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War clauses in IIAS – What protection do they offer?



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1. Introduction

Russia's invasion of Ukraine, now entering its ninth month, has once again thrown into sharp relief investor-state disputes arising out of war and armed conflict. Under the terms of most international investment agreements ("IIA"), a State agrees to protect the investments of investors from another State from discrimination, expropriation, and unfair and inequitable treatment. However, in situations of war or armed conflict, the State hosting the investment (the "Host State") may find it difficult or be unable to provide such protection, or these obligations may not apply. Many IIAs foresee this possibility and clarify what protection is to be provided in such situations, using one of the oldest standards of protection available to investors under IIAs, the so-called "war clause". These war clauses have been used by investors as an independent basis for compensation for harm incurred by their investments in conflicts such as the events in Crimea in 2014 or the unrest in Syria and Libya.

2. Applicable IIAs and types of war clauses

While the objective of war clauses generally is to provide an additional guarantee in times of war and armed conflict, the exact nature and scope of the protection depends on the type of war clause set out in the applicable IIA. Broadly, war clauses fall into two categories:

- (a) the non-discriminatory war clause (also referred to as the basic war clause); and
- (b) the extended war clause.

2.1 Basic war clauses

The vast majority of IIAs include a basic war clause.^[1] This guarantees a relative standard of treatment, either national treatment or most-favoured nation treatment, or both, to foreign investors with respect to measures adopted by the Host State regarding compensation for losses in war, armed conflict, civil disturbance or similar event. In other words, it usually guarantees that foreign investors whose investments have been harmed in such circumstances will be treated as well as a Host State's own investors (or foreign investors from another country).

This narrow scope of the basic war clause does not give rise to a right to claim compensation; this would only be created if the Host State has already adopted measures for compensation, indemnification, or restitution with respect to existing losses.

On the other hand, to invoke the basic war clause, the investor does not need to prove that the Host State is responsible for the harm to its investment. Moreover, the guarantee of non-discrimination in this type of war clause ensures that the Host State is obliged to grant non-discriminatory treatment, even when it is not internationally obligated to do so, and even to investors who are from countries that have become adversarial to the Host State.

Therefore, to be able to successfully invoke a basic war clause, an investor usually has to prove that:

- (a) the Host State has taken measures in relation to losses caused by war or conflict (or other circumstances specified in the war clause);
- (b) there are investors who are in similar or “like” circumstances to the investor;
- (c) such investors have been treated more favourably by the Host State in relation to such measures; and
- (d) there is a lack of reasonable or objective justification for this difference in treatment.

2.1 Extended war clauses

Some IIAs provide additional protection through an extended war clause.^[2] The extended war clause usually complements the basic war clause and provides for a substantive right to claim compensation for loss. The circumstances under which this right can be invoked vary, depending on the exact scope of the clause. The main types are clauses that:

- (a) provide a right to compensation in the event of (i) “requisitioning” of the investment, or (ii) destruction of the investment that was not required by the necessity of the situation, by the Host State’s authorities or forces;^[3]
- (b) guarantee just and equitable treatment (or even full protection and security) to be provided to investors whose investments have suffered losses as a result of war, armed conflict or similar situations;^[4] and
- (c) guarantee adequate compensation by the Host State in the event of losses suffered by an investor to their investment due to war, armed conflict or similar situations.^[5]

2.2.1. Extended war clause (A)

This is the most common type of extended war clause. The key threshold issue to be determined while invoking these kinds of clauses, is *who* caused the damage. Therefore, unlike the basic war clause (or the variations of extended war clause at (B) and (C)), here the investor must prove that the losses suffered are attributable to actions of the Host State. This could also include the acts of private military or security firms, who are either acting as agents of the Host State or who have been empowered to exercise governmental authority.

Under the terms of such extended war clauses, the doctrine of necessity usually provides a defence to the Host State’s liability to compensate losses for damage that it causes.

As a result, while extended war clauses are often broader in scope than basic war clauses in terms of substantive protections, depending on the specific wording of the extended war clause, the burden of proving the Host State’s liability may be higher.

2.2.2. Extended war clause (B) and (C)

These types of extended war clause are less common and impose a strict liability on the Host State to compensate the investor if it has suffered losses as a result of war, armed conflict or similar events. Such clauses may even provide that the Host State will be liable irrespective of whether the damage is attributable to it.^[6]

3. Conclusion

By clarifying the Host State’s obligations in situations of war and armed conflict, war clauses provide greater certainty and – potentially – a higher standard of protection than would be otherwise warranted. For example, a strict liability war clause may provide greater protection than would be required to be provided

under a traditional expropriation or full protection and security standard. War clauses can therefore be an important protection for investors who have invested in States facing conflict or civil insurrection.

For further questions or comments about this topic, please contact the authors.

References

[1] See for example, Article 6 of the Pakistan-Japan BIT (1998), Article 6 of the Austria-Yemen BIT (2002), Article IV(3) of the Syria-Turkey BIT (2004) and Article 4(3) of the Afghanistan-Germany BIT (2005).

[2] See for example, Article 4 of UK-Egypt BIT (1975), Article 6 of the Denmark-Laos BIT (1998), Article 6 of the Finland-Ukraine BIT (2004), Article VII of the Colombia-United Kingdom BIT (2010).

[3] Such as in cases of Article 6 of the Denmark-Laos BIT (1998) and Article 6 of the Finland-Ukraine BIT (2004).

[4] Such as in cases of Article 4(4) of the France-USSR BIT (1989) and Article 6(2) of the Switzerland-Georgia BIT (2014).

[5] Such as in cases of Article 5(3) of the France-Haiti BIT (1984) and Article 5(6) of the Eritrea-Italy BIT (1996).

[6] Such as in case of Article 5(6) of the Eritrea-Italy BIT (1996).