Hennebel Avocats

PRAXIS · GUIDE

Investment and armed conflict: a practical guide

Hennebel Avocats Modus Operandi

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INVESTMENT, ARMED CONFLICT AND EMERGENCY REGIMES

Before reading: if the situation is unfolding, contact the firm in confidence.

Crisis Room - Praesidium
If assets are being destroyed or seized, property is requisitioned, an evacuation takes place, a matter is recharacterised as criminal or a claim is about to become time-barred, seek an immediate confidential assessment before reading the guide in full. Urgent matters receive priority. *This guide provides guidance. It cannot replace legal advice or determine the course to take.*

Urgent contact

Operational summary

When an investment is affected by armed conflict, internal disturbances or a state of emergency, ordinary business law no longer governs it alone. Depending on the facts, international investment law, international humanitarian law, the law of State responsibility and, frequently, sanctions law and human rights protection mechanisms apply alongside domestic law. Each body of law has its own rationale, thresholds and adjudicators. An initial error of legal characterisation and a deadline missed while attention is focused on the crisis itself are among the most preventable reasons why claims in this field fail.

This guide advances three propositions. First, conflict does not suspend the law. Investment treaties generally continue to apply in wartime - it is precisely for such circumstances that they contain full protection and security standards and war clauses - and the International Law Commission's work on the effects of armed conflicts on treaties confirms that conflict does not in itself terminate or suspend treaty obligations. Second, conflict changes how the standards apply without abolishing them. Full protection and security is an obligation of vigilance, not an obligation of result. The award in *AAPL v. Sri Lanka* (ICSID, 1990), the first made directly under a treaty, linked it to the customary standard of due diligence. Fair and equitable treatment is assessed in the circumstances of the crisis. The State has defences - force majeure, state of necessity and essential security clauses - whose prospects, as the Argentine cases demonstrate, are uncertain. Third, the award does not conclude the case. Enforcement against a State at war or subject to sanctions is an undertaking in its own right, for which preparations begin on day one.

The twelve steps follow a strategic order. The first three - characterising the situation, identifying the scope of protection and preserving evidence and time limits - take place in the first weeks of the crisis and determine

what follows. Steps four to seven examine the substantive standards the investor will invoke: full protection and security, war and compensation-for-losses clauses, fair and equitable treatment, and expropriation. Steps eight and nine reverse the perspective. They examine State defences and the rules of attribution because a sound claim must anticipate the opposing case - and because the analysis must serve the host State as well as the investor. Steps ten and eleven cover the choice of forum, preliminary objections and enforcement. The twelfth step is for those reading this guide before a crisis: the most effective protection is put in place in advance.

This guide is intended for investors, funds, companies and family offices exposed to unstable jurisdictions, for their advisers, and for respondent States and sovereign entities. It sets out the sequence of decisions and the authorities governing them, as the law stood on 21 November 2026. It cannot replace advice tailored to the facts of a particular case.

Executive brief: a decision in ten minutes

Executive decision. Act before the crisis destroys evidence and forecloses the choice of forum. Armed conflict does not in itself terminate or suspend investment treaties, and time limits for bringing claims continue to run. The first decision concerns the legal characterisation of the situation, treaty and contractual protection, insurance and sanctions. Prepare the case with the State's defences and eventual enforcement in mind. Without assets available for attachment or a strategy for addressing immunity, an award may yield no financial recovery.

Intended outcome. Meet all deadlines, preserve the evidence, select the strongest legal basis and the most suitable forum, and develop a realistic strategy for compensation and enforcement from the outset.

Sequence of action

- **Characterise** Identify the conflict, occupation, emergency measures, sanctions and domestic legal basis for acts affecting the investment. Deliverable: the applicable body of law.
- **Establish coverage** Review the treaties, ownership chain, contracts, political risk insurance and survival clauses. Deliverable: available avenues of protection.
- **Gather evidence** Secure images, records and pre-crisis valuations, establish who carried out the acts, and record notices and deadlines. Deliverable: a contemporaneous record.

– **Plead and enforce** Bring together the protection standard, war clause, fair and equitable treatment, expropriation, State defences, choice of forum and available assets. Deliverable: reparation that can be recovered in practice.

Critical mistakes

– Waiting until hostilities end to document losses.
– Assuming that war suspends time limits: once a claim is time-barred or the wrong choice of forum has been made, the avenue is closed for good.
– Restructuring ownership once the dispute has arisen or is foreseeable.
– Discovering the rules on immunity from execution after the award.

Questions for management

– Is the objective continuity of operations, compensation, negotiation or exit?
– Should notice of dispute be given now, when it will commit the investor to an initial account of the facts but time limits are already running?
– What recovery through enforcement or settlement would make the proceedings economically justified?

This brief provides initial guidance. It cannot replace an assessment of the case or verification of the law applicable when action is taken. The twelve steps below provide the detail.

Step 01 - Characterise the situation and determine its effect on the applicable legal regime

Timing for the investor: **immediate** · At stake: the legal characterisation determines the applicable law and the entire strategy

The first decision concerns the legal characterisation of the situation, before any course of action is chosen. An international armed conflict, a non-international armed conflict, internal disturbances below the threshold of armed conflict, a declared state of emergency, the occupation of territory, a sanctions regime: each changes the applicable law. The same material loss - a factory destroyed, a site looted, a mineral deposit requisitioned - receives different legal treatment depending on the category into which it falls. Establishing the legal characterisation before acting is essential to the validity of every subsequent step.

The first question concerns international humanitarian law. The existence of an armed conflict - international when it is between States, non-international when the requisite thresholds of intensity and organisation are met in fighting between a State and armed groups or between such groups - triggers the application of a distinct body of law. In international armed conflict, the 1907 Hague Regulations (notably Article 23(g), which prohibits the destruction or seizure of enemy property unless imperatively demanded by the necessities of war) and the Geneva Conventions govern destruction, requisitions and, in occupied territory, the protection of property (Article 53 of the Fourth Convention prohibits destruction by the occupying power unless absolutely necessary for military operations, and Articles 46, 52 and 55 of the Hague Regulations govern confiscation of private property, requisitions and the administration of public property). In non-international armed conflict, those provisions do not apply as such. The applicable rules are common Article 3 of the Geneva Conventions, Additional Protocol II where its conditions of application are met, and the customary rules on the protection of property. This body of law operates in both directions. It can support a challenge to destruction for which there was no need. It can also provide the State with a justification - military necessity - that precludes certain grounds for compensation. By contrast, internal disturbances, riots or insurrections below the threshold of armed conflict leave the ordinary rules of investment protection fully applicable. Disturbances and riots have given rise to a substantial body of particularly clear decisions on full protection and security (step 04).

The second question concerns domestic emergency law. A state of emergency or state of siege changes the powers of the authorities - requisitions, transfer restrictions, exchange controls, temporary administration of companies - and affects the domestic legality of the measures taken. Domestic legality does not determine international lawfulness. A measure fully consistent with domestic emergency legislation may breach the applicable investment treaty. Conversely, a breach of domestic law may help establish arbitrariness. At this stage, the precise domestic basis for each measure must therefore be documented: an emergency decree, a military order, a requisition order or a judicial decision.

The third question concerns the continuity of international obligations. Contrary to a common assumption, armed conflict does not put an end to treaties. The International Law Commission's work on the effects of armed conflicts on treaties concludes that conflict does not in itself terminate or suspend treaties. Investment protection treaties are among those whose subject matter favours continued application - otherwise their war clauses would serve no purpose. Although the annex to the 2011 draft articles does not expressly list investment protection treaties, the commentary to the annex (§ 48) specifically identifies them as agreements analogous to the treaties of friendship, commerce and navigation concerning private rights covered by point (e). The cases concerning investments in Crimea, brought before tribunals constituted under the auspices of the Permanent Court of Arbitration pursuant to the 1998 bilateral investment treaty between Ukraine and Russia, show that even a contested occupation has not prevented tribunals from upholding jurisdiction (steps 09 and 10).

The fourth question concerns sanctions regimes. Conflict is frequently accompanied by international sanctions - asset freezes, sectoral restrictions and export controls - that affect the environment in which the investment operates and sometimes the investor itself. They complicate payments, insurance, the work of experts and even the eventual enforcement of an award. Sanctions must form part of the initial assessment, even if they are ultimately addressed in a separate forum. The guide to international sanctions in this series examines the regimes in detail. Some sanctions regulations, notably those of the European Union concerning Russia (Regulation (EU) No. 833/2014, Article 11, and Regulation (EU) No. 269/2014, Article 11, in the versions to be verified when action is taken), also prohibit the satisfaction of claims connected with contracts or transactions affected by restrictive measures. Their effect on the claim itself, as well as on enforcement, must be examined at the outset.

What to gather

- A precise timeline of events: the outbreak of hostilities or disturbances, declarations of a state of emergency, military orders and measures affecting the investment.
- The domestic legal basis for each measure (decree, order, requisition order or judgment).
- An inventory of the sanctions regimes applicable to the country, sector and counterparties.
- The precise ownership structure of the investment, identifying each entity and its nationality.

What not to do

- Respond publicly or send a notice of dispute before characterising the situation and checking the time limits. Protective steps must be taken immediately: request protection from the authorities in writing, notify the insurer of the loss within the policy deadline and preserve the evidence. Use factual language that does not commit the investor to a legal characterisation.
- Assume that conflict suspends treaties or time limits.
- Confuse the domestic legality of an emergency measure with its lawfulness under international law.

Key takeaway

Conflict changes which rules apply without suspending the law. Investment treaties contain standards designed specifically for war and disturbances - **the question is which law applies, not whether any law applies**, and the answer depends on a legal characterisation that must be made in the first few weeks.

Step 02 - Identify the scope of protection: treaties, contracts and insurance

Timing for the investor: **first few weeks** · At stake: the inventory of protections determines which avenues are open

The second step is to draw up a complete inventory of the protections available to the investment. There are five complementary sources of protection: bilateral investment treaties, multilateral treaties, contracts, the domestic law of the host State and political risk insurance. This inventory informs the litigation strategy - and often the strategy for preventive restructuring (step 12).

