ISSN: 2688-8653

Research on the Application of International Humanitarian Law in International Investment Arbitration under Armed Conflicts

Haoyang Zhou

School of Law, Guangdong University of Finance and Economics, Guangzhou, Guangdong, 510320, China

Abstract

In recent years, against the backdrop of the prominent escalation of longstanding historical issues and geopolitical conflicts, heightened global tensions have led to frequent armed conflicts worldwide. However, the role that International Humanitarian Law (IHL) ought to play has been overlooked in awards rendered by the International Centre for Settlement of Investment Disputes (ICSID). The non-presumptive nature of state responsibility has resulted in the application of expansive war clauses, imposing an unreasonable burden of proof on investors. International Humanitarian Law can address this deficiency by providing an international legal basis for the interpretation and application of "war clauses" in investment treaties, and by placing the burden of proving "military necessity" on the host state government. Meanwhile, it offers criteria for determining the interests and weighting in the proportionality principle applicable to indirect expropriation-specifically, it clarifies that where acts of the government's armed forces, within the scope of necessity, have an impact on a covered investment in terms of physical assets or services, such acts shall qualify as "expropriation" as stipulated in expansive war clauses. In this way, the application of expansive war clauses is expanded, thereby providing more robust protection for China's overseas investments.

Keywords

International Humanitarian Law; Armed Conflicts; War Clauses; Indirect Expropriation; International Investment Arbitration.

1. Introduction

According to the Yellow Book of International Situation: Global Political and Security Report, the majority of armed conflicts occur along the routes of the "Belt and Road Initiative" [1](e.g., the Syrian Civil War, the Ukrainian Civil War). The 2011 Libyan conflict not only posed a severe threat to the lives of Chinese citizens abroad but also inflicted substantial losses on a large number of Chinese-invested projects in Libya. In recent years, the outbreak of conflicts such as the Israel-Palestine conflict and the Russia-Ukraine conflict has heightened global tensions. For instance, the surge in investment arbitration cases since the onset of the Russia-Ukraine conflict in 2022 has attracted significant attention from Chinese outward investors. Ukrainian investors have initiated investment arbitration proceedings against Russia regarding Russia's actions in the Crimean Peninsula, relying on the Russia-Ukraine Bilateral Investment Treaty (BIT).Legally, however, there is no uniformity in the definition of relevant legal terms and concepts (e.g., "military necessity," "distinction of military objectives"). This has led to situations in investment arbitration where an act may violate a BIT while complying with IHL. Such fragmented law results in the disconnection of legal systems and undermines the predictability of the law. Against this backdrop-where "armed conflicts" are gradually replacing "war" in international discourse-this paper examines three core questions: why it is justified to apply IHL in the field of international investment; how IHL can be used to interpret "war clauses" in

ISSN: 2688-8653

international investment treaties; and how IHL can provide criteria for the proportionality principle applicable to indirect expropriation.

2. International Humanitarian Law under Armed Conflicts

2.1. The Connotation of "Armed Conflicts" in Modern International Law

International Humanitarian, alternatively known as the "law of war" or the "law of armed conflicts". Yet in the wake of the two World Wars, modern international law underwent a pivotal paradigm shift: starting from the 1928 Kellogg-Briand Pact, which legally prohibited war as a means of pursuing national policy, to Chapter VI of the 1945 Charter of the United Nations, which explicitly prohibits the use or threat of force. Against this backdrop, the "peaceful settlement of disputes" has evolved into a foundational principle within modern international law.

Consequently, some armed conflicts with obvious international characteristics are no longer legally termed "war" (e.g., the Israel-Palestine conflict, the Russia-Ukraine conflict). Modern international law thus tends to adopt the term "law of armed conflicts" rather than "law of war". The law of armed conflicts applies not only to wars formally declared or involving a state of war but also to all armed conflicts.

2.2. Legal Sources of International Humanitarian Law

According to the definition of International Humanitarian Law by the International Committee of the Red Cross (ICRC), IHL refers to the body of rules that, for humanitarian purposes, limits the effects of armed conflicts. It protects persons who do not participate in or have ceased to participate in hostilities[2], while also restricting the means and methods of warfare.

The former set of rules (regulating means and methods of warfare) is known as "Hague Law," represented by the Hague Conventions. It includes treaties and customs concerning means and methods of warfare, such as the 1856 Declaration of Paris Respecting Maritime Law. The latter set (protecting civilians and war victims) is referred to as "Geneva Law" or "Red Cross Law[3]," with the four Geneva Conventions as its core. It primarily consists of principles, rules, and regimes for the protection of civilians and war victims.

