, unconvincing. Evidence indicated that the government directly supported and assisted the Settlers/War Veterans in their occupation and redistribution of land. This substantial contribution to the situation precluded Zimbabwe from invoking the necessary defense under ILC Article 25(2)(b). The Tribunal stated that Zimbabwe's policies and actions were primary contributors to the economic decline and the situation that led to the alleged state of necessity.[84] Tribunal analysis shows that the threshold for the action to be classified as necessity is very high and even during armed conflicts, state actions need to satisfy certain elements like action being the only way, benefiting the essential interest, existence of the threat by a peril. And if all the criteria of Article 25[85] are not met, no action will be qualified as a necessity.

[83] Jure Zrilič, 'Host State's Defences against Conflict-Related Investment Claims', in The Protection of Foreign Investment in Times of Armed Conflict (Oxford Univ. Press 2019), 151, online edn, Oxford Academic Nov. 21, 2019).

[84] Bernhard von Pezold and Others v. Republic of Zimbabwe, ICSID Case No. ARB/10/15, paras 624-668, (2015)

[85] Draft Articles on Responsibility of States for Internationally Wrongful Acts, art. 25 (Int'l Law Comm'n 2001).

On the other hand, if the host state proves the state of necessity it will be excluded from the liability if it is included in the BIT. In the case LG&E International Inc. v. Argentine Republic LG&E, a U.S. company, along with other foreign investors, invested in the privatized Argentine gas sector. They acquired shares in several newly formed licensed companies responsible for gas transportation and distribution. The investment was underpinned by several guarantees, including the calculation of tariffs in U.S. dollars and periodic adjustments based on the U.S. Producer Price Index (PPI). These guarantees were crucial for ensuring a stable and predictable return on investment. By the late 1990s, Argentina entered severe economic crisis, characterized by a prolonged recession, rising debt, and decreasing confidence in the financial system. In response to the crisis, the Argentine government implemented several emergency measures, including freezing and later suspending the PPI adjustments for tariffs in 1999. In 2001, Argentina declared a state of emergency, and in 2002, it devalued the peso, abandoning the fixed exchange rate with the U.S. dollar. The Tribunal begins its analysis by considering whether the conditions in Argentina during the relevant period justified invoking Article XI about the necessity of the US-Argentina BIT. It evaluates whether the measures taken were necessary to maintain public order or protect essential security interests, despite violating the treaty. It also examines the standards set by international law regarding the state of necessity, particularly noting that a state must not have contributed to the crisis. The tribunal highlights that according to international law, for a state to invoke a state of the necessity defense, certain criteria must be met. There must be a serious and imminent threat to the essential interests of the state, the state must not have contributed to causing the crisis, the measures taken must be the only means available to protect the essential interests and the actions must not disproportionately impair the interests of other states. The tribunal acknowledges that Argentina faced an extreme crisis from December 2001 to April 2003, characterized by economic collapse, political instability, social unrest, and threats to essential

services. This period necessitated immediate action to stabilize the situation. The tribunal found that Argentina's state of necessity lasted from December 2001 until April 2003, during which the Emergency Law was in effect. This period coincided with severe economic indicators such as high unemployment, and social unrest. Based on the analysis of these factors, the tribunal concluded that Argentina was excused from liability for any breaches of its treaty obligations during the state of necessity period. This exemption is granted under Article XI of the treaty, which allows states to take necessary measures in exceptional circumstances.[86] Hence, host states face a high threshold to demonstrate necessity, despite the broad and flexible formulation of necessity clauses in BITs. In armed conflicts, states can invoke the necessity to justify actions taken for national security or public peace, thereby exempting themselves from liability towards investors.

[86] LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic (ICSID Case No. ARB/02/1), paras 77-98, (2007)

Conclusion

During armed conflicts, tribunals carefully assess and weigh various factors, including the satisfaction of investor claims and the subsequent awarding of compensation. However, a fundamental issue remains.

International documents, such as the Draft Articles on the effects of armed conflicts on treaties, touch upon this matter. Despite the existence of such a draft article, there lacks an effective mechanism to safeguard parties' rights during states of armed conflict. The non-binding nature and non-affirmative language of the draft article allows for broad interpretation by states, resulting in ambiguity regarding the applicability of international treaties. This ambiguity creates loopholes that lawyers may exploit to their advantage. Therefore, the investment community necessitates a binding and precise convention or document to regulate investment treaties, especially during armed conflicts.

Force majeure served as a good exemption for liability in contract law and historically in international politics. In investments, it would not be so effective mechanism for state defence. Even though armed conflicts can be qualified like *force majeure*. However, as seen, necessity serves as a mechanism for states to defend themselves during arbitration if met with all the requirements.

Ideally, the international community should create a binding document that leaves minimal room for interpretation regarding the intersection of investor rights and armed conflicts. For example, ICSID has its convention, which regulates procedures and minimizes ambiguity during dispute settlement. It gives parties certain freedom, yet certain rules are mandatory. This should be taken as an example to regulate important matters like investor rights during armed conflicts, the scope of protection they have, and the scope of host state defence.

While analysing protection mechanisms and tribunal approaches, several unanswered questions arise, warranting further examination. For instance, war clauses may be perceived as

encroaching upon the sovereignty of host states by imposing obligations during armed conflicts. During times of crisis, determining whether public interest or compensation for investors takes precedence poses a significant challenge. The proportionality test, which aims to ensure fairness, may not always yield just results. Investors may encounter practical obstacles in enforcing their rights under these clauses, such as difficulties accessing legal remedies or securing compensation from host states. The FPS standard imposes a duty of due diligence on host states rather than strict liability. This means that while states must take reasonable steps to protect investments, they are not strictly liable for any resulting harm. However, this approach may lead to inadequate protection, as states may fail to take sufficient preventive measures, assuming they can avoid liability by demonstrating minimal or ineffective action. In the tribunal's analysis and decisions, there is a clear tendency to favor investors as the weaker parties involved. They are often compensated for any violations of investment standards by the host state. However, the interpretation of clauses and determination of their precise definitions or scopes currently rest with the parties and tribunals. Having regulatory documents would simplify and provide more certainty in this process, which would reassure investors.

The thesis has underscored the significance of upholding investor protections, even in challenging circumstances, to maintain investor confidence and promote sustainable economic development. While defence mechanisms may provide avenues for host states to justify their actions, their application is subject to stringent conditions and scrutiny by international arbitration tribunals.

In conclusion, this thesis calls for continued research and dialogue on the interface between international investment law and armed conflict, to develop effective and equitable approaches to investment protection in conflict contexts. By addressing the legal challenges and

complexities inherent in this field, stakeholders can work towards fostering a conducive environment for investment, peace, and stability in conflict-affected regions around the world.

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