Bilateral investment treaties. Identify every treaty that may cover the ownership structure at each level of the chain: the local company, its direct shareholders, intermediate holding companies and the ultimate investor. Each treaty has its own scope (definitions of investment and investor, exclusions), standards (full protection and security, fair and equitable treatment, war clause, protection against expropriation) and dispute settlement clause (consent to arbitration, periods for amicable negotiations, choice of forum, clauses making that choice irrevocable, known as *fork-in-the-road* clauses). Particular provisions can be decisive - notably denial-of-benefits clauses and requirements concerning the legality of the investment. In conflict situations, two clauses warrant particular attention: the full protection and security clause (step 04) and the war clause (step 05). The relationship between them was the very issue in *AAPL v. Sri Lanka* (ICSID, 1990), the first award made directly under a bilateral investment treaty.

Multilateral treaties. The 1994 Energy Charter Treaty remains a central instrument for the energy sector, although its scope has narrowed considerably. By 29 October 2026, several EU Member States had withdrawn. Withdrawal took effect for France on 8 December 2023, for Germany on 20 December 2023 and for Poland on 29 December 2023, followed in 2024, 2025 and 2026 by other States, including Luxembourg, Slovenia, Portugal, Spain, the Netherlands, Denmark and Lithuania (effective 8 August 2026). Further withdrawals notified in 2026, including by Ireland, Romania, Bulgaria and Sweden, take effect one year after receipt unless the notification specifies a later date (Article 47(2)). The United Kingdom's withdrawal took effect in 2025 and those of the European Union and Euratom on 28 June 2025. The modernised text, adopted on 3 December 2024, entered into force in part on 3 September 2025 in respect of the exclusions for certain fossil fuel investments in Sections A and B of Annex NI, without affecting disputes already submitted under Article 26. The other amendments have applied provisionally since that date, subject to the Parties' declarations and to the extent consistent with their constitutions, laws or regulations. Both conditions must be checked when action is taken. Withdrawal does not immediately extinguish protection. Under Article 47(3), protection continues for twenty years from the effective date of each withdrawal for

investments made before that date. The starting date must therefore be calculated separately for each State, using the notifications published by the Energy Charter Secretariat and checking them when action is taken. Under EU law, Article 26 of the Treaty cannot provide a basis for intra-EU arbitration (CJEU, *Komstroy*, C-741/19). The interpretative agreement approved by the European Union in September 2025 and signed on 18 February 2026, which entered into force on 25 June 2026 for its first parties and on 13 November 2026 for the Union, specifies that Article 47(3) does not extend to such proceedings. Check when the agreement took effect for the parties concerned and distinguish their obligations from the effect given to the agreement by the arbitral tribunal hearing the claim or, at the enforcement stage, by the courts of a third State. The 1965 ICSID Convention provides the procedural framework for this field. It offers a forum (Article 25) and a distinct enforcement regime (Articles 54 and 55, step 11), without itself conferring substantive investment protection.

Contracts. State contracts, concessions, stabilisation agreements and financing agreements may contain their own arbitration, force majeure and hardship clauses, tax or regulatory stabilisation clauses, and waivers of immunity (whose importance becomes apparent in step 11). The relationship between contract claims and treaty claims - and the effect of any provisions on observance of undertakings, known as *umbrella clauses* - is one of the most technically demanding issues in the field. It requires separate analysis of each treaty and each contract.

Political risk insurance. The Multilateral Investment Guarantee Agency (MIGA), established within the World Bank Group by the 1985 Seoul Convention, covers the very risks addressed in this guide: war and civil disturbance, expropriation, transfer restrictions and breach of contract. MIGA guarantees are available only for investments in a developing member country (Article 14 of the Convention) and, in principle, for investments whose implementation begins after registration of the guarantee application or receipt by the Agency of other satisfactory evidence of the investor's intention to obtain its guarantee (Article 12, as amended with effect from 14 November 2010, which also extends eligibility to certain categories of existing investments, including their acquisition by a new eligible investor). A guarantee must therefore be arranged before the crisis. National public insurers and the private market offer comparable cover. Some conflicts also give rise to international claims mechanisms. For damage caused by Russia's aggression against Ukraine, the Council of Europe's Register of Damage began opening claim categories to legal persons on 29 April 2026. By 30 September 2026, all eleven categories intended for them were open. To our knowledge, the Convention Establishing an International Claims Commission for Ukraine, opened for signature on 16 December 2025, was not in force on 29 October 2026. The C categories are open to legal persons incorporated in Ukraine or abroad, except in Russia. The damage must have occurred on Ukrainian territory on or after 24 February 2022 and have been caused by an internationally wrongful act of Russia in or against Ukraine. A representative files the claim through Diia. Filing requirements, deadlines and the relationship with arbitration must be checked when action is taken. The Register records claims without deciding compensation. A political risk policy changes the strategy: losses must be notified within the policy deadlines, insurance payments

must be reconciled with the international claim, and the insurer's subrogation to the investor's rights must be addressed. An insurance payment does not necessarily cover the entire loss, but an insurer that pays is subrogated to the investor's rights (for MIGA, under Article 18 of its Convention, and for other insurers, under the policy and applicable law). This may reduce the amount the investor can claim in its own name. The payment must be disclosed and accounted for, never concealed from the tribunal.

What to gather

- A complete ownership chart identifying the nationality of each entity.
- The full text of the treaties applicable at each level and their current status (terminations, survival clauses).
- State contracts, concessions, arbitration clauses, stabilisation clauses and waivers of immunity.
- Political risk insurance policies, their definitions of covered loss and their notification deadlines.

What not to do

- Restructure ownership after the dispute has arisen in the hope of obtaining protection under a more favourable treaty. Restructuring when a dispute has arisen or is foreseeable invites an objection based on abuse (step 12).
- Allow time limits for notifying insurers to expire while assessing the prospects of litigation.

Key point

The assessment of protection extends beyond the local company to **the entire ownership chain**. Several treaties may protect an investment at different levels. The level at which to bring a claim - and hence the treaty and forum to use - is a major strategic decision with largely irreversible consequences.

Step 03 - Secure evidence and safeguard time limits from the onset of the crisis

Timing for the investor: **immediately and on an ongoing basis** · At stake: evidence deteriorates and time limits continue to run

While management attends to the immediate demands of the crisis - staff safety, evacuations and continuity of operations - time works against the legal case in two ways: evidence deteriorates and deadlines approach. This is the most routine step in the guide, yet every other step depends on it.

Evidence. An arbitration concerning war losses is argued years after the events, before a tribunal that witnessed none of them and must reconstruct the timeline, the condition of the assets, the origin of the damage and the chain of causation from the record. In the affected area, evidence disappears: sites become inaccessible, servers are destroyed or seized, witnesses disperse and public registries close. A contemporaneous evidentiary record must therefore be assembled as events unfold: dated and geolocated photographs and videos, satellite imagery, reports by a judicial officer or their equivalent where available, asset inventories, financial statements drawn up as at the eve of the crisis, correspondence with the authorities, and witness accounts taken promptly that precisely identify those responsible - units, uniforms, vehicles and written or oral orders. This identification will bear on attribution (step 09): knowing *who* destroyed or looted property is as important as proving *what* was destroyed or looted. The award in *AAPL v. Sri Lanka* (1990) shows the importance of the factual record. The tribunal assessed responsibility on the evidence concerning the circumstances of the destruction - and the investor bears the initial burden of proving the facts giving rise to responsibility.

Loss. Where the act is wrongful, the assessment of loss follows the principle laid down by the Permanent Court of International Justice in the Factory at Chorzów case (1928): reparation must, as far as possible, wipe out all the consequences of the wrongful act. Compensation for lawful expropriation is governed by the formula set out in the treaty (step 07). In either case, it must be possible to establish the value of what was lost. Preserve everything that documents the value of the business before the crisis: audited accounts, business plans, current contracts, order books, earlier valuations and production data. A central issue on the merits will be how much of the loss was caused by the State's measure or omission and how much by the conflict itself - for which compensation may be unavailable under any applicable regime. The quality of the contemporaneous record can decide that issue.

Time limits. No general principle suspends time limits because of war. Three categories must be checked immediately. The first comprises mandatory negotiation periods under treaties. Identify the precise starting

point in each instrument and any separate advance notice required before proceedings are brought. The second comprises treaty time limits for submitting a claim (the 2012 US Model Bilateral Investment Treaty, for example, bars a claim submitted more than three years after the date on which the investor knew or should have known of both the alleged breach and the loss suffered. Time therefore runs during the conflict, without awaiting its end, and expiry definitively bars arbitration. The period and its starting point vary and must be checked in each treaty). The third comprises deadlines under insurance policies and contracts. Also relevant are deadlines for any domestic proceedings contemplated and the effect of fork-in-the-road clauses. Under some treaties, bringing proceedings in the host State's courts may preclude subsequent arbitration. Conversely, other treaties require prior recourse to the domestic courts for a specified period (eighteen months in some treaties) running from the date of filing, failing which the State will object that the arbitral claim is premature. Others require a waiver of domestic proceedings before arbitration. The applicable clause must be identified before either forum is seised. The award in *Pantechniki v. Albania* (ICSID, 2009) illustrates the consequences. The investor had brought a contractual claim for payment in the Albanian courts. The sole arbitrator held the treaty claim resting on the same "fundamental basis" inadmissible. Only claims with an independent basis, such as failure to protect and denial of justice, were examined on the merits (and were ultimately dismissed). Before bringing domestic proceedings, identify which claims must be reserved for arbitration, as the choice is irreversible. The notice of dispute is itself a strategic act. It sets out an initial account of the facts and may determine the scope of the eventual claim. Its effect depends on the treaty. The US Model distinguishes the six-month period following the events giving rise to the claim from the requirement to give written notice at least ninety days before submission. Under some treaties, notably those following the US Model, advance notice alone does not stop the limitation period from running. Compliance is assessed as at the date of submission to arbitration.

What to gather

- A contemporaneous evidentiary record: dated images, satellite imagery, inventories, formal reports and witness accounts identifying those who carried out the acts.
- Documents establishing pre-crisis value: audited accounts, business plans, contracts and valuations.
- A comprehensive schedule of time limits for amicable negotiations, treaty claims, insurance policies, contracts and domestic remedies.
- A lawful, secure backup of relevant records and servers held outside the affected area.

