COVID-19 and Investment Claims: What Role for War and Emergency Clauses?

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While all of the provisions of international investment agreements (IIAs) are potentially applicable to claims under international investment agreements relating to the COVID-19 pandemic and its aftermath, the provisions addressing emergency situations are particularly germane. These include non-precluded measures provisions, discussed in another article of this special issue,[1] and war and emergency clauses, sometimes also called war and civil disturbances clauses, compensation-for-losses clauses, or the like (war clauses).[2]

War clauses apply specifically to highly disruptive situations, such as armed conflicts and civil disturbances, which can severely affect the public order of the host state. As with economic crises, the extent to which war clauses apply to public health crises depends on the language of the clause and the circumstances of the case. Further, a crisis that has its origin in a threat to public health may evolve into a situation expressly mentioned in the war clause, making its application less disputable. An example of a war clause that has been discussed in several arbitral decisions is Article IV.3 of the Argentina-US BIT:

> Nationals or companies of either Party whose investments suffer losses in the territory of the other Party owing to war or other armed conflict, revolution, state of national emergency, insurrection, civil disturbance or other similar events shall be accorded treatment by such other Party no less favorable than that accorded to its own nationals or companies or to nationals or companies of any third country, whichever is the more favorable treatment, as regards any measures it adopts in relation to such losses.[3]

The reference *inter alia* to a 'state of national' emergency and to 'other similar events' is probably wide enough to cover the situation created by COVID-19, at least in some countries. Yet aside from whether they apply to a crisis created by

1 See in this special issue the articles by Heidi López Castro and Jana Lamas de Mesa titled 'Non-Precluded Measures Clauses in Times of COVID-19' Customary international law also contains provisions relevant to IIA claims arising from the current crisis. See article in this special issue by Sebastián Green Martínez and Mariana de la Rosa Riera, 'COVID-19 and Circumstances Precluding Wrongfulness in Customary International Law: State of Necessity and Force Majeure'

2 On these clauses generally see Facundo Pérez Aznar, *Investment Protection in Exceptional Situations: Compensation-for-Losses Clauses in IIAs*, ICSID Review, Vol 32, n 3 (2017) 696–720.

3 Treaty between United States of America and the Argentine Republic concerning the Reciprocal Encouragement and Protection of Investment (signed 14 November 1991, entered into force 20 October 1994), art IV.3.

a pandemic, another relevant question is what effect do war clauses have. Of course, the answer to this question will vary depending on the text of the clause. However, two general approaches to war clauses may be discerned in the jurisprudence of investment tribunals. On the one hand, some tribunals have interpreted war clauses as swords, in the sense of providing investors covered by the applicable IIA with a cause of action additional to the other standards of treatment. This interpretation is discussed in the next section of this article. On the other hand, war clauses have been interpreted as shields, limiting the IIA obligations the host state has in certain extraordinary circumstances and, in this way, potentially affording a defence against investment claims arising from such circumstances. Section 3 considers this other interpretation. Section 4 concludes.

War Clauses as Sources of Additional Obligations

In several decisions, war clauses have been construed as not affecting potential claims under other standards of treatment contained in the IIA. Rather, on this interpretation war clauses require the host state not to discriminate against covered investors in respect of both national investors and other foreign investors, as regards any reparation measures the host state may take, without prejudice to the application of other obligations stemming from the rest of the provisions of the IIA. This interpretation was generally adopted in the decisions applying Article IV.3 of the Argentina-US BIT, quoted above.

In *CMS*, the tribunal stated:

> The plain meaning of [Article IV.3] is to provide a floor treatment for the investor in the context of the measures adopted in respect of the losses suffered in the emergency, not different from that applied to nationals or other foreign investors. The Article does not derogate from the Treaty rights but rather ensures that any measures directed at offsetting or minimizing losses will be applied in a non-discriminatory manner.[4]

The *Enron* Tribunal took a similar approach:

> While there is no reason to exclude from this Article economic emergency measures in given circumstances of particular gravity, it still would not allow derogation from rights under the Treaty as it refers to a different matter. Even less so can it be read as a general escape clause from treaty obligations and thus does not result in excluding wrongfulness, liability and eventual compensation.[5]

Another war clause that was applied in the context of the claims arising from the Argentine 2001 crisis is Article 4 of the Argentina-UK BIT, which reads thus:

> Investors of one Contracting Party whose investments in the territory of the other Contracting Party suffer losses owing to war or other armed conflict, revolution, a state of national emergency, revolt, insurrection or riot or resulting from arbitrary action by the authorities in the territory of the latter Contracting Party shall be accorded by the latter Contracting Party treatment, as regards restitution, indemnification, compensation or other settlement, no less favourable than that which the latter Contracting Party accords to its own investors or to investors of any third State. Resulting payments shall be freely transferable.[6]

