An Analysis of the Compensation Regime Applicable to Claims Arising from Armed Conflicts Affecting Investments in MENA

Noradèle Radjai, Laura Halonen & Panagiotis A. Kyriakou*

ABSTRACT

The present contribution discusses the forms and standards of compensation, as well as the valuation methods, applicable to investment claims arising out of armed conflicts in the MENA region. It explores the general international law framework, language found in treaties concluded by MENA states, as well as particularities in the domestic damages regimes.

1 INTRODUCTION

In its early days, international law on the protection of foreign investment focused on effects of hostilities and diplomatic crises on foreign property. By contrast, the modern era of international investment agreements (IIAs) has seen the emergence of general 'international administrative law' that safeguards everyday investment activities against various forms of state interference – or so it seemed until 2011, when the first investment claims arising out of the Arab Spring were filed. To some extent, the pendulum has now swung back, with several disputes related to international and non-international armed conflicts and civil strife having been filed in recent years.

States in the Middle East and North Africa (MENA) have figured prominently in this new wave of IIA claims. One need not look far to understand why that is, as the area has experienced some of the severest conflicts in the current decade. In such turbulent times, the likelihood of destruction and seizure of assets – and so, too, of a state having to pay damages for a potential violation of an IIA where those assets belong to foreign investors – significantly increases. Of great importance in this regard are the applicable compensation standards and

* Noradèle Radjai and Laura Halonen are respectively partner and counsel at Lalive in Switzerland. Panagiotis Kyriakou is a teaching assistant and PhD candidate at the Graduate Institute, Geneva.

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valuation methods. Indeed, while a state can be held liable for breach of an ordinary standard of protection under an IIA, the consequences of such breach (i.e. reparation) would need to be carefully gauged against the needs of the situation in cases of emergency caused by armed conflict.

In this contribution, the authors focus on the particularities of the compensation regime for investment claims arising out of armed conflicts, specifically in MENA states. The authors do so by inquiring into (2) how compensation for claims arising out of armed conflicts is calculated under traditional standards of investment protection; (3) the impact on the duty to compensate of security and exceptions clauses and relevant customary law defences; (4) compensation under specific war clauses; and (5) particular considerations arising under the laws of MENA nations.

2 OBLIGATION TO COMPENSATE IN TIMES OF CONFLICT UNDER TRADITIONAL STANDARDS OF PROTECTION

Investors may seek to recover losses suffered in the context of an armed conflict under specific war clauses,[1] as well as under traditional standards of investment protection, including expropriation, fair and equitable treatment (FET) and full protection and security (FPS).[2] Reparation in the latter case will be governed by the relevant treaty provisions and general international law.[3] General international law does not seem to establish a *lex specialis* regime for claims arising out of armed conflicts defining the forms that reparation for damages may generally take.[4]

Under general international law, reparation for internationally wrongful acts may take the form of restitution, compensation or satisfaction.[5] Restitution, i.e. the re-establishment of the situation which existed before the wrongful act was committed, constitutes the primary remedy. Where the granting of such remedy is materially impossible, or where it would involve a burden out of all proportion to the benefit deriving from it compared with monetary compensation, the

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1 For a discussion on war clauses see section 4 below.

2 The present article assumes that bilateral investment treaties (BITs) remain in force during war, although an argument can be made, on the basis of the International Law Commission (ILC)'s Draft Articles on the Effects of Armed Conflicts on Treaties (2011), that at least some of their clauses are suspended. See J. Ostransky, 'The Termination and Suspension of Bilateral Investment Treaties due to an Armed Conflict', 6 *JIDS* 136 (2015).

3 Although some commentators maintain that the reparation regime in international investment law is a *sui generis* transnational regime. See Z. Douglas, *The International Law of Investment Claims* (CUP, 2009), paras 172–5.

4 P. Sullo & J. Wyatt, 'War Reparations' in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (OUP, 2013), para. 41.

5 See ILC's Draft Articles on Responsibility of States for Internationally Wrongful Acts, A/RES/56/53, *Yearbook of the International Law Commission* (2001), vol. II (Part Two), Article 33.

latter is to be preferred.[6] Satisfaction, a remedy typically consisting in the acknowledgement of a breach by the responding party, is seldom appropriate in the investment law context.[7]

While restitution is theoretically the primary remedy in international law, investment tribunals have rarely ordered it.[8] This may be because, by the time of the award, 'any possibility of ordering a remedy to restore the situation as it existed prior to the infringement has usually been irrevocably lost'.[9] It may also be because investors are ultimately interested in making profits on their investment and are thus likely to seek compensation as the preferred remedy, or because of concerns over enforcement of awards ordering restitution.[10] Nonetheless, restitution might indeed be appropriate in the context of claims arising out of conflicts, where the injury suffered consists in the requisition of tangible assets for military purposes, provided that the seized assets remain in usable condition and can be returned to their owner – possibly accompanied by compensation for the time the assets were requisitioned and any wear and tear.

While the forms of reparation for war losses have not generated much discussion, the scene is less clear in respect of (2.1) standards of compensation and valuation methods/dates; as well as (2.2) military necessity. Hence, (2.3) a brief inquiry into how tribunals have approached the issue of compensation for war losses may shed light on a number of assumptions that must be made in that context.

2.1 Standards of compensation and valuation methods

Customary international law principles have been developed in respect of particular standards of reparation. The general principle is that a state must make full reparation for the injury caused by the internationally wrongful act.[11] That is a

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6 *Ibid*., Articles 35, 36. See also *Case Concerning the Factory at Chorzow* (Claim for Indemnity) (Merits), PCIJ Series A, No. 17 (1928), para. 47.

7 ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, *supra* note 5, Article 37; *Europe Cement Investment & Trade S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/07/2, Award (13 August 2009), paras 146–8.

8 They have, nonetheless, done so on occasion. See e.g. *Antoine Goetz et consorts v. République du Burundi*, ICSID Case No. ARB/95/3, Award Embodying the Parties' Settlement Agreement (10 February 1999), pp. 456, 518 et seq.

9 C. McLachlan, L. Shore & M. Weiniger, *International Investment Arbitration: Substantive Principles* (OUP, 2007), para. 9.113. Further, tribunals may refuse to order restitution in the form of specific performance guided by considerations of state sovereignty. See *AMCO Asia Corp. and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Award (21 November 1984), para. 202.

10 E.g. Article 54(1) of the ICSID Convention provides that: 'Each Contracting State shall . . . enforce the pecuniary obligations imposed by [an ICSID] award within its territories as if it were a final judgment of a court in that State.'