What not to do

- Wait until hostilities end to assemble the record. Evidence may disappear in the meantime.
- Bring proceedings in the host State's courts without checking the effect of a fork-in-the-road clause - *Pantechniki* shows the cost.
- Send a hastily drafted notice of dispute that commits the investor to an inaccurate account or omits heads of claim.

Common mistake
Assuming that a state of war suspends time limits and that the tribunal will "understand". Tribunals apply the governing provisions: **an expired time limit or an ill-judged choice of forum bars the claim**, however serious the losses.

CASE STUDY · 1

An industrial site destroyed during a *security operation*

Configuration

An anonymised scenario drawn from published ICSID decisions. A foreign investor operates a production site in an area where armed groups are active. The site is destroyed during an operation by the security forces. The precise circumstances - whether government forces, insurgents or the fighting itself caused the destruction - are disputed.

Legal crux

Full protection and security (obligation of vigilance: did the State take reasonable precautions?), the war clause in the applicable treaty, proof of the cause of destruction and the role of military necessity.

Sequence	Immediately gather evidence of the cause of the damage. Give notice of dispute preserving all grounds of claim, obtain an expert pre-crisis valuation and bring arbitration under the treaty offering the best combination of substantive standards and forum.
Reference	See **AAPL v. Sri Lanka** (ICSID, 1990 award): a farm was destroyed during a security operation, and responsibility was assessed by reference to due diligence - not absolute liability.

Step 04 - Invoke full protection and security: an obligation of vigilance, not of result

Timing for the investor: **at the heart of the merits** · At stake: the central standard for losses arising from war and disturbances

The standard of full protection and security (*full protection and security*) is central to most investment disputes arising from conflict or disturbances. Its contours were established in the first award made directly under a bilateral investment treaty: *AAPL v. Sri Lanka* (ICSID Case No. ARB/87/3, 1990 award). A shrimp farm was destroyed during a counterinsurgency operation by the security forces. The investor argued that the protection clause made the State absolutely liable for any loss. The tribunal rejected that interpretation. Full protection and security imposes an obligation of vigilance rather than a guarantee of a particular result - the State must exercise due diligence (*due diligence*) to protect the investment, and its responsibility arises from failure to exercise that diligence, not from the mere occurrence of damage.

Two awards developed this reasoning, with distinctions that matter in any case in this field. In *AMT v. Zaire* (ICSID Case No. ARB/93/1, 1997 award), facilities were looted during the disturbances that devastated Kinshasa. The tribunal held the State responsible because it had failed to take any measures to provide the protection due, rather than because soldiers had committed the looting - inaction constituted the breach of the obligation of vigilance. In *Pantechniki v. Albania* (ICSID Case No. ARB/07/21, 2009 award, sole arbitrator), facilities at a construction site were destroyed in the 1997 disturbances. The award supplied an important qualification - the diligence required is assessed in context, including the resources actually available to a State facing a breakdown of public order. A State overwhelmed by a widespread insurrection is judged differently from one that has the means to act and fails to do so. Limited State capacity does not, however, excuse every omission.

The investor's case therefore proceeds in three stages. First, establish that the State knew or ought to have known that the investment was at risk - warnings given, requests for protection and evidence that the threat in the area was widely known. This is why a formal written request for protection should be made as soon as a threat emerges. That correspondence will become a central piece of evidence. Second, establish what the State did or failed to do - failure to deploy forces, withdrawal without warning, refusal to intervene, or even active participation by State forces in destruction or looting. In the last case, proof that they acted in their official capacity opens the way to direct attribution (step 09). Third, establish a causal link between the failure and the damage, taking account of what diligent protection could reasonably have prevented.

Two questions remain contested. The first concerns the substantive scope of the standard. Originally directed at the physical security of persons and property, it has sometimes been extended by tribunals to the "legal security" of the investment environment. That extension is controversial, and a claim arising from armed conflict generally has little need to rely on it - physical security lies at the core of such a claim. The second concerns the relationship with international humanitarian law. Where destruction results from military operations governed by the law of armed conflict, military necessity may justify destruction that investment protection law alone cannot condemn. The precise relationship between the two bodies of law remains among the least settled issues in the field. The tribunal will need to be taken through the argument, and its agreement cannot be assumed. Subsequent awards concerning the Libyan conflict that began in 2011 include *Cengiz v. Libya* (ICC, award of 7 November 2018) and *Strabag v. Libya* (ICSID Additional Facility, ARB(AF)/15/1, award of 29 June 2020, outside the Washington Convention's annulment and enforcement regime, with recognition governed by the New York Convention). Both address full protection and security and war clauses in a protracted armed conflict and should be read before bringing a comparable claim.

What to gather

- Correspondence requesting protection from the authorities, with acknowledgements of receipt.
- Evidence that the threat was widely known (security alerts, earlier incidents in the area).
- A timeline of the security forces' conduct: deployments, withdrawals, refusals to intervene and participation in the acts.
- Evidence of the resources available to the State in the area at the relevant time.

What not to do

- Argue for absolute liability under the full protection and security standard. *AAPL* and *Pantechniki* rule it out. Even *AMT*, despite its more stringent formulation (the tribunal found responsibility "without having to determine" who had caused the losses, combining the obligation of vigilance under Article II(4) with the losses clause in Article IV(1)(b) of the treaty, an interpretation that has remained isolated), reasoned principally in terms of an obligation of vigilance. Such an argument undermines the credibility of the case. Ordinarily, only a clause conferring a right to compensation without proof of negligence - an extended war clause or a requisition clause, such as Article 12(2) of the Energy Charter Treaty - can support such a claim, whether the clause applies directly or is imported through most-favoured-nation treatment (step 05).
- Fail to request protection in writing during the crisis. The absence of a request weakens the evidence of failure to protect.

Key takeaway

As *AAPL v. Sri Lanka* (1990) held, full protection and security imposes an **obligation of vigilance**. The State answers for its failure to protect, rather than for every loss occurring within its territory. A strong case establishes three things: the State knew of the threat, it could act and it failed to do so.

CASE STUDY · 2

Looting by the security forces *themselves*

Configuration

An anonymised scenario drawn from published ICSID decisions. During urban disturbances, soldiers take part in looting the premises of a foreign-owned company. The State argues that it was itself overwhelmed by events.

Legal crux

Investigate two grounds separately: breach of the obligation of vigilance, which offers the firmer basis, and, as an additional ground, breach of an obligation applicable to the looting itself. The second requires identification of the obligation breached and attribution of the soldiers' acts to the State (step 09). It must be shown that they acted in an official capacity, even if contrary to orders (uniforms, State weapons and resources and, ideally, evidence of the unit, orders and chain of command), rather than in a purely private capacity. The term "forces" in a war clause may have a narrower meaning, as *AMT* held. The diligence required must be assessed in light of the circumstances.

Sequence

Identify the units involved precisely. Prove that looting occurred repeatedly without a State response. Base the claim on failure to protect and, if conduct in an official capacity is established, on the treaty obligation allegedly breached by the looting attributable to the State.

Reference

See **AMT v. Zaire** (ICSID, ARB/93/1, award of 21 February 1997). The tribunal held that soldiers who looted individually, without any established organisation, had not acted as State "forces" within the meaning of the treaty's war clause. It nevertheless held Zaire responsible for breach of its obligation of vigilance, reinforced by a broad interpretation of the losses clause in Article IV(1)(b) of the treaty that has remained isolated. The tribunal did not decide attribution under the law of State responsibility. The award illustrates a claim based on failure to protect.

Contact Hennebel Avocats

Is an investment at risk, has a loss occurred or is a deadline approaching? The firm assesses the situation in confidence and gives urgent matters priority.

Contact the firm

Step 05 - Invoke war clauses and compensation-for-losses clauses

Timing for the investor: during treaty analysis, from the initial review of protection · At stake: the specific regime governing conflict losses

Alongside their general standards, many investment treaties contain a provision specifically designed for the situations addressed in this guide: the war clause, or compensation-for-losses clause (*war clause*, *losses clause*). It is among the provisions most often misread in this field, because its effect varies radically with the wording - it can provide a valuable minimum level of protection or undermine the very argument advanced in reliance on it.

The relative or non-discrimination clause. In its most common form, the war clause creates no independent right to compensation. It guarantees only that, if the State compensates losses arising from war, a state of emergency, revolt or disturbances - the wording varies - it must treat foreign investors at least as favourably as its own nationals and investors of any third State (national treatment and most-favoured-nation treatment in respect of compensation measures). If the State compensates no one, a relative clause generally affords no relief (the award in *AMT v. Zaire* adopted a broader reading by combining the clause with the obligation of vigilance, an approach that has remained isolated). Its value is conditional but real. Where a compensation scheme, reconstruction fund or restitution measure has been adopted, the comparator permitted by the treaty must be identified. In *Güriş v. Syria*, for example, Article IV(3) of the basic treaty referred only to treatment accorded to investors of a third State. An advantage granted to nationals alone was insufficient.

The extended clause. Some treaties add a second, substantive limb. Where losses result from requisition of property by State forces or authorities, or from destruction of property by those forces or authorities where the situation did not require it, the investor is entitled to restitution or adequate compensation. Many such clauses add a decisive condition: the destruction must not have been caused in combat action. In *AAPL v. Sri Lanka*, the tribunal declined to apply the treaty's extended clause because there was no proof that government forces had caused the destruction and because the security operation constituted combat action. It held that proving these cumulative conditions placed a heavy burden on the investor and decided the case on the basis of due diligence. The extended clause creates a right to compensation for two specific categories of loss - requisition and unnecessary destruction - attributable to State forces. Destruction caused by insurgents and destruction required by the necessity of the situation fall outside it. Full protection and security (failure to protect) and, where applicable, expropriation (step 07) remain possible grounds in such cases. A third, rare variant should also be sought: the unqualified extended clause, found in certain treaties concluded by Italy, which requires the State to compensate war losses whoever caused them. In *Güriş v. Syria* (ICC, seat

in Geneva, final award of 31 August 2020, by majority. The Swiss Federal Supreme Court dismissed the investors' challenge concerning the currency of the award on 8 April 2021), the tribunal allowed the investor to import the war clause in the Italy-Syria treaty through the most-favoured-nation clause in the Türkiye-Syria treaty. The host State's treaties with third States must therefore be read alongside the basic treaty.