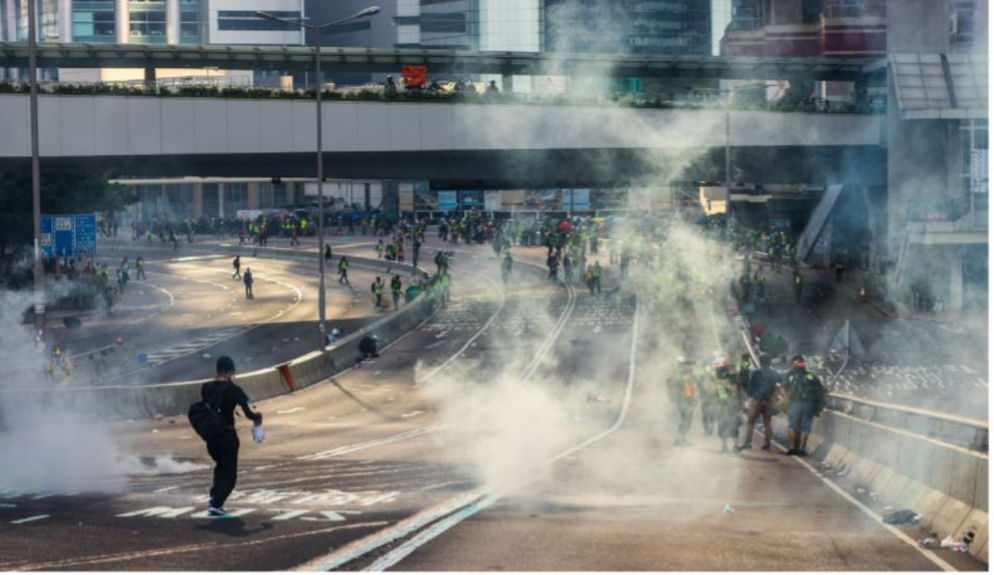
Different from Article 4.3 of the Argentina-US BIT, which is contained in the provision on expropriation, Article 4 of the Argentina-UK BIT is a stand-alone clause. The *BG* Tribunal observed that

> Article 4 of the [Argentina-UK] BIT does no more than ensure that the State does not treat the foreign investor

4 *CMS Gas Transmission Company v The Republic of Argentina*, ICSID Case No ARB/01/8, Award (12 May 2005) para 375.

5 *Enron Corporation and Ponderosa Assets, L.P. v Argentine Republic*, ICSID Case No ARB/01/3, Award (3 October 2007) para 321.

6 Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the Promotion and Protection of Investments (signed 11 November 1990; entered into force 19 February 1993), art 4.



War clauses have also been interpreted as constituting a *lex specialis* agreed by the contracting states of international investment agreements to govern the responsibility of the host state in respect of losses or damage to protected investments in critical situations

> less favorably than its own investor or investors of any third State with regard to "restitution, indemnification, compensation or other settlement" in case the foreign investor suffers losses due to, inter alia, a state national emergency."... Article 4 is merely concerned with the situation where nationals of the host State are indemnified or compensated, or benefit from a settlement. In this context, foreign investors should not be treated less favourably. Liability and compensation are thus expressly mandated, not excused.[7]

The view of the *National Grid* Tribunal on the same provision was to the same effect:

> It is evident from the foregoing that the purpose of Article 4 is not to exclude compensation for losses arising from, among other situations, national emergency but rather the contrary. The commitment of the parties is to ensure that their respective investors do not lose out in such situations.[8]

Allowing for differences in the texts of the specific provisions, these decisions stand for the proposition that war clauses provide for national treatment and most-favoured-nation obligations as regards any compensation that the host state may grant in the extraordinary situations covered by the war clause. These obligations sit alongside and complement other protections afforded to the investor by the IIA.[9] Under this interpretation, foreign investors could use war clauses to support claims arising from the COVID-19 situation, particularly to the extent any compensatory measures taken by the host state may be said to have discriminated against them. Conversely, no suggestion is made that war clauses may serve to limit the causes of action available to investors with respect to losses resulting from state measures addressing emergency situations. Thus, on this reading host states would find it hard to rely on war clauses to fend off investment claims arising from the pandemic.

War Clauses as Potential Limitations to IIA Obligations.

War clauses have also been interpreted as constituting a *lex specialis* agreed by the contracting states of the IIA to govern the responsibility of the host state in respect of losses or damage to protected investments in critical situations. According to this view, in the extraordinary circumstances where war clauses apply, under the IIA the host state is only bound by the obligations contained in these clauses. The obligations in the war clause typically consist in national and most-favoured-nation treatment in case the host state adopts any compensatory measures benefitting national or foreign investors. Even under this interpretation, however, the extent to which war clauses, when they are applicable, displace other standards of treatment may vary, particularly depending on the text and the context of the clause. For example, when the war clause is self-standing, the argument that it is a *lex specialis* vis-à-vis all the other standards of treatment in the IIA may be stronger. Conversely, when the war clause is contained in a provision regulating only one or some of the standards of treatment, it may be argued that it does not affect the standards contained in other provisions of the IIA.

