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Arbitration and Armed Conflict

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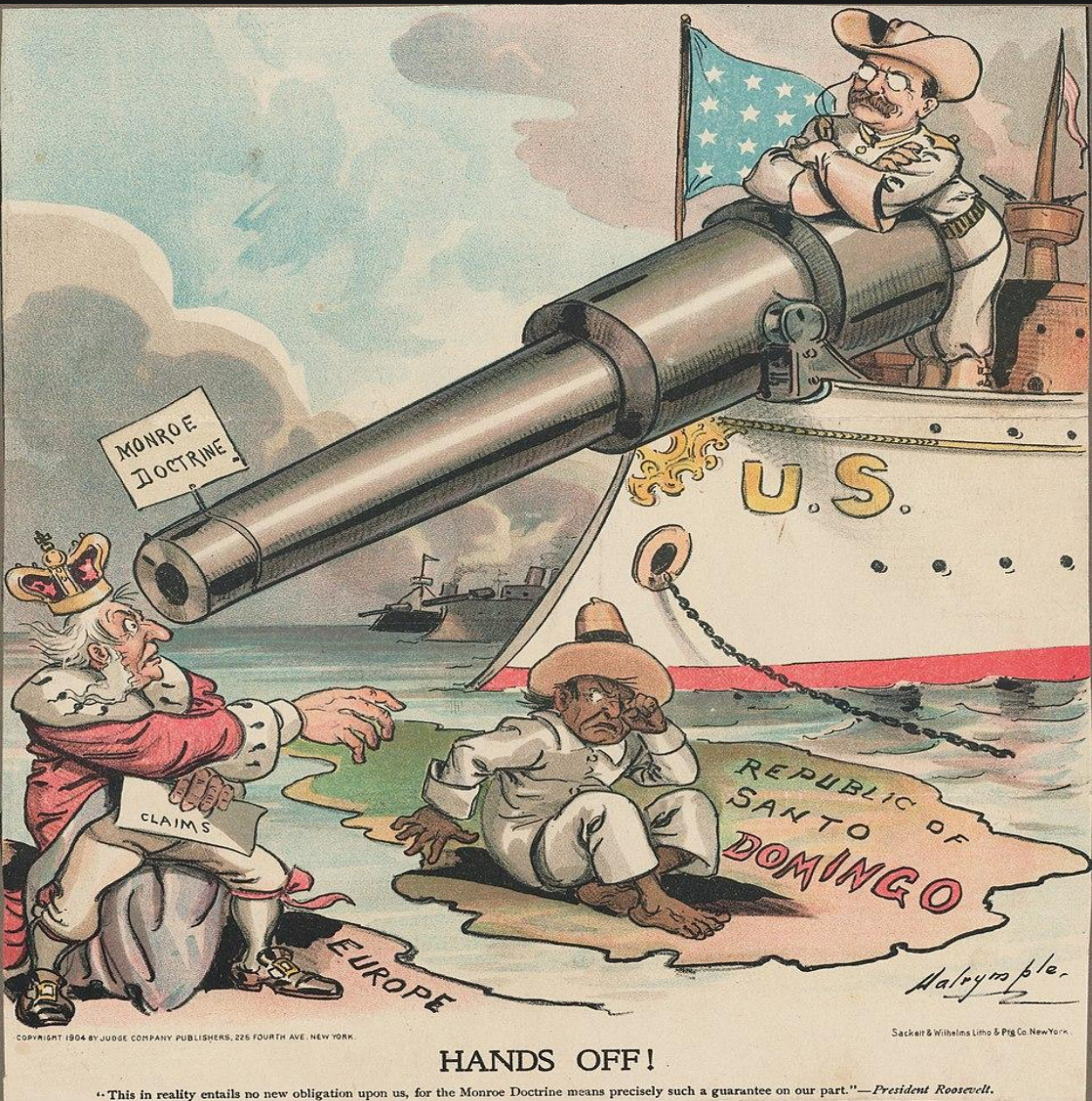


“

This agreement signals clearly to Russia that the Trump administration is committed to a peace process centered on a free, sovereign, and prosperous Ukraine over the long term.