There are two strategic consequences. The first concerns the relationship between standards. Unless the treaty provides otherwise, the war clause supplements the other standards. *AAPL v. Sri Lanka* specifically examined the relationship between the protection clause and the losses clause in the applicable treaty. Its lesson remains relevant - each ground has its own scope, conditions and evidentiary requirements, and the claim should plead the grounds in a reasoned order of alternatives rather than as an undifferentiated whole. The second concerns proof. The extended clause requires proof of the actor (State forces or authorities), the act (requisition or destruction) and, for destruction, the absence of necessity and, where the clause so provides, the absence of combat action - all issues that depend on the contemporaneous record in step 03 and the rules of attribution in step 09. For the State, conversely, proof that the situation required the destruction is one of the strongest defences because it addresses a condition within the clause itself.

> *Caution*
> Invoking a war clause prematurely can prejudice the claim. Relying on an extended clause without proof that a State actor caused the destruction, or on a relative clause without a relevant comparator, gives the State an easy success that can undermine the rest of the case. Select the ground only after reviewing the available evidence.

> *Spotlight*
> Two war clauses can bear the same heading and have opposite effects. A **relative** clause entitles the investor only to the treatment accorded to others, which presupposes a compensation measure against which treatment can be compared. An **extended** clause creates an independent entitlement for requisitions and unnecessary destruction attributable to State forces, often excluding destruction caused in combat action. The precise wording is decisive.

Step 06 - Plead fair and equitable treatment and legitimate expectations in a crisis

Timing for the investor: **at the heart of the merits** · At stake: the standard most frequently pleaded and most contested under emergency conditions

Fair and equitable treatment is the standard most frequently invoked in investment disputes. In a crisis, it is also the most delicate to apply. Its content depends on the treaty, which may establish an autonomous standard or refer to the customary minimum standard, whose content must then be established. For autonomous standards, several elements have become well established: protection against arbitrariness and discrimination, respect for the right to a fair trial and the prohibition of denial of justice, transparency and consistency in administrative action, and protection of the investor's legitimate expectations, subject to conditions that remain contested.

A crisis does not suspend the standard, but it changes how it applies. A state of emergency entails swift measures that depart from ordinary rules and can be severe: exchange controls, moratoria, requisitions and suspension of permits. These do not all constitute breaches. The tribunals in the Argentine cases - arising from the 2001 economic crisis and the emergency measures that froze public utility tariffs and converted them into pesos, a process known as "pesification" - accepted to varying degrees that the crisis affected the assessment of breach. They also recognised that dismantling the entire regulatory framework on which the investor had relied in making the investment could breach fair and equitable treatment. The distinction is between an adjustment the State may impose in a crisis and the reversal of a specifically promised framework, for which the State incurs responsibility.

Legitimate expectations require caution on two counts. The first is their source. An expectation is protected only if it rests on sufficiently specific commitments or assurances - a stabilisation clause, a contractual undertaking or a regulatory framework adopted to attract the investment. A general hope that legislation will remain unchanged is insufficient. The second is context. Investing in an area known to be unstable weakens any expectation of a stability that never existed. Tribunals take account of the risk the investor freely accepted. In the related context of protection, the award in *Pantechniki v. Albania* (2009) recalls that the host country's level of development and circumstances are relevant. An informed investor therefore bases its legitimate expectations claim on the specific commitments it received, rather than a general promise of stability belied by the circumstances.

Certain protections endure through any crisis: the prohibition of denial of justice, which requires the investor to have pursued effective domestic remedies, and the prohibition of outright arbitrariness. A state

of emergency does not authorise the targeted confiscation of an investor's property for private benefit, the exclusion of a class of litigants from the courts or the recharacterisation of a commercial dispute as criminal in order to break a foreign partner. Where a crisis measure manifestly serves a purpose other than its stated one, the fair and equitable treatment claim can be strengthened by examining the misuse of powers. The criminal and human rights proceedings must then be coordinated with the arbitration, as statements made in any one of them have consequences for the others. The guides to *lawfare* and human rights litigation strategy in this series address those matters separately.

What to gather

- All specific commitments received: stabilisation clauses, letters of intent, incentive schemes and authorisations.
- A timeline of the emergency measures and the official reasons given for them.
- Evidence of differential treatment of comparable operators (domestic or from third States).
- Evidence establishing, where relevant, the actual purpose of a targeted measure.

What not to do

- Base the claim on a general expectation of stability in a country whose instability was widely known.
- Make repeated public statements or statements in criminal proceedings that conflict with the position taken in arbitration. The case depends on consistency across proceedings.

Key point

In a crisis, fair and equitable treatment protects **consistency in the State's conduct** more than stability in the world at large. Emergency adjustments are permissible in principle. Repudiating specific commitments, singling out an investor for arbitrary treatment and denying justice are not.

Step 07 - Identify direct or indirect expropriation in times of conflict

Timing for the investor: **at the heart of the merits** · At stake: compensation depends on the legal characterisation

Conflict and emergency give rise to many forms of dispossession: formal nationalisation, a "temporary" seizure that continues indefinitely, compulsory administration, prolonged requisition, transfer of assets to an operator close to the government, or regulatory measures that make it impossible for an enterprise deemed undesirable to operate. The analysis distinguishes direct expropriation - formal transfer of title or outright seizure - from indirect expropriation, where the State, without taking title, deprives the investor of the use, control or economic value of its investment through a measure or series of measures equivalent in effect to dispossession.

Three distinctions shape disputes arising in a crisis. **First distinction: expropriation and war damage.** Wartime destruction does not in itself constitute expropriation. It falls to be examined under war clauses (step 05), full protection and security (step 04) and, for destruction attributable to State forces, the international humanitarian law applicable to the type of conflict (step 01), which prohibits destruction and seizure not required by military necessity. Conflating the regimes weakens the claim: each has its own conditions, evidentiary requirements and compensation formula. **Second distinction: expropriation and regulation.** Even outside a crisis, the State retains the power to regulate in the public interest. Its good-faith, non-discriminatory and proportionate exercise does not in principle constitute a compensable expropriation. A crisis broadens the practical scope of that power without making it unlimited. The legal characterisation turns on the degree of deprivation - substantial and lasting, or partial and temporary - the measure's actual purpose and whether it was discriminatory or targeted. **Third distinction: duration.** A requisition or temporary administration that was lawful at its inception may become an expropriation through indefinite extension, failure to compensate or refusal to return the property. The date of expropriation - decisive for valuation - then becomes a matter of dispute in its own right.

Compensation also requires a distinction. Lawful expropriation entitles the investor to the compensation prescribed by the treaty. Many treaties define this as the market value of the investment immediately before the measure or before the impending measure became known (for example, Article 13 of the Energy Charter Treaty). Unlawful expropriation and other breaches are governed by the Factory at Chorzów principle (PCIJ, 1928). That judgment confined the "fair price" limit to expropriations the State was entitled to carry out. Reparation for a wrongful act must, as far as possible, wipe out all its consequences and re-establish the situation that would probably have existed without it. The distinction determines the valuation date, a

critical question where conflict has depressed the value of the business. Valuation in conflict raises particular difficulties in practice. The conflict itself depresses the value of the business at the critical date, and the dispute turns on how much of the loss is attributable to the wrongful measure and how much to general conditions - for which the State need not compensate. Pre-crisis valuation evidence (step 03), the valuation date and the method (enterprise value, net assets or discounted cash flow where the operating history supports it) must be addressed with financial experts when the claim is prepared, rather than first considered at the reply stage.

The State's defence brings together its regulatory powers, the necessity of the situation, the absence of substantial deprivation and the conflict as a concurrent cause of loss. For the investor, the strongest claim pleads alternative legal characterisations in order - expropriation as the primary claim, and breaches of fair and equitable treatment and of the protection obligation in the alternative - with a separate analysis of loss for each.

> *Common mistake*
> Pleading every loss as an expropriation. Wartime destruction, emergency regulation and targeted dispossession are governed by **three distinct regimes**. A credible claim identifies the regime applicable to each loss and quantifies the loss separately under each.

Step 08 - Anticipate State defences: force majeure, necessity and essential security clauses

Timing: **from the preparation of the claim - and central to the State's defence** · At stake: the circumstances precluding wrongfulness and their limits

A sound claim must anticipate the defence, and a well-advised State defending a crisis-related claim will examine the circumstances precluding wrongfulness. This step considers the three principal defences - force majeure, state of necessity and treaty clauses on essential security - as tested in arbitral proceedings. It is relevant to both parties: the State builds its defence here, and the investor assesses the strength of its claim.

Force majeure (Article 23 of the 2001 ILC Articles). The wrongfulness of an act of a State is precluded if the act is due to an irresistible force or an unforeseen external event beyond its control that makes it materially impossible to perform the obligation. The threshold is high. Performance must be materially impossible. Greater difficulty or excessive cost is insufficient. Nor is the defence available if the situation results from the conduct of the State invoking it or if the State assumed the risk. In practice, force majeure protects a State overwhelmed by events - for example, where it has become materially impossible to fulfil a protection

obligation in an area under insurgent control. It rarely protects a State that chose to adopt the disputed measures: an emergency decree is a decision, not an impossibility.

State of necessity (Article 25). Article 25 is framed in negative terms and makes necessity subject to cumulative conditions. The act must be the only way to safeguard an essential interest against a grave and imminent peril. It must not seriously impair an essential interest of the State or States towards which the obligation exists or of the international community as a whole. The defence is unavailable if the obligation excludes reliance on necessity or the State made a sufficiently substantial contribution to the situation. Each condition is contested on its own terms: the essential nature of the interest (economic and social stability may qualify), the gravity and imminence of the peril, the "only way" requirement (available alternatives, even if more costly, defeat the defence), and the State's contribution to its own crisis. The ILC Articles (Article 27(b)) also leave open the question of compensation for material loss even where a circumstance precluding wrongfulness is established - necessity does not invariably relieve the State of all financial consequences.

