Investment Protection During Armed Conflict: Lawful in War, Compensable in Arbitration?

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One of the most important questions for foreign investors with assets in a State affected by armed conflict is simple: “If my investment is damaged, will I be compensated?” This concern has become increasingly relevant since the outbreak of the full-scale invasion of Ukraine in 2022, which subsequently led to an increased number of disputes involving foreign investors (Rishi, 2026). Imagine that a foreign investor owns a factory which, during hostilities, is used for military purposes and is destroyed by the host State’s armed forces. International Humanitarian Law (IHL) may consider the destruction lawful, but does that necessarily mean that the investor must bear the entire financial loss?

1. War does not switch investment treaties off

While historically the outbreak of war was considered to automatically terminate treaty relations between belligerents, a presumption of continuity has replaced this rule (Ackermann et al., 2023). This is reflected in Article 3 of the International Law Commission's Draft Articles on the Effects of Armed Conflicts on Treaties, which is based on the notion that treaties are designed to provide stable protection to foreign investors regardless of diplomatic and political quarrels (Ackermann et al., 2023). Furthermore, many Bilateral Investment Treaties (BITs) expressly address losses caused by armed conflict, revolution, insurrection, or national emergency (Akande, 2024).

However, continued treaty protection does not mean that the host State guarantees the physical safety of every foreign investment. For example, the full protection and security (FPS) standard is generally understood as a due diligence obligation rather than strict liability (Schreuer, 2022). This means that a State fighting a war cannot reasonably be expected to provide the same level of physical protection that it could in peacetime. In *Pantechniki v. Albania,* the tribunal found no FPS violation since Albanian authorities were "powerless" given the scope of the unrest in the country *(Pantechniki v. Albania, 2*009, para 82). Similarly, if an enemy missile destroys a foreign-owned warehouse despite reasonable measures taken by the host State, the mere existence of a BIT does not automatically make the State liable for that loss.

2. What happens if the host State itself causes the loss?

Many BITs contain so-called war clauses, which establish State obligations toward investors who suffer losses during armed conflict and other emergencies (Sabahi et al., 2019). The literature generally distinguishes between two main types of armed conflict clauses (Ackermann, 2022). First, an overwhelming majority of treaties contain "basic" armed conflict clauses that guarantee non-discrimination. They merely require the State to treat foreign investors no less favourably than domestic or third-State investors when compensation is provided (Stejskal, 2025). The second type is "extended" armed clauses, which go beyond the basic model. These clauses usually retains the same non-discrimination guarantee, but establish an additional entitlement to compensation, particularly where the loss results from requisitioning or destruction by the host State's forces (Ackermann, 2022).

A relevant example is the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ukraine for the Promotion and Reciprocal Protection of Investments (UK-Ukraine BIT), which contains both types of protection. Article 5(1) provides for non-discriminatory treatment, while Article 5(2) establishes additional protection when property is requisitioned by the host State's

forces or authorities, or destroyed by them in circumstances not involving combat action or not required by the necessity of the situation (UK-Ukraine BIT, 1993, art 5). Therefore, if a State forces requisition vehicles belonging to a foreign investor for military use, the BIT may still require compensation. Destruction, however, requires the analysis of whether it was required by the circumstances of the conflict.

3. How to decide whether destruction was "necessary" in war?

IHL has an important role to play in the interpretation of the war clauses. Terms such as "combat action" and "necessity of the situation" should be interpreted with due regard to the legal framework specifically designed to govern armed conflict (Ackermann, 2022). According to Additional Protocol I to the Geneva Conventions (Additional Protocol I), an object may become a military objective when its nature, location, purpose, or use makes an effective contribution to military action and its destruction, capture, or neutralisation offers a definite military advantage (Additional Protocol I, 1977, art 52(2)).

Yet existing scholarship shows that investment tribunals have often engaged only minimally with IHL when considering claims arising from armed conflict (Laufer, 2025). In *Strabag SE v. Libya*, the tribunal considered losses caused by Libyan armed forces and found that certain vehicles and equipment had been damaged or destroyed by government forces outside combat operations, meaning that the question of military necessity did not arise (*Strabag SE v. Libya*, 2020, para 289). The case illustrates the difficulties of applying war clauses to complex military circumstances, particularly when responsibility for the damage is disputed. Consequently, this is precisely where greater engagement with IHL would strengthen investment arbitration, consistent with the treaty interpretation methods under the Vienna Convention on the Law of Treaties (VCLT, 1969, art 31(3)(c)).

4. Lawful does not necessarily mean non-compensable

At the same time, the use of IHL should not mean that once a State proves that its conduct was lawful during hostilities, the BIT automatically disappears from the analysis. Requisitioning provides a useful example. During an armed conflict, a State may legitimately need to take private vehicles, machinery or buildings for military use, subject to the applicable conditions (Hague Regulations, 1907, art 52). However, the legitimate reason does not necessarily answer whether the owner should ultimately be compensated. Some BITs expressly require compensation for such measures (UK-Ukraine BIT, 1993, art 5(2)(a)). Therefore, the wording of the treaty remains crucial. If States agreed in advance to provide particular forms of protection during armed conflict, tribunals should not disregard those obligations simply because the underlying conduct occurred during war.

5. Bridging the gap: How far should BIT protection go?

Existing scholarship has already emphasised the importance of incorporating IHL into investment arbitration (Laufer, 2025). However, the recognition of the relevance of IHL is only part of the solution. Tribunals should also distinguish more clearly between military legality and treaty-based compensation, incorporating a two-step approach. First, tribunals should assess the military conduct under the applicable IHL. This requires establishing what caused the investment loss, whether the conduct is attributable to the host State, and whether it complied with the relevant rules of armed conflict. For example, where the property was destroyed during military operations, tribunals should consider whether it qualified as a military objective and whether the attack complied with the applicable rules on proportionality and precautions (Additional Protocol I, 1977, arts 51(5)(b), 52(2), 57). Second, tribunals should determine whether the applicable BIT requires compensation. Even where military conduct was lawful under IHL, the tribunal should separately examine the treaty's wording and the conditions for compensation. For instance, lawful requisitioning may still give rise to compensation under an extended war clause, while destruction during combat may be subject to different conditions.

This distinction is particularly important because investment protection during war must have its limits without losing its purpose. Foreign investors cannot reasonably expect a BIT to guarantee that an investment will survive an armed conflict. War inevitably creates losses that even a diligent State cannot prevent, and investment law should not become a mechanism for transferring every wartime commercial loss to the host State. At the same time, war should not become an investment-law-free zone. Requisitioning, discriminatory compensation or unnecessary destruction by State forces should not escape scrutiny merely because they occurred during an armed conflict.

This is the balance the proposed two-step approach seeks to achieve. It recognises the realities of military operations while respecting the protections States have agreed to provide. Rather than creating new compensation obligations or requiring a complete IHL assessment in every dispute, it encourages tribunals to explain how findings about wartime conduct affect the application of existing treaty protections. This would promote greater transparency and consistency in arbitral reasoning, while ensuring a clearer interaction between IHL and international investment law. Ultimately, a finding of military legality should inform, but not automatically determine, who bears the financial loss.

6. Conclusion

To conclude, the challenge for investment tribunals is not simply to determine whether wartime conduct was lawful, but to establish what legal consequences follow under the applicable investment treaty. IHL and

investment law may address the same conduct, yet impose different obligations.

The proposed two-step approach would provide a clearer framework for considering both, allowing tribunals to account for military necessity without overlooking treaty-based compensation rights. Ultimately, a State may be justified in destroying an investment during war, but that justification does not, by itself, determine who must bear the financial loss.

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