Customary international law also constitutes a source of IHL, encompassing the general acceptance of principles such as the protection of civilians and the prohibition of war crimes. Additionally, judgments and advisory opinions of the International Court of Justice (ICJ) and the International Criminal Court (ICC) are instructive for the development of IHL: they assist in the interpretation and application of legal provisions, and their jurisprudence plays a crucial role in interpreting IHL clauses and determining legal liability. Moreover, guidance documents and reports issued by the International Committee of the Red Cross (ICRC) provide recommendations on the interpretation and application of IHL.

Pursuant to Article 38 of the Statute of the International Court of Justice, conventions/treaties and customary international law are formal sources of IHL. Together with other aforementioned documents, they provide the necessary context for interpreting "war clauses," helping to understand how legal provisions have evolved and adjusted in line with the international community's changing understanding of warfare. This ensures that the law can effectively address the challenges posed by modern armed conflicts.

2.3. The Justification for Applying International Humanitarian Law in International Investment Arbitration

Article 31 of the Vienna Convention on the Law of Treaties stipulates that treaties shall be interpreted in light of their context and the objects and purposes for which they were concluded.

ISSN: 2688-8653

In the Asian Agricultural Products Ltd. v. Sri Lanka case, the parties held completely conflicting understandings and interpretations of the FPS clause and the war clause in the treaty[4]. The arbitral tribunal not only emphasized that Article 31 constitutes a generally recognized rule for the legitimate interpretation of treaties but also pointed out that since 1888, rules governing interpretation to be followed by tribunals when addressing controversial interpretive issues have been established. For the interpretation of treaty language and intent, reference to international law and international customs must be made in case of disputes[5]para39.

Regarding the determination of the expansive war clause, Sri Lanka argued that the rebel "Liberation Tigers of Tamil Eelam (LTTE)" were hiding in the farm in question. The arbitral tribunal ruled that the actions of Sri Lanka's armed forces constituted "combat operations" and held that a state would only be liable for violating the expansive war clause if it could be proven that the losses suffered were not caused by necessity. It also noted that proving military necessity was extremely difficult, as it was nearly impossible to reconstruct all the circumstances under which the combat operations occurred before the tribunal. Under IHL, the burden of proof in such cases lies with the state to demonstrate the necessity of its actions. However, in this case, the arbitral tribunal held that a state's international responsibility cannot be presumed, claiming that the party alleging a breach of international law bears the burden of proving such an allegation[5]paras62-64. This effectively shifted the burden of proving military necessity to the claimant. Ultimately, due to insufficient evidence to prove military necessity, the arbitral tribunal found that the conditions for applying the expansive war clause were not met.

It is worth noting that IHL contains provisions on military necessity. In the Asian Agricultural Products case, the arbitral tribunal cited a 1903 case and literature from 1926 and 1928 when addressing the proof of military necessity[5]para63, and cited cases from 1924 and 1930 for the rule that a state's responsibility cannot be presumed[5]para56. Nevertheless, since World War II, the principle of military necessity, and the principle of proportionality-have been known to almost every regular military force worldwide. Although IHL and international investment law pursue different objectives (with IHL focusing more on protecting people's livelihoods rather than investors' economic interests), the role of IHL should still be reconsidered in treaty interpretation.

Looking back at the development of international investment law, Intense ideological debates took place to determine the standard of protection to be afforded to foreign investors under customary international law. Investors, who had no standing in international law, were not only concerned about unfair rulings by host states but also aware of the difficulty in persuading their home states to provide protection. As a result, proposals were made to apply international arbitration or incorporate rules of public international law into contract clauses. However, the arbitration mechanism for dispute settlement was unpredictable in terms of application and effectiveness.

Till ICSID was established in 1965, According to statistics from the United Nations Conference on Trade and Development (UNCTAD), as of 2024, there are approximately 3,300 international investment treaties concluded between states[5]. Yet, the content of the protection standards provided by these treaties remains almost as uncertain and controversial as that of customary international law, with the meaning of many terms still unclear.

Such imprecise and ambiguous standards, when paired with ad hoc arbitration awards, have resulted in a lack of consistency in the development of the "system" governing international investment treaty law. Clarifying the protection standards that should be granted to foreign investors was among the goals that drove states to shift from relying on customary international law for protection to adopting investment treaty-based protection-and this goal remains unfulfilled to date.