Essential security clauses and the divergence in the Argentine cases. Many treaties contain a clause on non-precluded measures (*non-precluded measures*) reserving the State's right to take measures necessary to maintain public order or protect its essential security interests - Article XI of the US-Argentina bilateral treaty is one example. The 2001 Argentine crisis put this framework to the test and produced the most instructive divergence in the field. In *CMS* (2005 award), the tribunal rejected the necessity defence, assessing the treaty clause through the strict conditions of customary law. In *LG&E* (2006 decision), another tribunal, on comparable facts, upheld the defence under Article XI of the treaty - the essential security clause, interpreted in light of the state of necessity - for the most acute phase of the crisis, precluding responsibility during that period. In *Enron* (2007) and *Sempra* (2007), the defence failed again. The ad hoc committees then reviewed the awards. In *CMS* (2007), the committee identified manifest errors of law in equating the treaty clause with customary necessity but declined to annul the award on that ground because it had no appellate jurisdiction. Partial annulment was confined to the finding on the umbrella clause, for failure to state reasons (an error of law, even a manifest one, is not in itself a ground for ICSID annulment). In 2010 the *Sempra* award was annulled in full and the *Enron* award in respect of its findings on the defences, liability and compensation. This sequence requires careful reading - each annulment turned on grounds specific to the award, and the decisions do not embody a single doctrine - but three lessons emerge. A treaty's essential security clause and customary necessity are distinct rules whose relationship must be argued. The outcome of a necessity defence is genuinely uncertain, even on similar facts. The duration of the crisis matters - a defence upheld for its most acute phase does not cover the period before or after it.

The State's defence extends beyond those circumstances. It includes objections based on the illegality of the investment (corruption, fraud or breach of domestic law at establishment - an objection that may deprive the tribunal of jurisdiction or the claim of protection), the power to regulate in the public interest, and the principle of permanent sovereignty over natural resources, affirmed in particular in UN General Assembly

resolution 1803 (XVII) of 14 December 1962. That principle supports the regulatory power rather than constituting an independent defence, and the same resolution provides for appropriate compensation in the event of nationalisation. The State may also invoke the conflict as a concurrent cause when loss is assessed and, where the instrument permits, bring counterclaims. For the investor, anticipating these defences shapes the evidentiary record from step 03: proof of the alternatives available to the State, its contribution to the crisis and the targeted nature of the measure can defeat a necessity defence.

What to gather (both parties)

- A timeline of macroeconomic and security developments during the crisis, identifying the dates of turning points.
- Alternative measures discussed or available when the disputed decisions were taken.
- Evidence of the State's contribution to the situation (earlier policies, decisions that aggravated the crisis).
- The precise wording of the essential security clause in the applicable treaty and any available preparatory materials.

What not to do

- Treat the treaty clause and customary necessity as a single rule. The Argentine cases show the consequences of conflating them.
- For the State, invoke necessity without addressing the "only way" requirement or its own contribution. These are the two points on which the defence most often fails.

Spotlight

The Argentine cases - *CMS*, *LG&E*, *Enron*, *Sempra*, followed by the annulment decisions - do not establish which side is right. They show that **the outcome of a necessity defence is inherently uncertain** and that the case turns on the precise conditions - the only way available, the State's contribution and the relevant period - rather than the principle in the abstract.

CASE STUDY · 3

Economic emergency measures that *overturn the tariff framework*

Configuration

An anonymised scenario drawn from published ICSID decisions in the Argentine cases. A major financial crisis leads the State to freeze public utility tariffs and abolish indexation, destroying the economic balance of concessions held by foreign investors.

Legal crux

Fair and equitable treatment and expectations based on the tariff framework. The defence of state of necessity (Article 25 of the ILC Articles) and the treaty's essential security clause. The relationship between the two rules and the precise period covered by the defence.

Sequence

For the investor: establish the specific commitments and the alternatives available to the State. For the State: document the gravity of the peril and the absence of a practicable alternative, and define the period of necessity.

Reference

See the divergent outcomes in **CMS** (2005) / **LG&E** (2006) / **Enron** (2007) / **Sempra** (2007), the decision of the *CMS* committee (2007) annulling only the finding on the umbrella clause, and the full annulment of *Sempra* and partial annulment of *Enron* (2010).

> As soon as a conflict or emergency threatens an investment - and before taking any irreversible step.
>
> *When to contact Hennebel Avocats*
>
> Before giving notice of dispute, bringing proceedings in the local courts, restructuring ownership or making a public statement, while still meeting deadlines for notifying insurers and commencing proceedings. Subject to a prior conflict-of-interest check, either the investor or the host State may consult the firm as lead counsel, as co-counsel working with arbitration firms, financial experts and diplomatic advisers, or for strategic support. The initial discussion is confidential and entails no commitment. Urgent matters receive priority.
>
> Have your situation assessed

Step 09 - Establish attribution of conduct to the State

Timing: from the start of evidence gathering · At stake: State responsibility requires attribution

Between the act causing loss and the responsibility of the State lies a question that becomes acute in conflict: attribution. Who acted - and does that conduct engage the State's responsibility? Articles 4 to 11 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts (2001), widely accepted as reflecting customary law on this issue, provide the framework applied by investment tribunals.

The categories can be examined in descending order of how readily attribution can be established. The conduct of **State organs** - the armed forces, police and administration at every level - is attributable to the State (Article 4), including where the organ exceeds its authority or contravenes instructions (Article 7). A soldier who loots in breach of orders engages the State's responsibility if acting in an official capacity. That qualification is decisive. The ILC commentary distinguishes unauthorised official conduct, which is attributable, from an agent's purely private conduct. Apparent capacity (an agent acting under colour of official authority, using a State uniform, weapons or resources) carries considerable weight in drawing that distinction. This issue is distinct from the interpretation of a war clause. In *AMT v. Zaire* (1997), the tribunal declined to treat soldiers looting individually, without any established organisation, as State "forces" within Article IV(2) of the treaty. It did not decide attribution under the law of State responsibility. All evidence

of conduct in an official capacity (uniforms, weapons, vehicles, unit, orders, chain of command, use of State resources) should therefore be gathered while events are fresh. The conduct of **entities exercising elements of governmental authority** - officially recognised militias, security companies entrusted with public functions, State enterprises exercising delegated powers - is attributable insofar as they act in that capacity (Article 5). Next come the situations particularly associated with crises: the conduct of **persons or groups acting in fact on the instructions of, or under the direction or control of, the State** (Article 8) - the issue of armed "proxy" groups, for which proof of control is notoriously demanding. Also covered is the conduct of persons in fact exercising governmental authority **in the absence or default of the official authorities**, in circumstances calling for that exercise (Article 9), a category particularly relevant when State institutions collapse. The conduct of an **insurrectional movement that becomes the new government** of the State is retrospectively attributable to that State (Article 10) - a decisive rule when an insurrection succeeds, which can reverse the prospects of a case. Finally, conduct that the State subsequently **acknowledges and adopts as its own** is attributable to it (Article 11).

A contrario, acts of non-State armed groups that fall into none of these categories do not engage the State's responsibility - it is precisely for such losses that full protection and security (step 04) and war clauses (step 05) assume importance. The State does not answer for the insurgents' conduct but does answer for its own failure to protect. From the outset, the evidentiary strategy should therefore pursue both avenues: document the identity and insignia of those responsible to establish direct attribution if possible, and document the authorities' conduct to establish, in the alternative, a failure to exercise vigilance.

Occupation adds a further issue. Measures taken by the occupying power in occupied territory - "nationalisations", forced transfers and local expropriations - first raise the territorial and temporal applicability of the treaty, followed by questions of occupation law and, where relevant, attribution. The Crimea cases illustrate the point. Ukrainian investors whose assets in Crimea had been seized after 2014 brought claims under the 1998 Ukraine-Russia bilateral investment treaty before tribunals constituted under the auspices of the Permanent Court of Arbitration. The tribunals upheld jurisdiction over investments in territory that had come under the respondent State's control - *Everest Estate v. Russia* (PCA 2015-36, 2018) is a published example, and the final award in *Naftogaz v. Russia* (PCA 2017-16, 12 April 2023) is among the most significant. The partial award in the latter case was set aside only insofar as it upheld jurisdiction over all claims. On 19 July 2022, The Hague Court of Appeal limited jurisdiction to investments made on or after 1 January 1992. The Supreme Court of the Netherlands upheld that result, dismissing both parties' appeals on 6 December 2024. On the challenge to the final award, the same Court of Appeal held on 22 September 2026 that jurisdiction was lacking in respect of numerous assets. It invited submissions on partial setting aside and the corresponding amounts, reserving its decision. Subsequent developments must be checked when action is taken. Although the facts of each case are distinct, they establish at least this much: occupation does not create a legal vacuum, and effective control of territory can provide a basis for applying the treaty of the State exercising that control. Judicial review of the awards continues to evolve. In *Oschadbank v. Russia*, the French

Court of Appeal set aside the award on 30 March 2021 for lack of jurisdiction *ratione temporis*. The Court of Cassation quashed that judgment on 7 December 2022, and the court hearing the case on remittal dismissed the application to set aside on 1 July 2025. Russia lodged a further appeal on points of law. By an order of 13 July 2026, the English High Court continued the stay of enforcement proceedings pending the French decision on that appeal. On 23 June 2026, the Court of Appeal also set aside, for lack of impartiality on the part of an arbitrator, the tribunal's decision of 11 December 2023 dismissing Russia's application for revision. On 19 July 2026 Russia requested the resumption of revision proceedings before a reconstituted tribunal. The status of each proceeding must be checked when action is taken.

> *Key point*
> Every loss must be investigated from two perspectives from day one: **direct attribution** (who acted, bearing what insignia and on whose orders) and **failure to protect** (what the authorities did). Investigating both from the outset improves the prospects that one avenue will remain open if the other closes. Neither is available as a matter of course.