In *LESI v Algeria*, the arbitral tribunal had to apply the following war clause:

> The citizens or legal persons of any of the Contracting States whose investments have suffered losses owing to war or any other armed conflict, revolution, state of national emergency or revolt occurring in the territory of the other Contracting State, will receive from the latter state the benefit from a treatment not less favourable than that granted to its own citizens or legal persons, or to citizens or legal persons of the most favoured nation.[10]

7 *BG Group Plc. v The Republic of Argentina*, UNCITRAL, Final Award (24 December 2007) para 382.

8 *National Grid plc v The Argentine Republic*, UNCITRAL, Award (3 November 2008) para 253.

9 See also, e.g., *Bernardus Henricus Funnekotter and others v Republic of Zimbabwe*, ICSID Case No ARB/05/6, Award (22 April 2009), para 104.

10 Accordo tra il Governo della Repubblica Italiana ed il Governo della Repubblica Algerina Democratica e Popolare sulla Promozione e Protezione degli Investimenti, art 4.6) (free translation from the original in Italian).

This war clause was the last paragraph of Article 4 of the Algeria-Italy BIT, which was a general provision on protection of investments containing most (but not all) the standards of treatment. The tribunal observed that the first paragraph of the article, which regulated the full protection and security standard, and the war clause

> provided for different levels of investment protection and could not be applied cumulatively. Both the internal structure of Article 4 of the bilateral Agreement and its terms invite the Tribunal to conclude that the intention of the contracting states when concluding the Bilateral agreement was to make the first and the last paragraph of article 4 a special rule derogating from the general rule of the first paragraph, in order to allow the contracting States being liberated from their obligation of full protection and complete protection in case of war or other armed conflict, revolution, state of national urgency or revolt.[11]

The arbitral tribunal went on to refer to the award in *AAPL v Sri Lanka*,[12] where the majority interpreted the applicable war clause—article 4 of the Sri Lanka-UK BIT—as providing a cause of action additional to those resulting from other provisions of the treaty.[13] The dissenting opinion in *AAPL*, however, noted that since the war clause 'contain[ed] specific rules governing the particular case of investment losses sustained in civil disturbances [...] this provision must, in accordance with a well-settled principle of treaty interpretation, prevail over the [IIA's] general property protection provision'.[14] The *LESI v Algeria* Tribunal appeared to endorse this latter approach, relying on the need not to deprive the war clause of its *effet utile*.[15]

This approach is reminiscent of the principle of non-responsibility of the state under customary international law for losses caused in the case of war, revolt, popular uprising or similar events, which was affirmed by Judge Huber in *Affaire des Biens Britanniques au Maroc Espagnol*.[16] This principle was not unlimited, however. Huber himself stated that it did not exclude a duty to exercise 'une certaine vigilance' which could give rise to liability when the state did not adopt the measures at its disposal to address the consequences of revolutions or similar events.[17] Yet, referring to the case of war, he affirmed that the principle could apply even in respect of losses caused by the state's own forces.[18] However, aside from due diligence obligations, Huber also suggested that the prohibition against expropriation without just compensation was not affected, particularly in the case of discriminatory restrictions to property rights.[19]

Conclusions

As the world is still in the midst of the pandemic and states are trying to cope with its effects on public health, it is hard to predict the kind of claims and defences that will be put forward in investment arbitrations arising from this tragic global event. While war clauses are included in most IIAs,[20] their role in modern investment arbitration has been rather limited so far. However, investors should take into account that, under one of the main approaches to war clauses, these provisions could provide additional causes of action, particularly if the host state discriminates when taking remedial measures. Yet host states would also be well advised to consider that, provided they act reasonably and in a non-discriminatory way, war clauses may be a source of defences vis-à-vis investment claims relating to the fight against COVID-19.

11 *L.E.S.I. S.p.A. and ASTALDI S.p.A. v. République Algérienne Démocratique et Populaire*, ICSID Case No. ARB/05/3, Sentence (12 November 2008), para 174 (free translation from the original French).
12 Ibid.
13 *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award (27 June 1990), paras. 57-70. Article 4 of the Sri Lanka-UK BIT contains two paragraphs, which the *AAPL* Tribunal interpreted as constituting separate provisions. Ibid.
14 See ibid., Dissenting Opinion of Samuel K.B. Asante, para 3.
15 *L.E.S.I. v. Algeria* (n 11) para 175.
16 *Affaire des biens britanniques au Maroc espagnol (Espagne contre Royaume-Uni)*, 1 May 1925, Reports of International Arbitral Awards, Vol II, 615-742, 642.
17 Ibid.
18 Ibid, 645.
19 Ibid, 647. Some war clauses, after establishing the principle of non-discrimination in respect of compensatory measures that the host state may adopt, mandate compensation for specific situations, such as the 'requisitioning' of protected investments or their destruction 'not required by the necessity of the situation.' See The Energy Charter Treaty, art 12. Here again, these clauses may be interpreted as providing for additional causes of action, or as establishing a *lex specialis* regime under which, in case of war or other emergencies, the host state will only have to compensate in specific situations.
20 Pérez Aznar (n 2) 699.