”

US Treasury Secretary Scott Bessent on the
**United States-Ukraine Reconstruction
Investment Fund (2025)**



“

... in the Western Hemisphere the adherence of the United States to the Monroe Doctrine may force [it], however reluctantly, in flagrant cases of ... wrongdoing or impotence, to the exercise of an international police power.

”

US President Theodore Roosevelt articulating
The Roosevelt Corollary to the Monroe Doctrine
(1904)

AT THE CROSSROADS



“

In the field of World policy, I would dedicate this nation to the policy of the good neighbor . . . [who] respects the rights of others, the neighbor who respects his obligations and respects the sanctity of his agreements in and with a World of neighbors.

”

US President Franklin D. Roosevelt articulating the **Good Neighbor policy (1933)**

Rules based international economic system



New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention') (1958)

- 172 Contracting States
- Facilitates the enforcement of international commercial arbitration awards made in one contracting state within the territory of another



Convention on the Settlement of Investment Disputes between States and Nationals of Other States ('ICSID Convention') (1965)

- 158 Contracting States
- Facilitates the enforcement of investment arbitration awards, establishes an arbitral institution and is complemented by various rules



International investment agreements

- More than 2,900 Bilateral Investment Treaties (BITs)
- More than 400 treaties with investment provisions, including free trade agreements (FTAs)
- Aim to protect and promote investments made by investors from one country in another

Agenda

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Armed conflict & international
business activity

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01

Armed conflict & international business activity



IHL definition of ‘armed conflict’

“

An armed conflict exists whenever there is a resort to armed forces between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.

”

Prosecutor v. Tadic (IT-94-1-T), ICTY, 2 October 1995, para. 70.



Typologies of armed conflict



International conflicts

- Israel – Iran
- Russia – Ukraine
- Israel - Palestinian conflict (spillover to Lebanon and Yemen)



Internal conflicts

- Syria
- Yemen
- Libya
- Myanmar
- Sudan
- DRC



Civil unrest

- Arab spring
- Protests of controversial investments and activities
- Haiti and elsewhere



Criminal groups

- Terrorism
- Mining gangs
- Drug gangs
- Other illicit activities (extortion, smuggling, theft)

Many roles of the corporation



**As victim of conflict
in unstable States**



**As victim of
aggressor host
States**



**As contributor to
conflict and socio-
economic
discontent**



**As beneficiary of
armed conflict**



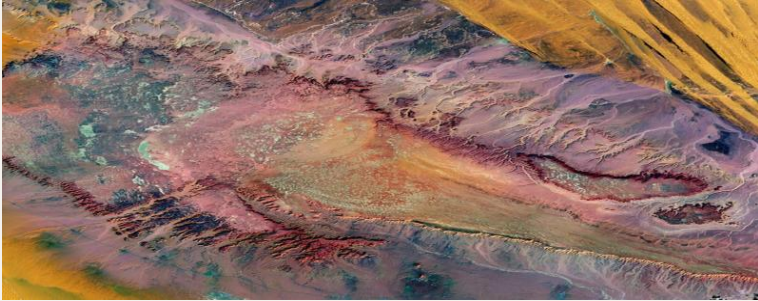
**As perpetrator and
accomplice**

02

International investment arbitration



Typology of war clauses in investment treaties



Compensation for losses clauses

A common feature, including in:

- BITs of Russia, Ukraine, Austria, France, Germany, Italy, Latvia, Netherlands, the UK, Libya, Syria, Yemen, SADC Model
- FTAs: NAFTA, USMCA, ECT, CETA



Extended war clauses

A less common feature found in:

- BITs of Ukraine, Austria, Sweden, Israel, Spain, UK, Libya, Syria, Yemen
- ECT

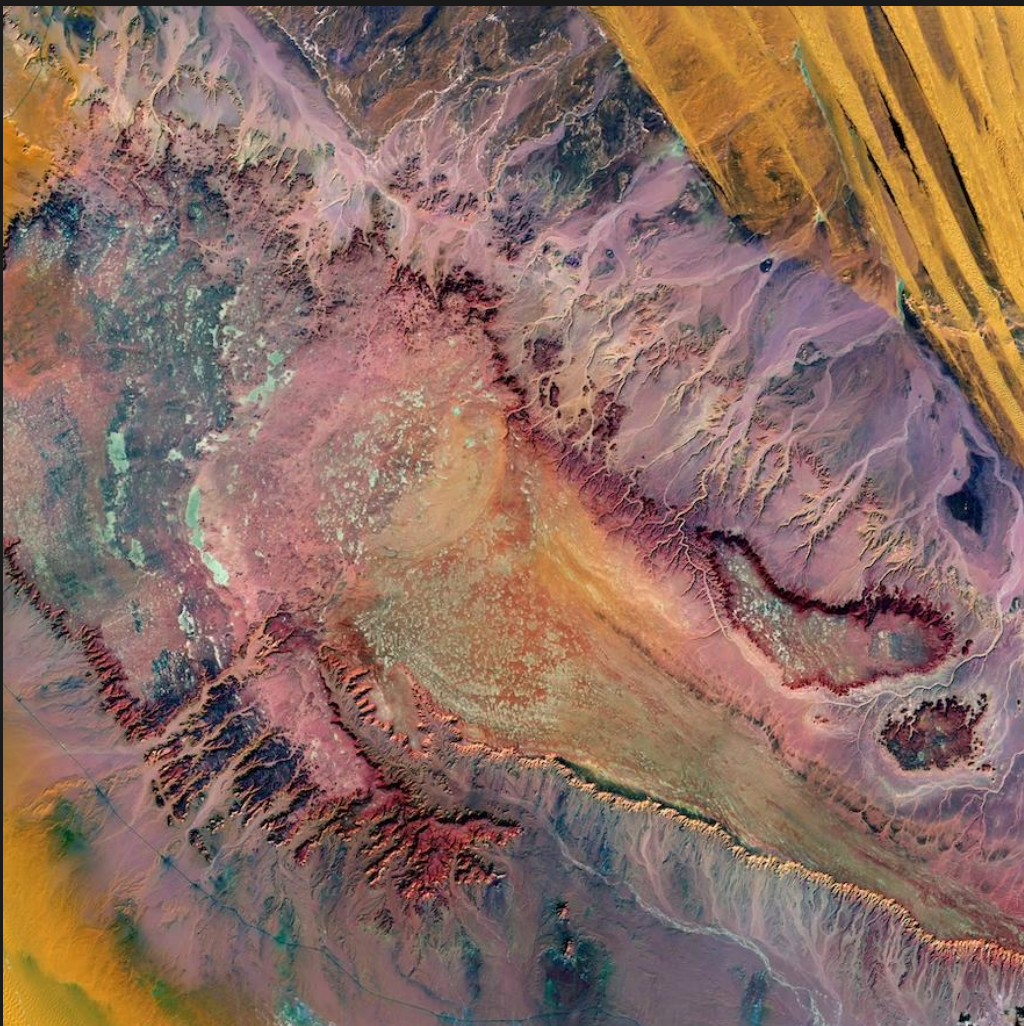


Strict liability war clauses

A rare feature that appears in some:

- BITs of Italy (e.g., with Yemen and Syria, but not Libya)

Compensation for losses clauses



“
Investors of one Contracting Party whose investments have suffered losses in the territory of the other Contracting Party as a result of war, armed conflict or other extraordinary circumstances shall not be discriminated against and shall be accorded most-favoured-nation treatment in respect of the payment of compensation or other forms of restitution for the loss suffered.
”

Article 4(5) of the Germany-Russia BIT

Extended war clauses

“

Without prejudice to [the non-discrimination clause] 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 . . .