3. The Application of "War Clauses"

In addition to mitigating and diversifying risks arising from armed conflicts by purchasing insurance from the Multilateral Investment Guarantee Agency (MIGA) or domestic insurers (e.g., China Export & Credit Insurance Corporation, Sinosure), foreign investors primarily rely on the conclusion of investment treaties to protect their rights and interests under international investment law. Based on differences in form and content, "war clauses" in investment treaties are categorized into two types: non-discriminatory war clauses and expansive war clauses. The distinction between these two types first appeared in the Basis of Discussion drafted by the Preparatory Committee for the 1929 Conference for the Codification of International Law.

3.1. Asian Agricultural Products Limited (AAPL) v. Democratic Socialist Republic of Sri Lanka

In that case, a Hong Kong-based company, initiated a dispute with Sri Lanka arising from the destruction of the main shrimp farm of Serendib Seafood Limited by Sri Lanka's government security forces. The destruction occurred on January 28, 1987, during a counterinsurgency operation launched by Sri Lanka against Tamil separatist armed groups. As a shareholder of the Sri Lankan company, AAPL submitted the dispute to the ICSID after failing to reach a settlement with Sri Lanka.

AAPL relied on the unconditional obligation of "full protection and security" (FPS Clause) stipulated in Article 2 of the UK-Sri Lanka BIT, arguing that this article imposed a form of "strict liability" on the Sri Lankan government for the damage[5]para45.In its defense, Sri Lanka contended that the term "full protection and security" was common in bilateral investment treaties; the inclusion of this clause was not intended to override the standard of state responsibility under customary international law, but rather to require states to exercise due diligence and provide a reasonable justification for any destruction of property-not to impose strict liability[5]para32.

The arbitral tribunal adopted Sri Lanka's argument. Its reasoning was based on treaty interpretation rules, which hold that all provisions of a treaty must be given meaning. According to AAPL's argument, strict liability would mean Sri Lanka was liable for compensation whenever losses occurred-rendering the war clause stipulated in Article 4 of the BIT redundant. The tribunal deemed this logically inevitable conclusion unreasonable[5]para51. It noted that the term "full" (in "full protection and security") indicated the parties intended to require a standard higher than the general minimum standard of customary international law, namely the "due diligence standard." However, the term "full" alone was insufficient to prove that the reciprocal obligations under the treaty had been converted into strict liability[5]para50.

After excluding the application of strict liability, the tribunal proceeded to discuss the interrelationship, respective scope of application, and burden of proof for non-discriminatory war clauses and expansive war clauses. Regarding the order of application of war clauses, the tribunal first examined the expansive war clause, as it entailed a higher standard of liability (i.e., adequate compensation for the free transfer of funds). The tribunal identified three key criteria for proving the applicability of the expansive war clause:

The destruction of property must not only occur during hostilities but also be carried out by the government's own forces or authorities;

The destruction must not be caused during combat operations, and must relate to unreasonable destruction allegedly committed outside the context of combat;

The destruction must not be required by the circumstances. Once it is proven that security forces exceeded reasonable limits and caused unnecessary destruction, the mere existence of

ISSN: 2688-8653

combat operations is insufficient to mitigate the liability of the government's forces and authorities[5]para57.

When the expansive war clause could not be proven or applied, the tribunal decided to apply the non-discriminatory war clause. It reasoned that the sole condition for applying the non-discriminatory war clause was the "existence of suffered losses." The evidence presented by both parties only confirmed that Serendib's farm was damaged during hostilities, and that losses from shrimp harvests occurred while government security forces occupied the farmland[5]para59. Furthermore, the Sri Lankan authorities had failed to fulfill their "due diligence" obligation to minimize the risk of killings and destruction. Consequently, the tribunal held Sri Lanka liable under international law[5]para85.

3.2. Formation of the Framework for Applying War Clauses

According to the views of the arbitral tribunal in the Asian Agricultural Products case, the application logic of war clauses can be summarized as follows:The FPS Clause provides general protection, reminding states to protect covered investments in accordance with customary international law;The expansive war clause offers a high standard of protection for covered investments ;The non-discriminatory war clause triggers compensation liability when the claimant has suffered losses and the host state fails to fulfill the "due diligence" obligation-the minimum standard required by customary international law.These views have been significantly developed in subsequent arbitral cases.

3.2.1. AMT v. Republic of Zaire

In the case of AMT v. Republic of Zaire, AMT initiated arbitration proceedings against Zaire under the 1984 U.S.-Zaire BIT. The dispute arose from acts of destruction and looting by members of the Zairian armed forces: military personnel damaged vehicles and production lines near AMT's camp, broke into commercial complexes and stores, destroyed or damaged inventory, and stole valuable items.