CASE STUDY · 4

Assets seized in *occupied territory*

Configuration

An anonymised scenario drawn from published decisions of tribunals constituted under the auspices of the Permanent Court of Arbitration. Investors' real estate and businesses are seized by authorities installed in territory that has come under the control of a neighbouring State.

Legal crux

Check whether the treaty covers the territory under effective control and establish the date of each investment. The Ukraine-Russia treaty terminated on 27 January 2025. Article 14(3) preserves its other provisions for ten years for covered investments made before termination. Assess whether the measures constitute expropriation, whether the local authorities' acts are attributable to the State and how an award might ultimately be enforced against an uncooperative State.

Sequence	Prove ownership and value before seizure. Select the treaty basis and commence arbitration, constituting the tribunal despite any failure by the State to appear. Identify assets available for attachment when choosing the forum and implement the enforcement strategy as soon as the award is made (step 11).
Reference	See the cases brought under the 1998 Ukraine-Russia BIT, including **Everest Estate v. Russia** (2018 award).

Step 10 - Choose the forum, commence proceedings and address preliminary objections

Timing: after reviewing the available protections, before time limits expire · At stake: a largely irreversible choice

The choice of forum has the greatest influence on the course of the case because it governs everything that follows: the law applicable to the proceedings, the constitution of the tribunal, the remedies against the award and, above all, its enforcement regime. The options depend on the consent expressed in the treaty or contract. They include ICSID arbitration where the conditions of Article 25 of the 1965 Convention are met - a legal dispute arising directly out of an investment between a Contracting State and a national of another Contracting State, with written consent - and ad hoc arbitration under the UNCITRAL Rules, frequently administered by the Permanent Court of Arbitration - the route taken in the Crimea cases - as well as institutional arbitration under certain treaties. Each option has its own enforcement regime, examined in step 11: the self-contained remedies and enforcement system of the ICSID Convention (Articles 52, 54 and 55), or the 1958 New York Convention. The prospects of enforcement are the criterion by which the forum should be chosen.

The preliminary phase is where the State raises its objections. Conflict situations add objections of their own. The usual objections concern jurisdiction *ratione materiae* (whether a protected investment exists), *ratione personae* (the investor's nationality, challenges to holding companies as mere vehicles, denial-of-benefits clauses) and *ratione temporis* (a dispute predating entry into force of the treaty), abuse of rights (restructuring after a dispute had arisen or had become reasonably foreseeable, rendering the claims inadmissible), admissibility (negotiation periods not yet completed, a choice of forum already exercised - *Pantechniki* again), and illegality of the investment (corruption or fraud at establishment). Conflict-specific objections include the applicability of the treaty to occupied territory, the alleged effect of hostilities on the treaty and an asserted

inability to participate in the proceedings. A State's failure to appear does not prevent arbitration - the rules permit the tribunal to proceed - but it complicates enforcement and demands particular rigour from the claimant. Even without opposing submissions, the tribunal must satisfy itself of its jurisdiction and that the claim is well founded.

At this stage, parallel proceedings and responses must also be coordinated. A crisis rarely gives rise to arbitration alone. There may be local criminal proceedings against executives, human rights proceedings concerning injury to persons or interference with property, banking and insurance issues, diplomatic action (diplomatic protection by the State of nationality remains a subsidiary avenue, but Article 27(1) of the ICSID Convention prohibits that State from exercising it or bringing an international claim in respect of a dispute that its national and the host State have consented to submit or have submitted to ICSID arbitration, unless the host State fails to comply with the award. Consent to ICSID arbitration thus closes that avenue, leaving open only informal diplomatic exchanges to facilitate settlement), and finally dealings with the media. Overall direction must be unified. Each submission, statement and complaint must be checked against the positions taken elsewhere because the opposing party will exploit any inconsistency. The guides in this series on human rights litigation strategy, *lawfare* and international sanctions address their respective areas.

What to gather

- A comparison of the forums available under each applicable instrument and their respective enforcement regimes.
- Evidence of jurisdiction: existence of the investment, nationality and control, dates of ownership and the representative's authority. Article 25(2) of the ICSID Convention excludes a natural person who also held the respondent State's nationality on the date of consent or the date of registration of the request. For a company having that State's nationality on the date of consent, establish foreign control and the parties' agreement to treat it as a national of another Contracting State.
- Documentary evidence that preconditions have been met: notice, negotiation period and attempts at amicable settlement.
- An inventory of all parallel proceedings under way.

What not to do

- Choose a forum for procedural convenience without assessing enforcement. The choice must take account of the ultimate means of recovery.
- Allow statements in criminal proceedings, in the media or to insurers to contradict the arbitral submissions.

Key takeaway
Choose the forum **with the outcome in view**: the enforcement regime for the eventual award, the remedies available against it and the ability of the proceedings to withstand the State's failure to appear. A favourable award that cannot be enforced is no victory.

Step 11 - Enforce the award against a State

Timing: **planned from the outset, pursued after the award** · At stake: converting the award into payment

An award against a State at war, subject to sanctions or simply unwilling to comply gives the creditor legal title to recover. Payment is a separate matter. Securing recovery on that title is a discipline in its own right and begins years before the award - when the forum is chosen (step 10) and assets are identified.

The regime depends on the forum chosen. **ICSID awards:** the 1965 Convention establishes a self-contained system - remedies against the award lie within that system. Foremost among them is annulment by an ad hoc committee on the limited grounds in Article 52 (the avenue pursued in the Argentine cases). An application must be made within 120 days of the date of the award or, for corruption on the part of a tribunal member, within 120 days of discovery and no later than three years after the award. An application for revision (Article 51) must be made within 90 days of discovering a decisive fact unknown to the tribunal and the applicant when the award was made, provided the applicant's ignorance was not due to negligence, and in any event no later than three years after the award. Subject to the new starting date provided for in Article 49(2), those remedies cease to be available once the time limits expire. Independently of those time limits, and subject to any stay of enforcement in proceedings for interpretation, revision or annulment, including the provisional stay that takes effect if requested in an application for revision or annulment until the stay request is decided (Articles 50(2), 51(4) and 52(5)), each Contracting State must recognise the award as binding and enforce its pecuniary obligations as if it were a final judgment of its own courts (Article 54). A request for a supplementary decision or rectification must be made within forty-five days of dispatch of certified copies

of the award. A decision under Article 49(2) forms part of the award. Its date becomes the reference date specified in that provision for the time limits in Articles 51(2) and 52(2), without dispensing with the need to establish when the fact or corruption was discovered. **Non-ICSID awards:** recognition and enforcement are governed by the 1958 New York Convention, subject to its scope, reservations, limited grounds for refusal, the more favourable law of the forum (Article VII) and review by the courts at the place of enforcement. An application to set aside the award before the courts of the seat is subject to the often short time limits imposed by the law of the seat, which must be checked as soon as the award is made (in France, an application to set aside an international award made in France is brought before the Paris Court of Appeal. It may be brought as soon as the award is made, and the ordinary time limit is one month from notification, by formal service unless otherwise agreed (Article 1519 of the Code of Civil Procedure). Extensions on account of distance must be checked, particularly the additional two months where the applicant resides abroad (Articles 643 and 1527). Decree No. 2026-741 of 6 August 2026 reforms arbitration law from 1 January 2027. Its provisions on awards and remedies apply only to awards made after that date, so the rules applicable to the award in question must be verified). Both regimes retain one limit: execution against State property is governed by the law on immunity from execution in force in each forum State - Article 55 of the ICSID Convention expressly provides this for ICSID awards. Even an ICSID award therefore does not permit attachment of any State asset in any jurisdiction.

Enforcement planning has three components. **Identifying assets:** locate, in favourable jurisdictions, State property used for commercial activity - as distinct from protected sovereign property (diplomatic, military and central bank property, which generally enjoys immunity) - and debts owed to the State that can be attached in the hands of third parties. In France, any protective measure or measure of execution against property of a foreign State requires prior judicial authorisation and satisfaction of one of the conditions in Article L. 111-1-2 of the Code of Civil Enforcement Procedures. **Choosing jurisdictions:** national rules on immunity differ considerably. The sequence in which proceedings for recognition and attachment are brought across jurisdictions is itself a strategic choice. **Additional means of securing recovery:** contractual waivers of immunity (hence their importance in step 12), negotiations backed by the prospect of enforcement - many awards against States result in negotiated settlement, particularly where the prospect of enforcement is credible - and attention to sanctions regimes, which may freeze the assets concerned or require authorisation for attachment. The guide to international immunities in this series examines these matters in full - immunity from jurisdiction and immunity from execution, categories of property and waivers - and should be read alongside this step.

Caution
Where the debtor State is subject to sanctions, assets may be frozen, attachment may require authorisation and banks may be reluctant to act even where their obligations permit it. Article 11(2a) of Regulation (EU) No. 833/2014 also prohibits, subject to its conditions, recognition or enforcement in the Union of certain decisions arising from arbitration brought against a Member State on account of sanctions against Russia. Check the place of the proceedings, the claim concerned and the identity of the party relying on the decision. For each jurisdiction, both the regime governing the assets and that governing the award or decision must be checked. The guide to international sanctions examines these regimes in detail.

Common mistake
Discovering the rules on immunity from execution after the award. Article 55 of the ICSID Convention expressly preserves the forum's law on immunity: **assets available for attachment must be identified before arbitration**, not after a favourable award.

Step 12 - Structure protection before the crisis

Timing: before a crisis - or between crises · At stake: protection is determined before it is needed

The final step is for those reading this guide outside a crisis: investors operating in fragile jurisdictions, funds deploying capital there and legal departments inheriting existing exposure. Everything discussed above - standards, clauses, forums and enforcement - depends on structuring decisions made before the crisis, while all options remain open. Once it breaks out, those decisions become difficult or cease to achieve their purpose.