”

Article 4(2) of the Yemen-Czech Republic BIT

Strict liability war clauses



“

Should investors . . . incur losses or damages on their investments in the territory of the other Contracting Party due to war, other forms of armed conflict, a state of emergency, civil strife, or other similar events, the Contracting Party in whose territory the investment has been affected shall offer adequate compensation in respect of such losses or damages.

”

Article IV of the Yemen-Italy BIT

Other relevant rules of investment law



Full protection and security clauses

Important standard found in:

- Most BITs, SADC Model BIT
- FTAs such as NAFTA, USMCA, ECT, AfCFTA Investment Protocol



Essential security clauses

A defence found in:

- A minority of BITs, including some BITS of Ukraine, Syria, Libya
- A minority of FTAs, including the ECT



Circumstances precluding wrongfulness

Defences found in CIL / ARSIWA, including:

- Necessity
- Self-defence
- Force Majeure



Assumption of risk or contribution by investors

Doctrinal defences that may affect, inter alia:

- Investor expectations of treatment
- Quantum of compensation

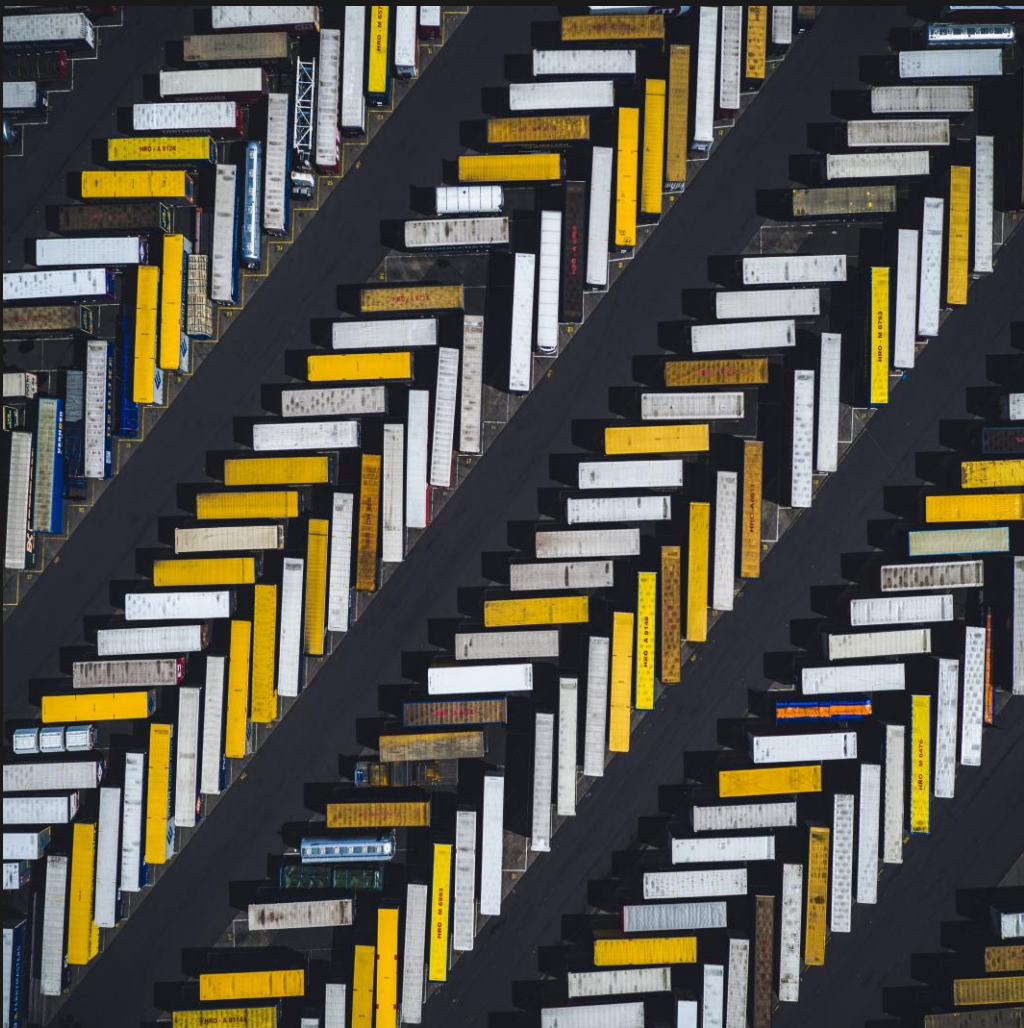
Full protection and security

“

Each Contracting Party shall . . .encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. . . .Such Investments shall also enjoy the most constant protection and security . . .

”

Article 10(1) of the ECT



Essential security

“

This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.

”

Article IX(1) of the US-Ukraine BIT



Necessity

“

1. *Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:*
 - (a) *is the only way for the State to safeguard an essential interest against a grave and imminent peril; and*
 - (b) *does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.*
2. *In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:*
 - (a) *the international obligation in question excludes the possibility of invoking necessity; or*
 - (b) *the State has contributed to the situation of necessity.*

”