11 See *Chorzow*, *supra* note 6.

subjective standard, seeking to 're-establish the situation which would, in all probability, have existed if that act had not been committed'.[12] In the context of compensation for lawful expropriation, the references in various treaties to 'adequate', 'prompt' and 'effective' compensation have been interpreted as departing from full reparation and establishing the objective standard of fair market value (FMV),[13] being the price a willing buyer would pay a willing seller in an arms-length transaction.[14]

There appears to be no reason why compensation for losses suffered during armed conflicts would depart from the FMV or the full reparation standard. That is not, however, the end of the discussion, the following observations being in order:

First, it is far from clear whether the FMV standard exclusively governs compensation for lawful expropriations, or whether, as several tribunals have suggested, it should also be used in unlawful expropriations or breaches of other standards of protection resulting in the complete destruction of the investment or important long-term losses.[15] Be that as it may, whether an investment claim arises out of an armed conflict appears to be irrelevant in the FMV versus full reparation debate for non-expropriatory measures, as the thrust of that determination is more on the magnitude of the breach.[16] Nonetheless, it must be noted that in times of conflict it is unlikely that an expropriatory act will heed due process, in other words it is unlikely that an expropriation will be lawful. As such, one can envisage tribunals calculating compensation for conflict claims either in accordance with the FMV standard by analogy, or in accordance with the standard of full reparation by way of direct application.

Second, there is much controversy surrounding the date on which the property or business in question must be valued. For lawful expropriations, the treaty standard is that of FMV and compensation is assessed as at the moment before the expropriation took place or became public knowledge, whichever is earlier.[17] For claims of illegal acts, some tribunals have opined that the full reparation standard

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12 *Ibid*.

13 *Taking of Property*, UNCTAD Series on issues in international investment agreements (2000), UNCTAD/ITE/IIT/15, pp. 45–6.

14 H. Weisburg & C. Ryan, 'Means to be Made Whole: Damages in the Context of International Investment Arbitration' in Y. Derains & R. H. Keindler (eds.), *Evaluation of Damages in International Arbitration*, Dossier of the ICC Institute of World Business Law (ICC, 2006), 165, p. 173.

15 See e.g. *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Award (12 May 2005), para. 410; *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award (14 July 2006), paras 420–4; *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL, Partial Award (13 September 2001), para. 618.

16 S. Jagusch & N. Duclos, 'Compensation for the Breach of Relative Standards of Treaty Protection', 10(4) *JWIT* 515 (2009), pp. 540–1.

17 See e.g. Article IV(1), US-Argentina BIT; Article 4(3), Brunei-Oman BIT.

entails setting the date of the breach as the valuation date, while others have found that reparation must be assessed as on the date of the award.[18]

In the context of a conflict claim, the date of valuation is likely to play a significant role, the following scenarios being conceivable:

(i) The conflict intensifies after the violation occurs or becomes public knowledge, but then ceases before the date of the award. In this case, setting the valuation date at the time of the breach will benefit the investor, as the escalation of the conflict is likely to have a negative impact on the value of the investment. This decrease in value will not be taken into account if valuation is performed as on the date of breach, whereas it will be taken into account if the investment is valued as on the date of the award.

(ii) The conflict ends before the award. In this case, setting the date of the award as the valuation date is likely to benefit the investor. The end of the conflict will likely have a positive impact on the value of the investment, which was not foreseeable at the time of the breach, and which the investor will wish to recover.

(iii) The conflict is ongoing at the time of the award, and the loss arises directly out of a measure taken as a result of it, such as a temporary prohibition of a service or an emergency import ban violating the FET standard. In such case, the breach will likely be of a continuing nature,[19] and the time of the breach will coincide with the time of the award, there being thus no practical concerns associated with determining the date of valuation. Nonetheless, the tribunal may also hold that the state will be held liable to pay compensation for further losses, so long as it does not end the breach.[20]

Third, be it under the FMV or the full reparation standard, valuation methods are far from well determined. Under the FMV standard, the discounted cash flow (DCF) method is used to calculate the value of an asset or a company, provided that the latter is a going concern, possessing the ability to generate future profits.[21] Future cash flows must then be projected for the anticipated life of the project or

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[18] *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award (2 October 2006), paras 497–9; *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award (24 July 2008), paras 775, 788.

[19] Unless the act in question is an expropriation (or expropriatory). See ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, *supra* note 5, Article 14, commentary, paras 4–6.

[20] *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/, Award (25 July 2007), paras 85, 97.

[21] See *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (30 August 2000), paras 119–20.

duration of the contract in question, and then discounted back to reflect the present value, in particular taking account of several risk factors.[22] Another method adopted by tribunals is the market-based approach, i.e. finding comparable assets on the market and taking account of possible differences between the comparable and the valued assets.[23] Some tribunals have also adopted asset- and cost-based approaches, wishing to avoid speculative projections into future profits. One of those is the book value approach, which looks at the value of a company's assets as reflected in its balance sheets, minus depreciation,[24] another being the historic cost, i.e. the historic amounts spent by the investor without taking into account depreciation.[25]

Generally, there are no principles departing from the above specific to the valuation of claims related to armed conflicts, as the choice of valuation method is dictated by the nature of the property being valued and the type of loss caused to it, rather than by the act resulting in its loss. The authors would, nonetheless, note the following: *First*, if DCF is applied, calculating a fair discount rate for the instability created by the conflict may prove to be a rather challenging task. *Second*, if a market-based approach is adopted, it will be hard not only to identify an existing market in times of severe conflict, but even to contemplate a hypothetical one. *Third,* the investor's exercise of due diligence must be carefully examined in the context of speculative investment operations and decisions made when the conflict was foreseeable, during it, or in its aftermath. Tribunals should not hesitate to limit compensation to the loss actually caused by the treaty breach by the state, where contributory negligence on the part of the investor can be established. *Fourth*, tribunals are unlikely to be able to project future profits under the DCF method where a conflict is long-lasting and intense, and thus likely to affect consumer behaviour. *Lastly*, an investment will not in principle be expected to generate profits in the period between the breach and the award in times of (continuing) conflict, and as such a tribunal is not expected to award lost profits for that period, if it decides to award damages based on lost profits.

2.2 Military necessity

Apart from general compensation standards and valuation methods, tribunals may further have to grapple with a question that may arise out of the interplay

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22 *Amoco International Finance Co. v. Islamic Republic of Iran*, I-USCT, Partial Award No. 310-56-3 (14 July 1987), para. 213.

23 See M. Kantor, *Valuation for Arbitration: Compensation Standards, Valuation Methods and Expert Evidence* (Kluwer, 2008), p. 15.

24 See I. Marboe, *Calculation of Compensation and Damages in International Investment Law* (OUP, 2009), p. 268.

25 See *ibid*., pp. 278–9.

between different branches of international law: whether compensation is owed where the measure is justified by military necessity under the laws of war.