Treaty planning. The first consideration is how to structure ownership so that one or more treaties offer the strongest combination of protections: comprehensive substantive standards (full protection and security, an extended war clause and fair and equitable treatment), clear consent to arbitration under a robust enforcement regime, and freedom from restrictive clauses (applicable denial-of-benefits provisions or potentially prejudicial elections of forum). Where an entity of one EU Member State invests in another Member State, this avenue is also closed or seriously compromised. The Court of Justice held the arbitration clause of an intra-EU bilateral treaty incompatible with EU law (*Achmea*, C-284/16, 6 March 2018). Most Member States concluded an agreement terminating such treaties on 5 May 2020, and under EU law the Energy Charter Treaty cannot provide a basis for intra-EU arbitration (*Komstroy*, step 02). Treaty planning is lawful if undertaken before the dispute becomes reasonably foreseeable. It becomes vulnerable from that point, even if the dispute has yet to arise. Arbitral tribunals treat such late restructuring as an abuse of rights.

In *Philip Morris Asia v. Australia* (PCA, award on jurisdiction and admissibility of 17 December 2015), the tribunal held inadmissible the claims of an investor that had restructured its ownership when the dispute was reasonably foreseeable, primarily to obtain treaty protection. Reasonable foreseeability is assessed case by case. The practical consequence is stark: the opportunity to restructure closes just when the need becomes apparent. Treaty coverage should therefore be reviewed periodically outside any crisis, and restructuring undertaken while circumstances are calm.

Contractual protection. Negotiate in State contracts the protections that treaties do not supply: stand-alone arbitration clauses, stabilisation clauses, definitions of force majeure that protect the operator rather than the State, and express waivers of immunity from jurisdiction and immunity from execution - the least costly provision to negotiate in peacetime and the most valuable in a crisis (step 11).

Political risk insurance. The 1985 Seoul Convention established MIGA specifically to cover non-commercial risks in emerging economies: war and civil disturbance, expropriation, transfer restrictions and breach of contract. A MIGA guarantee or an equivalent private policy offers three benefits. It provides compensation independent of the outcome of a lengthy arbitration, subject to the steps and remedies required by the policy. It can deter State action - a State expropriating an investment guaranteed by a World Bank Group institution faces the prospect of that institution's subrogation and the institutional weight it carries. It also requires documentation: obtaining cover entails recording the condition of the investment, providing an evidentiary baseline. The limits must be understood: caps on cover, exclusions, risk-based premiums, notification deadlines and conditions.

Monitoring treaty developments. Treaty coverage changes over time. The staggered withdrawals from the Energy Charter Treaty are a prominent example. Italy withdrew with effect from 1 January 2016 (survival until 1 January 2036). A series of further withdrawals took effect from December 2023 (France, Germany and Poland) to August 2026 (Lithuania), including those of the European Union and Euratom on 28 June 2025. Withdrawals notified in 2026, including by Ireland, Romania, Bulgaria and Sweden, take effect in 2027. Each withdrawal starts its own twenty-year survival period for earlier investments, subject to the intra-EU regime described in step 02. Bilateral treaties are terminated or renegotiated, their survival clauses vary and the case law evolves. A long-term investment in a sensitive jurisdiction warrants an annual review of protection: treaties in force, announced terminations, applicable survival clauses and the current ownership structure. The cost is modest for protection on which the entire case may one day depend.

What to gather (before a crisis)

- A review of treaty coverage for each investment at risk, updated annually.
- An inventory of critical contractual provisions: arbitration, stabilisation, force majeure and waivers of immunity.
- A cost-benefit analysis of a MIGA guarantee or private insurance policy for exposed assets.
- An evidence preservation plan ready to activate in a crisis (step 03).

What not to do

- Wait for a crisis before restructuring. Restructuring after a dispute has arisen invites an objection based on abuse.
- Take out insurance without considering how its deadlines and exclusions affect a potential litigation strategy.

Key takeaway

The opportunity to restructure closes when the dispute becomes foreseeable. **The decisive choices are made before the crisis**: ownership, clauses, insurance and evidence. The strongest crisis case is prepared before there is any sign of trouble.

CRITICAL REVIEW

Mistakes that *compromise the defence*

01 **Waiting until hostilities end before acting.** No general principle suspends time limits because of war. Periods for amicable negotiations, treaty time limits for bringing claims and insurance policy deadlines continue to run while attention is focused on the crisis.

02 **Reacting before characterising the situation.** Armed conflict, disturbances, a state of emergency, occupation and sanctions each affect the applicable body of law. A hastily drafted notice or premature public statement can commit the investor to an unfavourable characterisation.

03 **Pleading absolute State liability.** As *AAPL v. Sri Lanka* (1990) held, full protection and security is an obligation of vigilance. Only a clause conferring a right to compensation without proof of negligence, such as an extended war clause or a requisition clause (step 05), can support a claim approaching strict liability. A claim premised on a guaranteed result loses credibility on all its other grounds.

04 **Failing to request protection in writing during the crisis.** Proving the State's failure turns on what it knew and what it was asked to do. The absence of any documented request for protection causes lasting damage to the central ground of the claim.

05 **Confusing war damage, regulatory measures and expropriation.** There are three regimes, each with its own evidentiary requirements and compensation formula. Pleading every loss as an expropriation risks dismissal of the entire claim where a more discriminating legal characterisation would at least have preserved separate grounds.

06 **Reading a war clause without distinguishing its relative and extended forms.** One entitles the investor only to the treatment accorded to others. The other confers an independent right in respect of requisitions and unnecessary destruction, often excluding combat operations. Misreading the clause costs an entire ground of claim.

07 **Bringing proceedings in local courts without checking fork-in-the-road clauses.** *Pantechniki v. Albania* (2009) shows the cost. The arbitral claim resting on the same fundamental basis as the claim before the local court was held inadmissible, even though pleaded as a treaty claim.

08 **Underestimating State defences.** Force majeure, state of necessity and essential security clauses: the Argentine cases show that such defences can succeed, at least for the most acute phase of a crisis. A claim that fails to anticipate them is exposed at the worst possible moment.

09 **Investigating attribution too late.** The identity of those responsible - units, insignia and orders - can be established only while events are fresh. Years later, the losses may remain but the actors may no longer be identifiable, leaving only a failure to protect to be proved from the authorities' response.

10 **Restructuring ownership after the dispute has arisen.** Restructuring when a dispute has arisen or is foreseeable invites an objection based on abuse of rights and a finding that the claims are inadmissible. The opportunity closes just when the need becomes apparent.

11 **Choosing the forum without considering enforcement.** The ICSID regime or the New York Convention, immunity from execution and assets available for attachment: the choice of forum must take account of the ultimate means of recovery. An unenforceable award is no victory.

12 **Allowing positions taken in different settings to contradict one another.** Arbitration, criminal defence, human rights mechanisms, insurers and the press: a statement made in one setting has consequences in the others. The opposing party will exploit any inconsistency between submissions.

What to expect from an initial discussion with Hennebel Avocats

Before discussing the substance of a matter, the firm checks for conflicts of interest. At first contact, please provide only the identities of the parties and the State concerned. The initial discussion is confidential and confined to assessing the situation. It may take place by secure telephone, encrypted videoconference or in person, subject to availability. The firm uses Signal and Threema for confidential communications and a secure facility for uploading sensitive documents. No substantive information should be sent through a general-purpose messaging service.

The discussion covers three matters: the precise nature of the situation and the measures at issue (conflict, disturbances, state of emergency, occupation, destruction, requisition, expropriation or recharacterisation as a criminal matter), the timeline of events and the status of relevant time limits (amicable negotiations, time bars, insurance policies), and the outline of a strategy (treaties and levels of ownership that may be relied upon, available forums, foreseeable defences and enforcement). Following the discussion, the firm may, according to the circumstances, provide a written assessment setting out the available options and the scope of an engagement. The terms for preparing that assessment are specified in advance.

Legal professional privilege applies to the initial discussion under the conditions prescribed by law.

In a confirmed emergency - ongoing destruction or seizure, an imminent time bar, or an enforcement measure to be sought or resisted - the firm gives urgent requests priority and can activate a crisis team (Crisis Room · Praesidium) to coordinate legal action, evidence preservation and parallel approaches to insurers and banks.

ANNEX - AUTHORITIES CITED

Table of instruments and decisions cited

Authorities cited throughout the guide and their significance for practice. Decisions are cited by year. The main text explains their scope and limits.

REFERENCE	SUBJECT	PRACTICAL TAKEAWAY
ICSID, 1965	Convention on the Settlement of Investment Disputes between States and Nationals of Other States	Article 25 (jurisdiction), Article 27 (diplomatic protection and exceptions), Article 49(2) (supplementary decision or rectification: 45 days, new starting date), Articles 51 and 52 (revision: 90 days from discovery, subject to a three-year limit. Annulment: 120 days from the award, with a special rule for corruption), and Articles 54 and 55 (enforcement and immunities).
AAPL, 1990	AAPL v. Sri Lanka (ICSID, ARB/87/3)	First arbitration based directly on a BIT. Full protection and security imposes an obligation of vigilance, not absolute liability.
AMT, 1997	AMT v. Zaire (ICSID, ARB/93/1)	Responsibility for failure to protect against looting. Inaction constituted a breach of the obligation of vigilance. Soldiers looting individually were not regarded as State "forces" within the meaning of the war clause.

Pantechniki, 2009	Pantechniki v. Albania (ICSID, ARB/07/21)	Diligence assessed in light of the circumstances and the State's resources (full protection and security claim dismissed on the merits). Under the fork-in-the-road clause, a claim resting on the same fundamental basis as the action before the local court was inadmissible.
CMS, 2005	CMS v. Argentina (ICSID, ARB/01/8)	Necessity defence rejected. The ad hoc committee (2007) held that interpreting Article XI through customary law was a manifest error of law but declined to annul on that ground. Partial annulment was limited to the finding on the umbrella clause, for failure to state reasons.
LG&E, 2006	LG&E v. Argentina (ICSID, ARB/02/1, decision on liability of 3 October 2006)	Defence upheld under Article XI of the US-Argentina BIT (essential security clause), interpreted in light of necessity, for the most acute phase of the crisis. The period covered matters.
Enron, 2007 · Sempra, 2007	Enron v. Argentina (ICSID, ARB/01/3) and Sempra v. Argentina (ICSID, ARB/02/16)	Necessity defence rejected. The Sempra award was annulled in full and the Enron award in respect of the findings on the defences (Article XI and customary necessity), liability and compensation (2010), illustrating the unsettled state of the law.