The arbitral tribunal found that Zaire's failure to take action in response to these incidents-resulting in catastrophic consequences-and its failure to prevent harm to AMT's investments constituted a breach of its obligations under the BIT[6]. While Zaire did not deny the occurrence of the acts, it contested the application of the non-discriminatory war clause and the FPS Clause. Zaire argued only that "SINZA (a subsidiary of AMT) was indeed a victim of the 1991 and 1993 looting, like all other victims," but contended that AMT had failed to provide evidence that Zaire "afforded SINZA less favorable treatment than it gave to its own nationals or companies, or to those of third countries[7]para6.09." In Zaire's view, the application of the non-discriminatory war clause was conditional on the existence of compensation provided to domestic or third-country investors.

The tribunal rejected this argument, holding that Zaire's reasoning would only be valid if Zaire had granted preferential treatment to its own nationals/companies or those of third countries. The tribunal emphasized that Zaire's failure to fulfill similar obligations to third countries did not exempt it from its objective duty to provide protection and security to AMT-a duty derived from the FPS Clause in Article 2 of the BIT[7]para6.10. This ruling clarified that the FPS Clause applies in both peacetime and times of conflict.

3.2.2. LES v. People's Democratic Republic of Algeria

In LES v. People's Democratic Republic of Algeria, the claimant (LES) argued that since the start of the project, the execution of the contract had been severely hindered by security issues in the project area, and Algeria's response measures had been inadequate throughout.

The arbitral tribunal addressed the relationship between the FPS Clause and the non-discriminatory war clause, noting a key distinction between the two: the FPS Clause requires a "continuous, adequate, and complete" level of protection and security, while the non-discriminatory war clause mandates treatment "no less favorable than that accorded to domestic or most-favored-nation (MFN) nationals or legal persons." The tribunal held that these two standards were hardly compatible, and that the non-discriminatory war clause, as a special rule, should take precedence over the FPS Clause. This means that in situations such as war, other armed conflicts, revolutions, national emergencies, or insurrections, contracting states may be exempted from their obligation to provide "adequate protection" under the FPS Clause-because such a standard may be objectively impracticable to achieve[7].

3.2.3. Pantechniki S.A. v. Republic of Albania

In the case of Pantechniki S.A. v. Republic of Albania, two-thirds of Albanian adults lost most of their savings due to a Ponzi scheme. The ensuing riots resulted in hundreds of deaths, the collapse of government institutions, and the inability of both public and private security forces to withstand waves of looting. The claimant’s road construction site was occupied and looted by rioters amid widespread civil unrest[8].

Regarding the non-discriminatory war clause, the arbitral tribunal noted that the claimant had admitted its failure to prove that the Albanian government had shown favoritism toward other victims of the unrest. On the application of the FPS Clause, the claimant argued that Albania was obligated to proactively protect its investment from looting and to take preventive measures to avoid such harm. However, the tribunal held that the obligation under the FPS Clause must also take into account a state’s capacity: a state is not required to comply with absolute international standards[9]para89, but rather to meet a standard of "reasonable expectation" based on its actual capabilities.

Drawing on the development of the aforementioned cases, a framework for the application of war clauses can be derived, as summarized below:

While this application logic appears reasonable in theory, a critical practical dilemma emerges from the cases: the expansive war clause has never been applied as a basis for compensation in arbitral awards. As the tribunal in the Asian Agricultural Products case noted: "It must be pointed out that foreign investors invoking the applicability of Article 4(2) bear a heavy burden of proof. Among the requirements[5]paras58.63, the most critical ones-proving military necessity and the non-presumption of state responsibility-make the application of this clause nearly impossible." In contrast, under IHL, the burden of proving "military necessity" rests with the government authorities (the host state). This inversion of the burden of proof (placing it on the investor rather than the state) in investment arbitration is clearly unreasonable-or at the very least, highly questionable.

4. The Interpretation of "War Clauses" by International Humanitarian Law

IHL establishes principles, rules, and regimes applicable to both international and non-international armed conflicts, encompassing a series of treaties and customary international law. Since Hugo Grotius argued that "the exclusivity of domestic jurisdiction ceases the moment atrocities against humanity begin[9]," Theodor Meron-a scholar of international human rights law-has noted through his research that works on international law prior to the 1648 Peace of Westphalia already reflected the concept of the common interests of humanity and the right to humanitarian intervention, even before Grotius’ time[10].