ILC Articles on Responsibility of States for International Wrongful Acts (ARSIWA), Article 25 ('Necessity')



Self-defence

“

The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations.

”

ILC Articles on Responsibility of States for International Wrongful Acts (ARSIWA), Article 21 ('Self-defence')



Force majeure



“

1. *The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act is due to force majeure, that is the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation.*
2. *Paragraph 1 does not apply if:*
 - (a) *the situation of force majeure is due, either alone or in combination with other factors, to the conduct of the State invoking it; or*
 - (b) *the State has assumed the risk of that situation occurring.*

”

ILC Articles on Responsibility of States for International Wrongful Acts (ARSIWA), Article 23 ('Force majeure')

Assumption of risk

“

An investor investing in an area with endemic civil strife and poor governance cannot have the same expectation of physical security as one investing in London, New York or Tokyo. (1)

[The post-civil war economy and] colossal reconstruction efforts [informed the investor's expectations as to stability and the claimant should have been aware of the presence of Syrian troops in Lebanon]. (2)

[It] is impossible to judge the system of police and protection of life in force [in the region of Africa by the standard of the home-State investor and finding that the missionary society must have been aware of the perils to which it exposed itself] (3)

”

(1) *Pantechniki SA Contractors & Engineers v Albania* (2009)

(2) *Toto Construzioni Generali SpA v Lebanon* (2012)

(3) *Home Frontier and Foreign Missionary Society of the United Brethren in Christ case* (1920)



Assumption of risk (cont.)

“

Investment protection under international law is not insurance against bad business judgment or commercial risk. (1)

An investor cannot simply close its eyes to the circumstances that it is getting into. (2)

A claimant may not be excused from the consequences of its own lack of due diligence.

(3)