The interplay between international humanitarian law and the bilateral investment treaty regime on compensation for conflict claims may ignite polemics. Notably, the former tolerates certain acts of violence against civilian objects, where such objects become military objectives due to their use by combatants.[26] An attack on such objectives which satisfies the requirement of proportionality, and which provides a definitive military advantage to the attacker, is justified by military necessity.[27] There is therefore no liability for such acts under international humanitarian law, and accordingly no compensation is owed to the owner of the property. In the case of property not used by combatants, damage is tolerated to the extent that it is incidental and satisfies the requirements of proportionality and precaution.[28] Where the damage is not justified by military necessity or is not incidental, monetary compensation is owed,[29] for the calculation of which no particular principles have been laid down in the jurisprudence of international courts and tribunals.

This gives rise to a possible normative conflict between humanitarian and investment law on damages: for example, under the FPS standard, failure to exercise due diligence resulting in the destruction of civilian property may trigger a state's obligation to compensate, even where the property is used by combatants, or the damage is incidental.[30] Under international humanitarian law, however, the same failure will be justified by military necessity, and no compensation will be owed as a result. In any event, a normative conflict of this type is less likely to arise where the investor claims losses under a war clause which, as discussed below, contains more precise language addressing situations of military necessity or other similar types of emergencies.

2.3 Tribunals' approaches

There being no *lex specialis* compensation regime under general international law governing claims arising out of conflicts, it is useful to consult the limited caseload that exists on the matter, in order to discern how and to what extent the above observations have been treated in practice. In this connection, the landmark case of *AAPL v. Sri Lanka* is particularly informative. The arbitration was initiated by a

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[26] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3, Article 52(2).

[27] *Ibid*., Article 52(2).

[28] *Ibid*., Article 57(2)(b).

[29] *Ibid*., Article 91.

[30] *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award (27 June 1990), paras 50, 67.

Hong Kong entity that held a large minority share in a Sri Lankan shrimp farming and export company. In 1987, a shrimp farm belonging to the company was destroyed during a counter-insurgency operation undertaken by Sri Lankan armed forces against the Tamil Tigers, who controlled the area where the farm was located. The investor sought to recover a proportion of the value of all assets destroyed corresponding to the size of its shareholding, under the FPS standard, and alternatively under the extended war clause[31] found in the applicable UK-Sri Lanka BIT.

The tribunal found that regardless of whether the destruction of property was caused by government forces or terrorists, Sri Lanka had not undertaken all reasonable measures to prevent it, and had thereby violated its due diligence obligation under the FPS clause.[32] The tribunal proceeded to award compensation in accordance with a standard which it formulated as the 'full value of the investment lost as a result of said destruction and the damages incurred as a result thereof'.[33]

Applying the above standard, the tribunal first reasoned that, since the protected investment under the treaty consisted of a 48.2% shareholding in the joint venture, rather than the individual assets, compensation would be calculated on the basis of the value of the shareholding.[34] It then noted that the valuation date would be that preceding the destruction,[35] observing that the joint venture was no longer a going concern capable of generating profits.[36] The tribunal further stated that compensation would be calculated on the basis of the company's physical assets minus its liabilities,[37] and refused to award goodwill or lost profits, as the company had been operating for two years and had not demonstrated any potential of profitability with reasonable certainty.[38] Notably, the tribunal did not indicate the valuation method used in respect of the physical assets, but it can be assumed that this was their book value. Finally, the tribunal acknowledged that it was essentially ordering compensation based on the standards applicable for expropriation by 'inviting' the parties to complete an agreement whereby the

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31 For a discussion on this aspect of the dispute see section 4.2 below.

32 *AAPL v. Sri Lanka*, *supra* note 30, paras 84.b, 84.d, 86. Subsequent case law has suggested that the applicable standard may be more subjective and take into account the specific circumstances of the respondent state: *Pantechniki SA Contractors and Engineers v. Albania*, ICSID Case No ARB/07/21, Award (28 July 2009), paras 76–81.

33 *AAPL v. Sri Lanka*, *supra* note 30, para. 88.

34 *Ibid*., para. 95.

35 *Ibid*.

36 *Ibid*., para. 99.

37 *Ibid*., para. 97.

38 *Ibid*., para. 106.

investor transferred its shares in the local company to the Sri Lankan government.[39]

A slightly different approach to compensation was taken in another case, that of *AMT v. Zaire* (presently the Democratic Republic of Congo). The case was initiated by a US investor who held the majority of shares in a Zairean company producing batteries and importing goods. Members of the Zairean armed forces began looting Kinshasa in 1991, protesting against newly introduced government reforms, and caused damage to the investor's property in the process. The company's premises were thus closed and reopened in 1992, only to be subject to another raid in 1993 and thus closed down definitively. The investor claimed a breach of the FPS standard and compensation on that ground, as well as compensation under the extended war clause found in the US-Zaire BIT. The tribunal found that Zaire had failed to comply with the standard of vigilance, thus violating the FPS provision,[40] and further reasoned that the situation at issue would fall within the scope of the extended war clause.[41]

Focusing on damage to property rather than diminution of share value, and thereby departing from *AAPL v. Sri Lanka*, the tribunal went on to determine FMV ('true value' or 'actual market value') as the applicable compensation standard, even though the case did not involve expropriation claims, and the tribunal acknowledged that the breaches found could not 'be assimilated to expropriation'.[42] In choosing a valuation method, it reasoned that it would have to take into account the realities of the current situation in Zaire,[43] and that its award would in that respect be based on 'equitable principles', as it would exercise 'discretionary and sovereign power'.[44] As such, it considered it appropriate to compensate the investor for 'the very losses which have been caused by the acts of violence and looting',[45] while expressly rejecting a claim for lost profits as the claim was found to be 'neither practical nor reasonable' and 'far removed from the striking realities of the current situation'.[46] The tribunal set out the tribunal-appointed expert's assessment of actual value of the assets lost or destroyed,[47] and then without any further explanation awarded the claimant double that amount.[48] In conclusion, though its analysis is far from clear, the

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39 *Ibid*., para. 111.
40 *American Manufacturing & Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award (21 February 1997), paras 6.04–6.11.
41 *Ibid*., para. 6.14.
42 *Ibid*., paras 7.03 and 7.13.
43 *Ibid*., paras 7.13–7.16.
44 *Ibid*., para. 7.21.
45 *Ibid*., para. 7.16.
46 *Ibid*., para. 7.14.
47 *Ibid*., para. 7.19.
48 *Ibid*., pp. 41–2, operative para. (4).

tribunal seems to have exercised some constraint when calculating damages, perhaps not only due to the isolated incidents in the period between 1991 and 1993, but also the civil strife which later took place and was ongoing at the time of the award.[49]