In the modern international community, following the establishment of the United Nations in the aftermath of the two World Wars, IHL has been increasingly applied to all states as a form of customary international law. While much of IHL has been incorporated into treaties such as the Charter of the United Nations and the Geneva Conventions, this does not preclude its

ISSN: 2688-8653

application as customary international law within the international legal system. This conclusion is supported by two key points:

First, pursuant to Article 38(1)(b) of the Statute of the ICJ Statute, customary international law consists of two elements: state practice and opinio juris (the belief that the practice is legally required). The subjective element of opinio juris can, in turn, be inferred from sources such as bilateral or multilateral treaties.Second, in the 1986 Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) case, the ICJ confirmed that customary rules and treaties exist separately in law. The spheres of rules covered by the two do not overlap, nor do they have identical content. Furthermore, even if customary norms and treaty norms are identical in content, there is no basis for the Court to conclude that the incorporation of customary norms into treaty law necessarily deprives customary norms of their applicability distinct from treaty norms. Relevant treaties are regarded as reflecting or embodying already accepted or emerging rules of customary international law[11]-this further demonstrates that the two can coexist within the international legal system.

When interpreting "war clauses" in investment treaties, the distinct nature of these two legal sources leads to differences in their application, which in turn results in variations in interpretation and application methods.

4.1. Interpretation of "Armed Conflicts"

In the case of LES v. People's Democratic Republic of Algeria, tribunal noted that as an exception to the general principle of "adequate protection" (the FPS Clause), Article 4.5 (the non-discriminatory war clause) limits the scope of application to specific situations-including war, other armed conflicts, revolutions, national emergencies, and insurrections-and that these situations significantly reduce the level of investor protection. For this reason, the tribunal emphasized that Article 4.5 should be strictly interpreted. Specifically, the clause only covers the following scenarios occurring within the territory of a Contracting Party: war, any other armed conflict, revolution, national emergency, and insurrection[8]para175.

It is important to note, however, that the term "armed conflict" first appeared in Article 2 of the 1949 Fourth Geneva Convention, and its definition evolved throughout the 20th century to include internal conflicts such as revolutions and emergencies. In 2011, the International Law Commission (ILC), defined "armed conflict" as "a situation of sustained resort to armed force between States, or between governmental authorities and organized armed groups, or between such groups within a State[12]."

With regard to the distinction between international armed conflicts and non-international armed conflicts, the latter has gradually become the most widespread and destructive form of organized human violence[13]-largely due to the rise of terrorist organizations, mercenary companies, and private security firms. In response, IHL has continuously expanded its regulation of non-international armed conflicts: it synthesizes state practices and court jurisprudence, and adds provisions specifically addressing such conflicts.

In the field of international investment, the core objective is to protect investors' investment interests. Therefore, there is no need to distinguish between international and non-international armed conflicts in investment agreements. This distinction is only relevant to the host state itself-primarily for determining who ultimately bears liability. Under investment agreements, however, the host state cannot invoke the "nature of the armed conflict" (whether international or non-international) as a ground to exempt itself from liability.

4.2. Interpretation of "Expansive War Clauses"

As indicated in the above context, the application of expansive war clauses falls into two scenarios: the first occurs when the military or authorities of the other Contracting Party destroy all or part of the investor's covered investment when such action is not necessitated by

ISSN: 2688-8653

circumstances; the second occurs when the military or authorities of the other Contracting Party expropriate all or part of the investor's covered investment. Losses resulting from these scenarios shall, depending on the circumstances, be addressed through restitution of the investment to its original state, compensation to the investor, or a combination of both restitution and compensation.

4.2.1. Destruction of Covered Investments

To claim for such destruction, the investor must prove three elements:The destruction of property was caused by government forces or authorities during hostilities;The destruction was not caused in the course of combat operations, and is related to the presumption of unreasonable destruction carried out outside combat;The destruction was not necessary.However, in practice, based on the cases mentioned above, investors are typically required to prove only two key points: whether the destruction was necessary. For the determination of "combat operations," it is sufficient if the government armed forces can demonstrate three conditions: the existence of an operation code name, the existence of an operational objective, and the purpose of controlling territory.

In the Asian Agricultural Products Case, the investor was unable to prove whether the destruction was caused by government armed forces or insurgents, nor could it prove the existence of military necessity[5]para59. In the AMT v. Zaire Case, AMT similarly failed to prove that the destruction was caused by government armed forceseven though the destruction was carried out by individuals wearing military uniforms and carrying military weapons, the tribunal held that there was no evidence showing these individuals were organized or acting under official orders[7]para7.09.

In fact, the burden of proving the existence of "combat operations" and "military necessity" should lie with the government armed forces. Pursuant to Article 48 of Additional Protocol I to the Geneva Conventions of 1949, parties to a conflict shall at all times distinguish between civilian objects and military objects. This provision reflects the principle of respecting and protecting civilians , which further supports the argument that the government bears the burden of justifying the necessity of actions that may harm civilian investments.