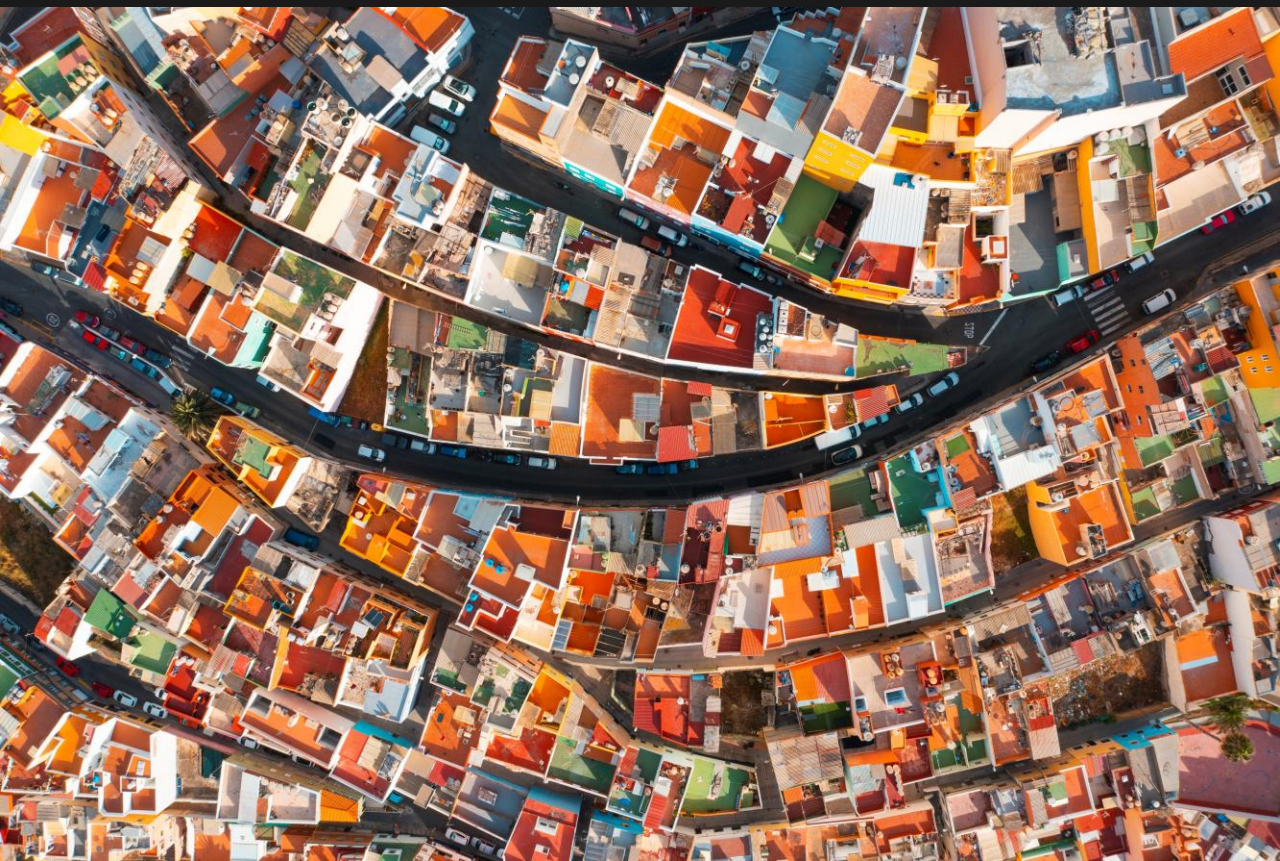
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(1) *M.C.I. Power Group L.C. and New Turbine, Inc. v. Ecuador* (2007)

(2) *Jan de Nul N.V. and Dredging International N.V. v. Egypt* (2008)

(3) *Metal-Tech Ltd. v. Uzbekistan* (2013)





Investor's contribution

“

The investor's own conduct, including the failure to investigate or to seek guarantees, may constitute a contributory fault. (1)

It is for the investor to obtain the 'social license', and in this case it was unable to do so largely because of its own failures . . . The Canada-Peru FTA was not, any more than ICSID, an insurance policy against the failure of an inadequately prepared investor to obtain such a licence. (2)

”

(1) Occidental Petroleum Corporation v. Ecuador II (2012)

(2) Philippe Sands's partial dissent in Bear Creek Mining Corp. v. Peru (ICSID ARB/14/21, Nov. 30, 2017)

Relevant rules of international humanitarian law



Due diligence

- Common Article 1 (CA1) of the Geneva Convention on “the duty to ensure respect”
- Article 58(c) of Additional Protocol 1 on precautions against the effects of attacks



Principle of precaution in attack

- Article 57 of Additional Protocol 1



Military necessity

Doctrinal requirements:

- Least injurious measure taken for a ‘military purpose’ (principle of distinction)
- Purpose must conform to IHL



Proportionality

Doctrinal requirements:

- Harm to civilians or civilian property must not be excessive in relation to military gain

Relevant soft law standards for business



Human rights standards

- UNGPs
- OECD Guidelines on MNEs
- UN Global Compact



Standards specific to security

- Voluntary Principles on Security and Human Rights (VPs)
- International Code of Conduct for Private Security Providers (ICoC)



Standards specific to conflict zones

- Kimberley Process Certification Scheme
- Heightened due diligence (per UNGPs / OECD Guidelines)



Subject matter specific standards

- International Law Commission's Draft Principles on Protection of the Environment in Relation to Armed Conflicts

03

International commercial arbitration



Typology of relevant commercial contract clauses



Force Majeure

- Ubiquitous in international contracts
- Excuse non-performance when unforeseen events, like war, render a party's obligations impossible or impracticable



Material Adverse Change (MAC)

- Especially relevant in Share Purchase Agreements (SPAs)
- Allow a buyer to walk away if significant negative events impact the target's business



Stabilization Clauses

- Common in long-term infrastructure or energy contracts with states or state-owned entities
- Protect investors from sudden changes in law or regulatory regimes



Other risk allocation methods

- Termination and Abandonment Provisions
- Reps & Warranties
- Covenants
- Frustration and impossibility of performance (doctrines)

Human rights and humanitarian affairs clauses



Heightened Due Diligence in Conflict-Affected and High-Risk Areas (CAHRAs)

Required by:

- EU Conflict Minerals Regulation
- EU Batteries Regulation
- EU Corporate Sustainability Due Diligence Directive (CSDDD)
- Section 1502 Dodd-Frank Act (US) (conflict minerals)
- OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas
- UNGPs / OECD Guidelines / VPSHR



Contractual measures as part of due diligence

Required by:

- EU Corporate Sustainability Due Diligence Directive (CSDDD)
- Responsible Contracting Project
- UNGPs / OECD Guidelines / VPSHR

Arbitration proceedings affected by armed conflict



Seat and venue disruption

Responses:

- Remote proceedings and use of technology
- Emergency arbitrations
- Seat transfers
- Guidance notes for complex situations



Evidentiary challenges

Responses:

- Relaxing evidentiary standards (e.g., affidavits in lieu of live testimony)
- Use of technology (e.g., electronic document production)



Procedural adaptations

Challenges:

- Transparency
- Mass claims
- Third party participation

Responses:

- Hague Rules on Business and Human Rights Arbitration



Enforcing awards

Challenges:

- Sovereign party defences (e.g., immunity)
- Currency restrictions on payment
- Broken legal systems
- Public policy defence



Sanctions

Challenges:

- Participation in arbitration could breach sanctions

Responses:

- Screening protocols
- Additional disclosures

04

Looking ahead



Keynote speaker



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Suzanne is the founder of Paxus LLP, a leading boutique international law, international arbitration, and business and human rights law firm. Prior to founding the firm, she spent twenty years practicing in these areas with global law firms in London and New York, most recently as a partner in the Litigation, Arbitration & Investigations Group at Allen & Overy, where she also co-headed the Business & Human Rights Practice and ESG Group.

Suzanne advises and represents governments, international organisations and private clients on a wide range of contentious and non-contentious issues arising under public international law. She acts as counsel before international commercial and investment arbitration tribunals (including under the ICC, UNCITRAL, ICSID and PCA rules), and sits as an arbitrator and CEDR-accredited mediator in the resolution of international disputes.

She is adjunct Associate Professor of Law at University of Notre Dame (USA) Law School, where she teaches International Arbitration. Earlier in her career, Suzanne held positions with the United Nations, the Council on Foreign Relations and the Inter-American Institute of Human Rights.

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P A X U S

Q&A

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