Tribunals have also had the opportunity to deal with such issues in the context of arbitrations brought against MENA states, particularly after the Arab Spring revolutionary wave in 2010. While several of the claims relating to the Arab Spring were eventually settled or dismissed for lack of jurisdiction, and many are still pending,[50] one decision of limited relevance was rendered this year, namely the *Ampal-American v. Egypt* decision on liability and heads of losses. The investors claimed among other things that various attacks on their gas pipelines had caused damage to their investment, and that Egypt was liable to pay compensation under the FPS standard, as well as the treaty's expropriation provision, as it did not take appropriate security measures to prevent the damage. The tribunal noted that the FPS standard would need to be assessed in light of the conflict the region had been experiencing, but found ultimately that since the pipeline had been subject to a total of thirteen attacks, the government had clearly not reacted appropriately (since the first attacks should have served as a 'warning'), and had thus failed to observe its due diligence duties.[51] While the tribunal has yet to render its award on quantum, it did, before concluding its liability award, set out the various heads of losses on the basis of which compensation will subsequently be assessed. The tribunal ruled that compensation for the entirety of the losses caused – including losses arising from breaches unrelated to the attacks on the pipeline[52] – would be calculated by reference to the FMV of the claimants' shareholding.[53] The tribunal did not indicate that it would award any separate damages flowing specifically from the breach of the FPS standard.

In a nutshell, it appears that a tribunal's approach to the valuation of claims brought against MENA states in situations of conflict and unrest will vary depending on the case. To an extent, this reflects the general legal uncertainty surrounding the compensation regime under international investment law. What can nonetheless be safely presumed is that, while tribunals are not expected to significantly depart from the applicable general principles, they are expected to pay

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49 See especially the tribunal's pronouncements *ibid.*, paras 7.17–7.18.

50 See J. McDonald & D. Owen, 'The Effects on Arbitration of the Arab Spring', *GAR* (20 April 2016), http://globalarbitrationreview.com/chapter/1036966/the-effects-on-arbitration-of-the-arab-spring (last accessed June 2017).

51 *Ampal-American Israel Corporation and others v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss (21 February 2017), paras 283–90.

52 The tribunal found separate breaches of the BIT to have been committed by expropriation of a tax licence and ultimately by unlawful termination of the gas supply contract that amounted to an expropriation of the entire investment. *Ibid.*, para. 354.

53 *Ibid.*, para. 352.

heed to the emergency of the situation and possibly exercise restraint in their calculation of damages. This is an approach that should be welcomed at least by those who have criticized the impact on peace-building and reconciliation of the possibility of foreign investors getting full reparation for their losses suffered as a result of war, while large portions of the local civilian population have also suffered grave material losses, and been possibly displaced without any, or only minor, compensation being offered.[54]

3 IMPACT ON COMPENSATION OF EXCEPTIONS AND SECURITY CLAUSES AND CUSTOMARY LAW DEFENCES

While BITs are subject to the general international law rules on situations of emergency, several states have opted not to rely exclusively on this, but to negotiate specific clauses addressing emergency situations, in order to ensure that treaty obligations will not hinder the fulfilment of fundamental public policy objectives – the maintenance of public order in times of conflict included. Those can broadly be categorized as general exceptions and security clauses, and are worth examining here due to the legal uncertainty regarding compensation to which they may give rise.

General exceptions or non-precluded measures clauses are inspired by Article XX of the General Agreement on Tariffs and Trade (GATT), and typically operate as primary rules of international law regulating the consequences of a *prima facie* breach of a BIT provision.[55] Such clauses can be found in MENA BITs (though states such as Syria and Saudi Arabia typically do not include them). For example, Article 14(2) of the Finland-Egypt BIT provides for a public order exception:

> Provided that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination by a Contracting Party, or a disguised investment restriction, nothing in this Agreement shall be construed as preventing the Contracting Parties from taking any measure necessary for the maintenance of public order.

To the extent that a measure is necessary to maintain public order in times of unrest or even more so in time of armed attack or war, the measure will not amount to a breach of a BIT that contains such a clause.

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[54] E.g. M. Lawry-White, 'International Investment Arbitration in a *Jus Post Bellum* Framework', 16 *JWI&T* 633 (2015), pp. 659–60. See also in general J. Zrilič, 'International Investment Law in the Context of *Jus Post Bellum*: Are Investment Treaties Likely to Facilitate or Hinder the Transition to Peace?', 16 *JWI&T* 604 (2015).

[55] A. Gourgourinis, 'General/Particular International Law and Primary/Secondary Rules: Unitary Terminology of a Fragmented System', 22(4) *EJIL* 993 (2011), pp. 1023–4.

National security clauses are in turn inspired by Article XXI GATT and are specifically designed to address situations of extreme emergency. A typical national security clause in a BIT by a MENA state reads as follows:

> Nothing in this Agreement shall be construed to prevent any Contracting Party from taking any actions that it considers necessary for the prevention of its essential security interests . . . taken in time of war or other emergency in international relations . . .[56]

Like general exceptions clauses, an act or measure that is justified under a national security clause will not constitute a breach of a BIT obligation. Importantly, where such clauses make use of terminology such as 'it considers necessary', they differ from general exceptions in that they are self-judging, meaning that the state is given wide discretion to determine whether an act or a measure is necessary in order to maintain stability in times of emergency.[57]

The prevailing (but not the only) view is that general exceptions and essential security clauses are primary rules of international law. Their effect is to preclude the finding of a breach, in contrast to secondary rules of international law such as necessity and *force majeure*, which are predicated on the finding of a breach, but preclude its wrongfulness.[58] This distinction is important in the context of discussing compensation under BITs arising from armed attacks, as there is confusion in international law concerning damages payable for acts committed in circumstances precluding wrongfulness. The confusion arises from Article 27 of the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, which provides as follows:

> The invocation of a circumstance precluding wrongfulness in accordance with this chapter is without prejudice to: (a) compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists; (b) the question of compensation for any material loss caused by the act in question.

It would appear that, under that provision, some unspecified type of compensation may be owed, even where the act is justified by necessity or *force majeure*. It would further appear that once the circumstances precluding wrongfulness are no longer present, reparation can be claimed from that point on. It can, nevertheless, be argued that compensation would in fact require a specific provision, and that Article 27 merely foresees the *possibility* of *lex specialis* regimes existing, rather than establishing in itself a compensation obligation.[59]

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[56] Article 11(1)(c), Yemen-Czech Republic BIT.

[57] A. Sykes, 'Economic Necessity in International Law', 109(2) *AJIL* 296 (2015), p. 303. The outer limit of the discretion is determined by the international law obligation to act in good faith. See UNCTAD, *The Protection of National Security in IIAs* (2009), pp. 39–41.

[58] As explained in *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Decision on Annulment (25 September 2007), paras 129–34.

[59] S. Ripinsky, 'Necessity: Effect on Compensation', *TDM* 6 (2007), p. 5.