(1) Non-Military Objectives

Under the principle of distinction ,a core principle of international humanitarian law, attacks against civilians and civilian objects are prohibited, while the use of lethal force against combatants and the destruction of military objectives are lawful. However, civilians and civilian objects may lose their protected status in specific circumstances: for instance, attacks may lawfully target civilians who directly participate in hostilities, and civilian objects may be reclassified as military objectives if they are used for military purposes.The status of non-state armed groups-whether they qualify as "combatants" (who directly participate in hostilities) or "civilians"-is often ambiguous, yet this distinction is critical: combatants are legitimate targets for attack at all times, whereas civilians may only be targeted when they are participating in hostilities.

During the 1990 Gulf War, the ICRC sent a memorandum on the applicability of international humanitarian law to all States Parties to the 1949 Geneva Conventions, stating: "The following general rules are considered binding on all parties to an armed conflict: ... At all times, a distinction must be made between combatants and military objectives on the one hand, and civilians and civilian objects on the other[14]."

(2) Military Necessity

Article 57 of the Additional Protocol I sets out preventive measures for attacks that may affect civilians or civilian objects. Paragraph 2(a) of Article 57 specifies three core obligations:Verify the target: Take all feasible steps to verify that the objective to be attacked is neither a civilian nor a civilian object, and is not entitled to special protection;Choose appropriate

ISSN: 2688-8653

means/methods: Adopt all possible precautionary measures in selecting attack methods and means to avoid or minimize incidental loss of civilian life, injury to civilians, and damage to civilian objects;Proportionality assessment: Refrain from deciding to launch any attack that may cause incidental harm which would be excessive in relation to the concrete and direct military advantage anticipated.

To fulfill its mandate of disseminating IHL, the ICRC dispatches representatives worldwide to train armed forces and security forces on these rules, emphasizing that "commanders must take all feasible precautionary measures." The term "feasible precautionary measures" refers to measures that are practically implementable, taking into account the tactical situation-including all relevant circumstances such as humanitarian and military considerations.

It is important to note that the obligation to "take all possible measures" under military necessity is not absolute. For instance, the Committee that reviewed NATO's bombing campaign against the Federal Republic of Yugoslavia stated in its 2000 final report to the ICTY Prosecutor: "Commanders and aircrews directly involved in operations must be afforded a certain degree of discretion to determine which available resources to use and how to use them." This highlights that military necessity primarily aims to prevent indiscriminate attacks-attacks that cause civilian casualties disproportionate to the expected military advantage. It also requires governments to provide corresponding military reports to reasonably explain the actions of their authorities.

Canada's 2008 Manual on the Use of Force clarifies in the chapter "Principles and Rules Governing the Use of Force in Direct Connection with Armed Conflict" that:

"Feasible" shall be understood as considering all circumstances at the time, including humanitarian and military factors.

Planners and commanders shall act reasonably and in good faith.

Decisions regarding the use of force shall be based on an assessment of information reasonably available at the time; such decisions shall not be judged based on information disclosed afterwards.

Reasonable and good-faith efforts must be made to gather intelligence and review existing intelligence.

The standard required is one of "reasonableness," not "perfection."

The standard for determining whether the required level of care has been met is objective: "Would a reasonable person in the position of the commander, planner, or staff member have acted in the same way under the circumstances?"

In summary, while the proof of military necessity grants government armed forces a certain degree of discretionary authority in operations, they must still submit timely military reports to demonstrate that their actions comply with IHL. If such compliance cannot be proven or is in doubt, the government shall bear the adverse consequences: the expansive war clauses shall apply to raise the compensation standard, and the principle of "presumption of non-responsibility of the state" shall not be invoked.

4.2.2. Expropriation of Covered Investments

First, it is important to clarify that, according to the arbitral tribunal's ruling in the AMT Case, acts of expropriation of property by "military forces" or "authorities of the other Party" may be equated to expropriation. Proving this form of direct expropriation is relatively straightforward[7]para7.07: the investor only needs to demonstrate that the invested property has been expropriated. However, in practice, the emergence of indirect expropriation has complicated the situation.Professor Zeng Huaqun defines indirect expropriation as follows: Even if the host state does not publicly declare an expropriation and the legal ownership of the invested property remains with the foreign investor, the host state adopts measures that hinder

ISSN: 2688-8653

the investor from exercising rights over the invested property, rendering the investment effectively useless[15]. Indirect expropriation is the second most common cause of action in investment disputes[16] and a primary basis for Chinese investors to initiate arbitration against host states. Cases such as Xie Yeshen v. Peru, Ping An v. Belgium, and China State Construction Engineering Corporation (CSCEC) v. Yemen all involve disputes over the determination of indirect expropriation. Among these, only the CSCEC v. Yemen case occurred against the backdrop of armed conflict.

In July 2009, Yemeni military and security forces attacked and detained employees of CSCEC (Beijing), and forcibly barred CSCEC from accessing the project site-effectively preventing CSCEC from performing its contractual obligations. On July 22, 2009, Yemen's Civil Aviation and Meteorology Authority notified CSCEC that it was terminating the Construction Contract on the grounds that CSCEC could not return to the project site to complete work. CSCEC therefore argued that Yemen had unlawfully expropriated its investment in the project and initiated arbitration against the Yemeni government at ICSID on December 3, 2014.Regarding indirect expropriation, the China-Yemen BIT only stipulates the conditions for "expropriation" in general terms. The Yemeni government contended that only "lawful expropriation" was protected under the BIT. Although the arbitral tribunal rejected this argument by invoking the BIT's "object and purpose" of promoting foreign investment[17], as noted earlier, a key objective of protecting foreign investors through investment treaties is to replace vague "standard-based rules" with clear "normative rules"-or at minimum, to clarify standards by providing solutions that enhance predictability.

To address the imprecision of investment treaty texts, some investor-state arbitral awards have invoked the principle of proportionality as a tool to balance two competing interests: the broad protection of investors' rights under investment treaties, and the host state's right to regulate in the public interest. However, the principle of proportionality is ultimately a technical framework for organizing arguments. Without the input of external normative content, it becomes a "scale without weights"-even if the general requirements are identified, it cannot determine how the "balance" required by proportionality will be achieved until the interests to be recognized and their respective weights are clarified.

IHL may help resolve two key issues in applying the proportionality principle in such contexts, particularly during armed conflicts: the identification of value-based elements and the assignment of weight to competing interests. In the context of indirect expropriation, the proportionality principle is reflected in three criteria for determining indirect expropriation:The "sole effect test" ; The "sole purpose test" ; The "effects-and-purpose balancing test".The concepts of "proportionality" (in IHL) and the "principle of proportionality" (in investment law) share a common premise: "Individuals affected by state action should not be required to bear unnecessary burdens that are disproportionate to the objective pursued[18]." Based on this premise, tribunals invoking the proportionality principle should address three questions:

Suitability: Are the means used by the state appropriate to achieve the objective it pursues?

Necessity: Are the means adopted necessary to achieve the stated objective?

Proportionality in the strict sense: Even if no less restrictive means are available, do the burdens imposed on the individual outweigh the benefits secured by the state's objective?[19]

IHL treaties contain substantive rules on expropriation, which provide normative guidance for addressing these questions:Article 55(2) of the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War (1949) stipulates: "The Occupying Power may not requisition foodstuffs, articles or medical supplies available in the occupied territory, except for use by the occupation forces and administration, and then only if the needs of the civilian population have been taken into account. The Occupying Power shall make arrangements to ensure that fair value is paid for any requisitioned goods, in accordance with the provisions of international conventions in force."Article 46 of the Hague Regulations of 1899 (Convention (II) provides: "Private property must be respected and cannot be confiscated." Article 52 adds: "No contribution shall be levied except on the communes or inhabitants of occupied territory. Except for payments required for the needs of the army of occupation, no general levy in money shall be imposed upon the population of occupied territory except under a written order, and on the responsibility of the commander in the occupied district. Such requisitions and services shall as far as possible be paid for in cash; if not, a receipt shall be given and payment made as soon as possible."

In summary, for the purposes of expansive war clauses, if an investor can demonstrate that actions by government armed forces-even within the scope of "military necessity"-have affected their covered investment in terms of goods or services, such actions qualify as "expropriation" under the clauses. Consequently, the higher compensation standard prescribed by expansive war clauses shall apply.

5. Conclusion

Arbitral tribunals have overlooked the role that IHL ought to play in their rulings. While it is correct-and even foundational-for tribunals to rely heavily on the investment treaties concluded between the parties, a critical question arises: why has investment arbitration emerged as an effective means of obtaining compensation for investment losses during armed conflicts in recent decades?The answer lies in the differences between IHL and investment treaty frameworks: Under IHL, Article 3 of the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land stipulates that belligerents shall be liable for compensating losses caused by their armed forces' violations of treaty provisions. However, IHL only establishes compensation obligations; it does not provide a mechanism for the direct enforcement of rights. In contrast, investment arbitration enables investors to claim damages as individuals, and typically does not require the exhaustion of local remedies-a procedural advantage absent in IHL.