This uncertainty in the law is another reason why it is preferable for states to include specific clauses in their treaties that regulate the consequences of measures that are required for the maintenance of public order or essential security interests of the state, rather than rely on the general provisions in customary law, even though in the absence of a specific treaty provision the general customary law defences of necessity and *force majeure* are of course available to all states.[60]

Another interesting example of a possible treaty clause in this regard is found in Article 7 of the Qatar-Bosnia and Herzegovina BIT, which provides for a mixed national security and general exceptions 'preclusion' clause. Notably, the clause specifies that compensation under the clause is payable in accordance with the expropriation provision, which in turn includes a non-discrimination war clause. This *renvoi* is rather rare in the context of emergency clauses, but it can be useful in clarifying the circumstances in which compensation is payable and those in which it is not.

4 COMPENSATION FOR LOSSES UNDER WAR CLAUSES

While the above clauses address measures taken in times of conflict in relation to liability, there exist provisions in treaties that are more specific to damages. Several BITs include what are commonly referred to as war clauses,[61] establishing a particular regime in respect of compensation for losses in times of armed conflict. Such clauses can be useful for investors since, by creating a *lex specialis* regime for obligations in times of war and civil disturbance, they override customary law rules on the fate of treaty obligations in turbulent situations, such as the rules of necessity and *force majeure* that can preclude wrongfulness, as discussed above.[62] However, it is not clear how a war clause would interact with an exceptions or a security clause, if the two appear in the same treaty.[63]

While the language of war clauses contained in the IIAs of countries in the MENA region is not uniform, war clauses typically feature in them in one form or another. Below, we discuss (4.1) non-discrimination war clauses; (4.2) extended war clauses; (4.3) the relationship of such clauses with other treaty standards; and (4.4) their scope of application.

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[60] See e.g. *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, Award (23 September 2003), para. 108.

[61] Borrowing the terminology of C. Schreuer, 'The Protection of Investments in Armed Conflicts', *TDM* 9(3) (2003).

[62] UNCTAD, *Bilateral Investment Treaties 1995–2006: Trends in Investment Rulemaking* (2007), p. 52.

[63] Unless, like the Qatar-Bosnia and Herzegovina BIT discussed above, the treaty provides expressly for interaction between the two.

4.1 Non-discrimination war clauses

War clauses can broadly be divided between those that are extended and those that provide for a non-discrimination obligation only. Non-discrimination war clauses require that national treatment (NT) or most-favoured-nation (MFN) standards to be extended to investors when awarding any compensation for damage caused by acts of war, insurrection or other armed activities. An example is provided by the Korea-Turkey BIT:

> Nationals or companies of one Contracting Party whose investments in the territory of the other Contracting Party suffer losses owing to war or other armed conflict, insurrection or similar events in the territory of the latter Contracting Party shall be accorded by the latter Contracting Party treatment not less favourable than that accorded to its own nationals or companies or to nationals or companies of any third State, whichever is the most favourable treatment, as regards any measures it adopts in relation to such losses.[64]

This type of provision does not establish a stand-alone obligation to compensate for damage to property owing to an armed conflict. It merely provides that, once the host state decides to compensate its own nationals or those of a third state, compensation must be extended to the investor under the same terms. If compensation is awarded to nobody else, there is also no obligation to compensate the protected investor. In terms of its scope of application, the above type of clause refers in particular to 'war', 'other armed conflict', 'insurrection' or 'similar events'.[65] It is unclear whether smaller-scale disturbances would be covered by it.

The obligation imposed by this particular clause is couched in both broad and narrow terms: (a) the losses covered must arise from the military action or war itself ('owing' to the conflict – a typical formulation), but then (b) the host state is required to extend any 'measures' it takes in relation to such losses to the protected investor.

A similar clause appears in Article 14 of the Agreement for Promotion, Protection and Guarantee of Investments among Member States of the Organisation of the Islamic Conference, although it limits the scope of protection to physical assets:

> The investor shall be accorded a treatment not less than that accorded by the host state to its national investors or others regarding the compensation of damage that may befall the physical assets of investment due to hostilities of international nature committed by any international body or due to civil disturbances or violent acts of general nature.

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[64] Article 7, Korea-Turkey BIT. See also Article 7, Qatar-Portugal BIT; Article 7, Iran-Tunisia BIT.

[65] Potential difficulties arising from the different terms that may be used to define the scope of application of war clauses are discussed in more detail in section 4.4 below.

The obligation is triggered under this clause by 'hostilities of international nature', 'civil disturbances' or 'violent acts of general nature' and is limited to paying the same compensation.

The non-discrimination war clause contained in Article 4(3) of the Saudi Arabia-Austria BIT is similar, though it does not establish a separate standard of protection, rather forming part of the FPS provision. It reads as follows:

> Investors of either Contracting Party whose investments suffer losses in the territory of the other Contracting Party owing to war or other armed conflict, revolution, a state of general emergency, or revolt, shall be accorded treatment not less favourable by such other Contracting Party than that accorded by the latter Contracting Party to its own investors or to the investors of a third State as regards restitution, indemnification, compensation or other valuable consideration. Such payments shall be freely transferable.

Under this clause, the triggering event can be any of 'war', 'other armed conflict', 'revolution', 'a state of general emergency' or 'revolt'. The required treatment extends to 'restitution, indemnification, compensation or other valuable consideration' and it is further specified that if payments are made, they must be freely transferable.

4.2 Extended war clauses

Extended war clauses typically include a non-discrimination clause, but also go beyond it. Compensation under the extended part is an obligation rather than a matter of discretion for the state.[66] However, this obligation typically applies only to acts of requisition or destruction of property not caused in combat action or mandated by military necessity.

Article 4 of the Czech Republic-Syria BIT provides an example of an extended clause, which reads as follows:

> 1. Where investments of investors of either Contracting Party suffer losses owing to war, armed conflict, a state of national emergency, revolt, insurrection, riot or other similar events in the territory of the other Contracting Party, such investors shall be accorded by the latter Contracting Party treatment, as regards restitution, indemnification, compensation or other settlement, not less favourable than that which the latter Contracting Party accords to its own investors or to investors of any third State.
> 2. Without prejudice to paragraph 1 of this Article, 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

[66] J. Ostransky, *supra* note 2, p. 144.

> 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 during the period of the requisitioning or as a result of the destruction of the property. Resulting payments shall be freely transferable in a freely convertible currency without delay.[67]

The first paragraph contains an MFN/NT obligation in respect of reparation of any form for losses owing to 'war, armed conflict, a state of national emergency, revolt, insurrection, riot or other similar events'. The inclusion of 'riot' in the list ensures that potentially fairly small-scale disturbances are covered by it.

The second paragraph then addresses two specific scenarios: (i) losses resulting from the requisitioning of property by forces or authorities of the host state, and (ii) destruction of property by the forces or authorities of the host state not caused in combat action or not required by the necessity of the situation. In such cases, and provided that the claimant can discharge its burden of proving the alleged facts,[68] the host state must accord restitution or compensation, which must be 'just' and 'adequate' and thus presumably calculated in accordance with the FMV standard.[69]

While the scope of subparagraph 2(a) is clear, subparagraph 2(b) prompts the question of what the terms 'combat action' and 'necessity of the situation' might entail. In all likelihood, the terms constitute an indirect reference to the laws on military necessity in international humanitarian law. Accordingly, where the destruction of property in the hands of armed forces is not justified by military necessity, compensation will be mandatory. By contrast, where the situation is justified by military necessity, compensation will be governed by subparagraph 2(a) instead, and will be a matter of discretion, subject to the non-discrimination obligation.

A further issue worth highlighting concerning this (and most other) extended war clause(s) is the qualification that applies where the acts in question were not required by combat action or the necessity of the situation. This qualification applies *only* to the destruction of property. Requisition implies an obligation to compensate in all circumstances, and no enquiry need be launched into whether the action was necessary or not.

An extended war clause can also be found in Article 4 of the Oman-UK BIT:

> (1) Nationals or companies 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 in the territory

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67 See also Article 7, Morocco-Croatia BIT.
68 *AAPL v. Sri Lanka, supra* note 30, para. 58.
69 See section 2.1 above.

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 nationals or companies or nationals or to companies of any third State. Resulting payments shall be freely transferable.

2) Without prejudice to paragraph (1) of this Article, nationals and companies of one Contracting Party who in any of the situations referred to in that paragraph suffer losses in the territory of the other Contracting Party resulting from (a) requisitioning of their property by its forces or authorities, or (b) destruction of their property by its forces or authorities, which was not caused in combat action or was not required by the necessity of the situation, shall be accorded restitution or adequate compensation. Resulting payments shall be freely transferable.

A noteworthy difference between this provision and that in Article 4 of the Czech Republic-Syria BIT discussed above is that the latter provides only for the payment of 'adequate' compensation. It is unclear whether this would need to be established on a FMV basis, or if a lesser sum would suffice.

The Cyprus-Qatar BIT does not contain a stand-alone war clause; rather, it contains a clause under the expropriation standard in Article 5:

(5) Investors of one Contracting Party whose investments in the territory of the other Contracting Party suffer losses owing to war or other armed conflict, a state of national emergency or civil disturbances 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) Notwithstanding paragraph 5 an Investor of one Contracting Party who, in any of the situation referred to in that paragraph, suffer a loss in the territory of the other Contracting Party resulting from: a) Requisitioning of its investments or part thereof by the latter's forces or authorities; or b) Destruction of its investments or part thereof by the latter's forces or authorities, which was not required by the necessity of the situation, shall be accorded by the latter Contracting Party restitution or compensation which in either case shall be prompt, adequate and effective. Resulting payments shall be made without delay and be freely transferable.

While the language of this clause is similar to that quoted above, this time the triggering event can be 'war or other armed conflict, a state of national emergency or civil disturbances' and restitution or compensation is to be 'prompt, adequate and effective' – a fairly clear reference to the FMV standard.

In general, it appears that there is no particular homogeneity in the language of the war clauses found in BITs concluded by MENA states. While many treaties provide for some sort of regime governing compensation for losses suffered during armed conflicts, few of them specify the applicable standard of compensation, and, to the authors' knowledge, none of them specify the applicable valuation method.

Rules on valuation and standards of compensation must hence be taken from general international law.

That said, certain states follow a consistent approach in their BIT drafting, including similar clauses in their BITs with different states. For instance, Egypt has included a quasi-identical extended war clause in several of its BITs,[70] while Turkey has generally, though not invariably, included war clauses under expropriation provisions.[71]

4.3 Relationship with other standards

According to the majority (but not necessarily prevailing) view, war clauses provide a floor treatment to the investor while not derogating from the traditional standards of protection, which still apply in times of conflict. In other words, they provide an additional layer of protection since, under the expropriation, FET and FPS standards, considerations of sovereignty such as public purpose or police powers could make it hard to establish liability.

In *AAPL v. Sri Lanka* the tribunal examined the applicability of a war clause and, without analysing its overlap with the FPS standard, ultimately applied both provisions.[72] One of the arbitrators dissented on this issue, finding that the war clause alone was applicable, on the basis of the rule that *generalia specialibus non derogeant*.[73] In *AMT v. Zaire*, the tribunal specifically rejected the respondent state's defence that it was complying with the non-discrimination war clause by providing the same compensation to the claimant as it had provided to others that had suffered from the looting (i.e. none).[74] This confirmed implicitly that the tribunal considered that the presence of a war clause had no impact on the application of the other standards of protection.

A more detailed discussion, however, took place in *LESI & ASTALDI v. Algeria*, the first known case involving a conflict in a MENA state. In that case, the investors had signed a contract for the construction of a dam with the competent national agency in 1993, but the civil strife that followed caused significant delays to the materialization of the project, as the state attempted to address numerous security concerns. Eventually, the contract was terminated by the agency, leading the investors to pursue claims of expropriation, FET and FPS.

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70 See e.g. Article 4, Egypt-Pakistan BIT; Article 4, Egypt-Armenia BIT; Article 4, Egypt-Slovakia BIT.

71 See e.g. Article III, Turkey-Moldova BIT; Article IV, Turkey-Greece BIT; Article 4, Turkey-Hungary BIT.

72 *AAPL v. Sri Lanka*, *supra* note 30, para. 78.

73 *AAPL v. Sri Lanka*, dissenting opinion of Samuel K.B. Asante.

74 *AMT v. Zaire*, *supra* note 40, paras 6.09, 6.10.

The tribunal dismissed the expropriation and FET claims on their merits, but – departing from *AAPL* and *AMT* – noted that the inclusion of a war clause under the 'protection of investments' provision indicated a derogation from the FPS standard in times of unrest, the clause constituting *lex specialis*.[75] Consequently, and given that the measures adopted by Algeria were reasonable in view of the intensity of the conflict in the region of the investment, the tribunal found that the war clause alone would govern the dispute at hand, and awarded no compensation to the investors as they had been treated in that respect no less favourably than Algerians or nationals of third states.[76]

There is thus no certainty as to whether the presence of a war clause excludes the application of the other investor protections in times of war or unrest.[77] *AAPL v. Sri Lanka* and *AMT v. Zaire* took the view, without any discussion or apparent argument from the respondent state, that war clauses applied in addition to the usual standards in the applicable BIT. *LESI & ASTALDI v. Algeria*, a much more recent decision by a tribunal having had the benefit of full argument as well as the earlier awards to guide its reasoning, took the opposite view and concluded that the war clause was the only one that the investor could rely on in times of unrest.