This discrepancy undermines both the predictability of the law and the lawfulness of tribunals' assessments of the consequences of armed conflicts. Such a "legal fragmentation" also creates risks: armed groups may exploit foreign investments as "shields," increasing the likelihood of attacks on foreign property.To address these issues, while taking investment treaties as the foundational basis, tribunals must better leverage IHL for interpretive purposes. Specifically:On Military Necessity: Host states may not abuse the principle of "presumption of non-state responsibility" during armed conflicts. Instead, they must submit timely military reports to demonstrate that their actions comply with IHL. If compliance cannot be proven or is in doubt, the host state shall bear the adverse consequences-the expansive war clauses shall apply, triggering the higher compensation standard.On Expropriation of Investments: If an investor can demonstrate that actions by government armed forces-even those within the scope of "military necessity"-have affected their covered investment in terms of goods or services, such actions qualify as "expropriation" under the expansive war clauses. Consequently, the higher compensation standard prescribed by these clauses shall also apply.

References

[1] Chinese Academy of Social Sciences, Institute of World Economics and Politics. Yellow Book of International Situation: Annual Report on International Politics and Security (2023) [M]. Beijing: Social Sciences Academic Press, 2023, p.2.

ISSN: 2688-8653

[2] “WHAT IS INTERNATIONAL HUMANITARIAN LAW?”, ADVISORY SERVICE ON IHL, International Committee of the Red Cross 19,avenue de la Paix,1202 Geneva,Switzerland T +41 22 734 60 01shop.icrc.org© ICRC, March 2022

[3] Gasser, H.-P. (1993). International Humanitarian Law-An Introduction. Geneva: Henry Dunant Institute (Published for the International Red Cross and Red Crescent Movement). p. 26.

[4] Asian Agricultural Products Limited v. Democratic Socialist Republic of Sri Lanka ,ICSID Case No. ARB/87/3,Award,21 June 1990,para38.

[5] United Nations Conference on Trade and Development (UNCTAD). Mapping of IIA Content [Database]. Available at: https://investmentpolicy.unctad.org/international-investment-agreements/iia-mapping. Accessed on: 23 September 2024.

[6] American Manufacturing & Trading, Inc. v. Republic of Zaire, ICSID Case No. ARB/93/1, Award, 21 February 1997,para6.08.

[7] LESI, S.p.A. and Astaldi, S.p.A. v. People's Democratic Republic of Algeria, ICSID Case No. ARB/05/3, Award,12 November 2008,paras174-175.

[8] Pantechniki S.A. Contractors & Engineers v. Republic of Albania, ICSID Case No. ARB/07/21, Award ,30 July 2009,para1.

[9] H.Lauterpacht,1997,The Grotian Tradition in International Law,Grotius,Vol. Ⅰ,An Elgar Reference collection,pp.441.

[10] T.Meron, 1991, Common Rights of Mankind in Gentili, Grotius and Suarez, American Journal of International Law, Vol.85, pp.110.

[11] Jennings, R. Y., & Watts, A. (Eds.). (1992). Oppenheim’s International Law (9th ed., Vol. I, Part 1). London: Longman. (Translated by Wang Tieya, Chen Gongchuo, et al. (1995). Beijing: Encyclopedia of China Publishing House, p. 22.)

[12] United Nations. International Law Commission Report (Sixty-Third Session) [R]. 2011: 173.Accessed on: https://legal.un.org/ilc/reports/2011/chinese/addendum.pdf

[13] David Armitage, 2017, Civil Wars: A history in Ideas, Yale University Press, American, p.5.

[14] ICRC, Memorandum on the Applicability of International Humanitarian Law, 14 December 1990, §II, IRRC, No. 280, 1991, p. 24.

[15] Zeng, Huaqun,1999, International Investment Law (in Chinese). Beijing: Peking University Press, p. 447.

[16] Special Update on Investor–State Dispute Settlement: Facts and Figures, IIA Issues Note, November 2017, Issue 3, p. 6.

[17] Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen, ICSID Case No. ARB/14/30, Decision on Jurisdiction, 31 May 2017 (hereinafter “Decision”), para.58.

[18] Jeffrey Jowell and Anthony Lester, ‘Proportionality: Neither Novel nor Dangerous’, in Jeffrey Jowell and Dawn Oliver (eds), New Directions in Judicial Review (London: Stevens,1988), pp.51,69.

[19] See, e.g., Case C-331/88, R.V.Ministry of Agriculture, Fisheries and Food,ex parte Fedesa[1990]ECR 4023.