It would assist investors considering whether to invest in regions that may be prone to unrest, or those that have already suffered losses as a result of war or armed conflict and are contemplating their avenues for redress, if the issue could be clarified, as either interpretation is arguable. On the one hand, it makes limited sense to include a war clause if the higher standards of protection (FPS, FET, expropriation) apply in any event. On the other hand, it would be easy to specify that the outbreak of war or hostilities suspend the other provisions apart from the war clause, but this is not done in the vast majority of BITs.[78]

4.4 Scope of application

Apart from their interplay with other standards, clauses on compensation for losses may also give rise to issues with respect to their scope of application. The terms most commonly used in delimiting that scope are 'conflict', 'war' and 'emergency', though 'insurrection', 'revolt', 'strife', and 'riot' also appear frequently in treaties. In the absence of a commonly accepted definition of any of those terms in international investment law, an analysis of the legal framework governing BIT

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[75] *L.E.S.I. S.p.A. and ASTALDI S.p.A. v. République Algérienne Démocratique et Populaire*, ICSID Case No. ARB/05/3, Award (12 November 2008), para. 174.

[76] *Ibid*., paras 180–2.

[77] It does not appear that the argument was even raised by the respondent state in *AAPL v. Sri Lanka* and *AMT v. Zaire*.

[78] See also J. Ostransky, *supra* note 2, p. 145.

claims arising out of conflicts must turn on the laws of war *(jus in bello)*, i.e. international humanitarian law, as well as human rights conventions.

In the context of the 1949 Geneva Conventions, which are the instruments laying out the *jus in bello*, 'armed conflict' constitutes the *ratione materiae* scope of application. In particular, the treaties regulate two types of conflict: international and non-international.[79] While these terms were left undefined, the International Criminal Tribunal for the former Yugoslavia has provided some benchmarks, reasoning in *Tadic* that 'an armed conflict exists whenever there is a resort to armed force between States'.[80] It has further held that, in turn, a non-international armed conflict exists 'whenever there is . . . protracted armed violence between governmental authorities and organized armed groups or between such groups within a State'.[81] Moreover, it has reasoned that the term encompasses situations where several factions confront each other even without the involvement of the government's armed forces.[82] This definition from *Tadic* was later adopted (in slightly modified form) by the ILC in its Draft Articles on the Effects of Armed Conflicts on Treaties.[83]

Concerning the term 'emergency' as used in the context of armed activities that do not amount to a full-scale armed conflict, human rights law may shine light. The United Kingdom and the Republic of Ireland notified several derogations from the European Convention on Human Rights to the Council of Europe in the period 1952 to 2001, in response to activities of the Irish Republican Army (IRA, a terrorist organization). In its first judgment rendered under Article 15 of the Convention,[84] the European Court of Human Rights found that since the IRA operated as a secret army using violence to achieve its unconstitutional purposes, and damaging the international relations of the state, the situation amounted to a 'public emergency threatening the life of the nation'. Hence, Ireland was justified in derogating from certain obligations under the

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79 Common Article 2 to the Geneva Conventions, 75 UNTS 85, 287, 972, 1125 UNTS 3; see also Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 UNTS 609.

80 ICTY, *Prosecutor v. Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-A (2 October 1995), para. 70.

81 *Ibid*.

82 ICTY, *Prosecutor v. Fatmir Limaj*, Judgment, IT-03-66-T (30 November 2005), paras 85–6.

83 ILC *Draft articles on the effects of armed conflicts on treaties, with commentaries* (2011), Article 2, commentary, para. (4).

84 The European Convention on Human Rights permits a state to derogate from certain obligations under the Convention (including Article 1 of Protocol 1 on the right to property). See Article 15, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5. See also Article 4(1), International Covenant on Civil and Political Rights, 16 December 1966, UNTS Vol. 999, p. 171. For example, Colombia notified the Covenant Commission of derogations under Article 4(1) in response to the war on drugs.

European Convention on Human Rights.[85] It is also worth noting that the meaning of the term 'emergency' is not necessarily limited to the military or terrorist context. A state of emergency can also be caused by, for example, a large scale natural disaster.

Lastly, 'war' is not defined in international law, since 'armed attack', 'use of force' and 'aggression' are the relevant terms of art instead.[86]

In any event, given the general tenor of the typical list of triggers included in IIAs, it is certain that any type of armed activity will be given due consideration by an investment tribunal. In recent cases related to the hostilities in Crimea, the characterization of which has left the international legal community divided, the tribunals reportedly undertook an analysis of the general public international law regime governing the use of force, hearing numerous arguments, albeit jurisdictional, based on hostilities in the host state.[87] It can be expected that tribunals in the future will reason along similar lines, considering conflicts of any type, from international armed conflicts to insurrections or other armed activities.

5 SPECIFIC ISSUES RELATING TO CLAIMS FOR DAMAGES AGAINST MENA STATES

An arbitral tribunal's calculation of compensation for claims arising out of conflicts in a MENA nation may also turn on the latter's domestic laws. In this section, the authors undertake a brief enquiry into such domestic law particularities, specifically by (5.1) reviewing the prohibition of lost profits and interest under the laws of MENA states, and (5.2) assessing the potential effects of such prohibitions in the context of an investment arbitration.

5.1 Interest and lost profits under the laws of MENA states

With the exception of Israel, states in the MENA region are predominantly Muslim, Islamic law or *sharia* thus finding application in several matters. While *sharia* is not uniform, certain fundamental principles are recognized by all *sharia* schools and jurisdictions. As far as principles of compensation for damages are concerned, the discussion has revolved around the concepts of *riba* (interest) and *gharar* (literally uncertainty, translated into arbitration language as essentially

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85 *Lawless v. Ireland no. 3*, Application no 332/57, Judgment (1 July 1961), para. 30.

86 See e.g. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment (27 June 1986), I.C.J. Reports 1986, p. 14, para. 191.

87 L.E. Peterson, 'In Jurisdiction Ruling, Arbitrators Rule that Russia is Obliged under BIT to Protect Ukrainian Investors in Crimea following Annexation', *Investment Arbitration Reporter* (9 March 2017), https://www.iareporter.com/articles/in-jurisdiction-ruling-arbitrators-rule-that-russia-is-obliged-under-bit-to-protect-ukrainian-investors-in-crimea-following-annexation/ (last accessed June 2017).

valuation taking into account lost profits). In general, public policy under *sharia* prohibits *riba* and *gharar*.[88] That is so because findings on interest and lost profits are based on speculation, and guarantee gain without hard work and personal activity.[89] As such, courts in Saudi Arabia have declared interest and lost profits unenforceable as a matter of public policy.[90] In Egypt awards cannot provide for the payment of interest exceeding 7%,[91] whereas in Bahrain moratory interest under civil obligations is prohibited.[92]

However, despite the dictates of *sharia,* and despite its strict interpretation by some courts, lost profits and interest are in fact in most Islamic MENA states either partially or fully permitted. As one commentator notes, 'be it through pragmatism, evasion, or the principle that "agreements must be observed," arbitration agreements are, in fact, sprinkled with "Western" style provisions in a number of parts of the Islamic Middle East'.[93] Accordingly, an arbitral award granting 'Western' style remedies should in principle be recognized and enforced in most *sharia* jurisdictions.[94] Some states have in fact enacted laws expressly recognizing the validity of lost profits and interest,[95] while others have legalized them 'in some very unconventional ways'.[96]

More specifically, one commentator has observed that parties have often introduced claims equivalent to interest in the form of alternative remedies, consisting of 'proven financial damages resulting from late payment or late performance or claims for sharing or disgorging profits made by the defaulting party, as well as various other forms of penalty that can be provided by contract or recognized by custom'.[97] Further, parties have included, and courts have enforced, clauses providing for liquidated damages, i.e. the payment of a predetermined sum

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88 A.H. El Ahdab & J. El Ahdab, *Arbitration with the Arab Countries* (Kluwer, 2011), p. 22.

89 O.M.H. Aljazy, 'Jurisdiction of Arbitral Tribunals in Islamic Law (Shari'a)' in M.A. Fernández Ballesteros & D. Arias (eds.), *Liber Amicorum Bernardo Cremades* (Kluwer, 2010) 65, p. 79. It must be noted that the prohibition of *gharar* in Islamic law does not extend to claims against the government for the unilateral termination of a contract, as those are generally governed by the *droit administratif*, which in turn requires full compensation of any loss suffered. See M. Abu Sadah, 'International Arbitration Contract Principles: Analysis of Middle East Perceptions', 9(2) *Journal of International Trade Law and Policy* 148 (2010), p. 161.

90 J.-B. Zegers, 'Foreign Investment Protection in Saudi Arabia', 9 *Yearbook of Islamic and Middle Eastern Law* 65 (2002–2003), p. 70.

91 N. Comair-Obeid, 'Salient Issues in Arbitration From an Arab Middle Eastern Perspective', 4(1) *Arbitration Brief* 52 (2014), p. 71.

92 *Ibid*., p. 73.

93 A.J. Gemmell, 'Commercial Arbitration in the Islamic Middle East', 5(1) *Santa Clara Journal of International Law* 169 (2006), p. 181.

94 H. Arfazadeh, 'A Practitioner's Approach to Interest Claims under Sharia Law in International Arbitration' in F. de Ly & L. Lévy (eds.), *Interest, Auxiliary and Alternative Remedies in International Arbitration,* Dossier V of the ICC Institute of World Business Law (ICC, 2008) 211, p. 213.

95 A.H. El Ahdab & J. El Ahdab, *supra* note 88, p. 22.

96 *Ibid*.

97 H. Arfazadeh, *supra* note 94, p. 212.

additional to the damages awarded for the breach of contract.[98] Such alternative remedies may, in fact, even exceed compound, let alone simple interest.[99]

Certain jurisdictions may permit simple but not compound interest. Nonetheless, this prohibition is by no means a MENA peculiarity, as there are numerous other jurisdictions that do not permit the compounding of interest. Lastly, it must be observed that interest is also forbidden in Judaism; still, this prohibition is of no significance since the Torah is not a source of law in Israel.

5.2 Relevance of domestic law considerations

As noted above, while awards containing positive findings of interest and lost profits are enforceable in the majority of MENA jurisdictions, certain legal traditions and courts still apply *sharia* strictly. Certain other jurisdictions prohibit compound interest regardless of *sharia*. There are accordingly limited possibilities for awards granting such remedies to be challenged by the responding party. In this connection, there are four conceivable scenarios:

First, in a non-ICSID arbitration,[100] a public policy defence may be raised by the respondent before enforcement courts, if enforcement is sought in a MENA state that treats the prohibition of interest or lost profits as a matter of international public policy. This issue is less likely to be raised as a ground for setting aside, unless the seat is also in an Islamic state with relevant restrictions in its laws.

Second, in ICSID and non-ICSID arbitrations alike, domestic law considerations may affect the tribunal's decision on damages in the case of intangible assets governed by the laws of a MENA state, and in particular those of a purely financial nature, such as bank loans or bonds.[101] If domestic law is indeed applicable to damages and the tribunal fails to take any such rules prohibiting interest or loss of profits into account, the award may be challenged on the grounds of *ultra* or *extra petita*.[102] Given the wide latitude tribunals are given to determine the law applicable to compensation in the first place, such a challenge is, in any event, unlikely to succeed.

Third, domestic law considerations may come into play where the tribunal has before it a non-discrimination war clause. If the compensation the state awards to its nationals for war losses does not include interest or lost profits, because those

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98 T. Badawy, 'The General Principles of Islamic Law as the Law Governing Investment Disputes in the Middle East', 29(3) *Journal of International Arbitration* 255 (2012), p. 264.

99 H. Arfazadeh, *supra* note 94, p. 213.

100 It must be noted that, in fact, Iran and Libya are not signatories to the ICSID Convention.

101 See the approach taken by the tribunal in *Ceskoslovenska obchodni banka a.s. ('CSOB') v. Slovak Republic*, ICSID Case No. ARB/97/4, Award, 29 December 2004, para. 222.

102 ICSID Convention, Article 52(1)(b); The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, 330 UNTS 38, Article V.1(c).

are prohibited under its laws, the investor will not be able to claim such remedies under the clause. Similarly, where the war clause provides for compensation in accordance with the laws of the host state, and the state prohibits interest or lost profits, the investor will not be able to successfully claim them.

Lastly, it must be noted that enforcement courts of ICSID signatories may decide to simply disregard their obligation under the Convention to recognize ICSID awards as if they were final judgments of their own,[103] driven by policy considerations. Naturally, the state would then be liable for a breach of the ICSID Convention. Likewise, courts may interpret Article 54 of the ICSID Convention broadly as permitting a refusal of enforcement in cases where the award would not be enforced if it were a judgment of a domestic court.[104]

6 CONCLUSION

While a rather *sui generis* compensation regime had been developed under traditional Islamic law, it seems that arbitration in MENA states no longer entails any significant particularities in that respect, and that those that might remain will come into play under very limited circumstances in investment arbitration. The compensation principles applicable in the context of a claim against a MENA state arising out of an armed conflict will thus largely depend on the underlying treaty. War clauses may dictate the applicability of an MFN or NT standard of compensation, either in addition to or instead of FMV or full reparation. Moreover, tribunals may be drawn towards exercising constraint in their decision to award lost profits, and may be rather cautious in their choice of date of valuation.

Naturally, only time will tell whether such projections will be confirmed. But, given the large number of investment claims pending against MENA states, the time to find out must be near.

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[103] ICSID Convention, Article 54.

[104] For an example of where this occurred, see *Micula et al. v. Romania* [2017] EWHC 31 (Comm) (English High Court), paras 130–2.