ILC, 2001	Articles on Responsibility of States for Internationally Wrongful Acts	Articles 4-11 (organs, governmental authority, control, exercise of governmental authority where required in the absence of official authorities, successful insurrection and adoption of conduct), Article 23 (force majeure), Article 25 (necessity, strict conditions) and Article 27(b) (question of compensation for material loss reserved).
Chorzów, 1928	Factory at Chorzów (PCIJ, merits, Judgment No. 13 of 13 September 1928, Series A No. 17)	Principle of full reparation for a wrongful act: wipe out all its consequences as far as possible. This differs from the compensation due for lawful expropriation.
ECT, 1994	Energy Charter Treaty	Protection of investments in the energy sector. Several Member States withdrew at different dates (effective from December 2023 to August 2026, with withdrawals notified in 2026 taking effect in 2027), as did the EU and Euratom (effective 28 June 2025). The twenty-year survival clause (Article 47(3)) runs from each withdrawal, with no recourse to intra-EU arbitration under EU law. Article 13 governs compensation for expropriation. The modernised text has been partly in force since 3 September 2025, with the remainder applied provisionally from that date, subject to the Parties' declarations and compatibility with their domestic law.

MIGA, 1985	Convention Establishing the Multilateral Investment Guarantee Agency (Seoul)	Insurance against non-commercial risks: war and civil disturbance, expropriation and transfer restrictions. Limited to developing member countries (Article 14). In principle, eligible investments are those implemented after registration of the application or receipt by the Agency of other satisfactory evidence of the intention to obtain its guarantee. Certain categories of existing investments have been eligible since the amendments entered into force on 14 November 2010 (Article 12). Subrogation of the Agency (Article 18).
Everest Estate, 2018	Everest Estate v. Russia (PCA 2015-36, 1998 Ukraine-Russia BIT)	Crimea cases: the treaty was held applicable and jurisdiction upheld over investments in territory that had come under the respondent State's control. Judicial review of the awards continued to evolve as at 29 October 2026.
New York, 1958	Convention on the Recognition and Enforcement of Foreign Arbitral Awards	Regime for recognition and enforcement of non-ICSID awards, with limited grounds for refusal.
The Hague, 1907	Regulations respecting the Laws and Customs of War on Land (annexed to the Fourth Hague Convention)	International armed conflict and occupation: Article 23(g) (destruction and seizure prohibited unless imperatively demanded by the necessities of war), and Articles 46, 52 and 55 (private property, requisitions and administration of public property).

Geneva, 1949 · AP II, 1977	Geneva Conventions (common Article 3 and Fourth Convention, Article 53) and Additional Protocol II	Article 53 of GC IV prohibits destruction by the occupying power except where absolutely necessary for military operations. In non-international armed conflict, examine common Article 3, Protocol II within its scope of application, customary law and other applicable treaties.
ILC, 2011	Draft articles on the effects of armed conflicts on treaties	Article 3: armed conflict does not ipso facto terminate or suspend treaties. Annex (indicative list), point (e). The draft articles do not constitute a treaty.
US-Argentina BIT	Bilateral investment treaty, Article XI	Non-precluded measures clause (public order, essential security interests) at the centre of the Argentine cases.
UNCITRAL	UNCITRAL Arbitration Rules	Ad hoc arbitration, often administered by the PCA (Crimea cases). Recognition under the New York Convention.
Cengiz, 2018	Cengiz v. Libya (ICC, No. 21537/ZF/AYZ, Libya-Türkiye BIT)	Full protection and security and the losses clause applied in the context of the Libyan conflict that began in 2011.
Strabag, 2020	Strabag v. Libya (ICSID Additional Facility, ARB(AF)/15/1)	Armed conflict losses clause and full protection. The award falls outside the Washington Convention's annulment and enforcement regime.

Güriş, 2020	Güriş v. Syria (ICC, No. 21845/ZF/AYZ, seat in Geneva, final award of 31 August 2020, by majority)	The most-favoured-nation clause in the Türkiye-Syria treaty permitted the investor to import the unqualified war clause in the Italy-Syria treaty. The Swiss Federal Supreme Court dismissed the investors' challenge concerning the currency of the award on 8 April 2021.
Naftogaz, 2023	Naftogaz v. Russia (PCA 2017-16, 1998 Ukraine-Russia BIT)	On 19 July 2022, The Hague Court of Appeal set aside the partial award insofar as it concerned investments made before 1 January 1992. The Supreme Court of the Netherlands dismissed the appeals on 6 December 2024. In the challenge to the final award of 12 April 2023, the Court of Appeal reopened argument on 22 September 2026 on partial setting aside and the amounts concerned, reserving its decision.
Oschadbank, 2021-2026	Oschadbank v. Russia (PCA 2016-14), review by the French courts	The award was set aside for lack of jurisdiction ratione temporis (Paris Court of Appeal, 30 March 2021). That judgment was quashed (Court of Cassation, 7 December 2022) and the challenge dismissed on remittal (1 July 2025). On 23 June 2026, the decision of 11 December 2023 dismissing the application for revision was set aside for lack of impartiality on the part of an arbitrator. Russia requested resumption of revision proceedings on 19 July 2026. Judicial review continues to evolve.

Philip Morris Asia, 2015	Philip Morris Asia v. Australia (PCA 2012-12, award on jurisdiction and admissibility)	Restructuring when the dispute was reasonably foreseeable constituted an abuse of rights and rendered the claims inadmissible.
UNGA 1803, 1962	General Assembly resolution 1803 (XVII), Permanent sovereignty over natural resources	The principle supports the power to regulate and does not constitute an independent defence. Appropriate compensation is due in the event of nationalisation (§ 4).
US Model, 2012	US Model Bilateral Investment Treaty (2012), Article 26(1)	Three years from the date on which the claimant knew or should have known of both the alleged breach and the loss suffered by the claimant or its enterprise.
Register of Damage, 2026	Register of Damage Caused by the Aggression of the Russian Federation against Ukraine (Council of Europe)	Claim categories for legal persons began opening on 29 April 2026 and were all open by 30 September 2026. Eligibility, the relationship with arbitration and time limits must be checked.
Claims Commission, 2025	Convention Establishing an International Claims Commission for Ukraine (16 December 2025)	The Convention was not in force on 29 October 2026. Under Article 30(3), twenty-five signatories must have expressed their consent to be bound and their combined contributions must represent at least half of the Register's 2025 budget. The Convention enters into force on the first day of the month following the expiry of three months from the date on which both conditions are met.

EU 2025/1904	Decision (EU) 2025/1904 of the European Parliament and of the Council of 10 September 2025 (agreement on the interpretation and application of the ECT)	The agreement in force excludes intra-EU arbitration under the survival clause. Its effect before arbitral tribunals and the courts of third States remains contested.
Code of Civil Procedure, Article 1519	Code of Civil Procedure, Article 1519, and Decree No. 2026-741 of 6 August 2026	For an international award made in France, the time limit for applying to set it aside is one month from notification, extended by two months if the applicant resides abroad. Check the transitional provisions of the reform taking effect on 1 January 2027.
EU sanctions concerning Russia	Regulations (EU) No. 833/2014 and No. 269/2014, Article 11	Clauses prohibiting the satisfaction of claims connected with contracts affected by restrictive measures. They bear on the claim itself.
Achmea, 2018 · intra-EU agreement, 2020	CJEU, 6 March 2018, Achmea, C-284/16, and Agreement for the termination of intra-EU bilateral investment treaties (5 May 2020)	Arbitration under intra-EU bilateral treaties is foreclosed or seriously compromised.

Main sources

- Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington, 1965), in particular Articles 25, 27, 51, 52, 54 and 55.
- International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts (2001), in particular Articles 4 to 11, 23, 25 and 27, and the commentaries thereto.
- International Law Commission, draft articles on the effects of armed conflicts on treaties (2011), in particular Article 3 and the annex. UN General Assembly resolution 1803 (XVII) of 14 December 1962, Permanent sovereignty over natural resources.

- PCIJ, Factory at Chorzów, merits, Judgment No. 13 of 13 September 1928, Series A No. 17.
- ICSID awards: AAPL v. Sri Lanka (ARB/87/3, 27 June 1990), AMT v. Zaire (ARB/93/1, 21 February 1997) and Pantechniki v. Albania (ARB/07/21, 30 July 2009). ICSID Additional Facility: Strabag v. Libya (ARB(AF)/15/1, 29 June 2020). ICC awards: Cengiz v. Libya (No. 21537/ZF/AYZ, 7 November 2018) and Güriş v. Syria (No. 21845/ZF/AYZ, 31 August 2020). PCA: Philip Morris Asia v. Australia (2012-12, award on jurisdiction and admissibility of 17 December 2015).
- Argentine cases on the state of necessity and the essential security clause: CMS (ARB/01/8, 2005, partial annulment in 2007), LG&E (ARB/02/1, 2006), Enron (ARB/01/3, 2007, partial annulment in 2010) and Sempra (ARB/02/16, 2007, annulment in 2010).
- Crimea cases under the 1998 Ukraine-Russia BIT, including Everest Estate v. Russia (PCA 2015-36, award of 2 May 2018) and Naftogaz v. Russia (PCA 2017-16, final award of 12 April 2023, with decisions on the partial award by The Hague Court of Appeal, 19 July 2022, and the Supreme Court of the Netherlands, 6 December 2024). Oschadbank v. Russia (PCA 2016-14): Paris Court of Appeal, 30 March 2021, Court of Cassation, 7 December 2022, Paris Court of Appeal (on remittal), 1 July 2025, and Paris Court of Appeal, 23 June 2026 (setting aside the arbitral decision of 11 December 2023 on the application for revision).
- Energy Charter Treaty (1994), in particular Articles 13 and 47(3), and the modernised text (Sections A and B of Annex NI in force since 3 September 2025 and the other amendments provisionally applied from that date, subject to the Parties' declarations and compatibility with their domestic law). Withdrawals of Member States (effective from December 2023 to August 2026, with withdrawals notified in 2026 taking effect in 2027) and of the European Union and Euratom (effective 28 June 2025). Decision (EU) 2025/1904 of 10 September 2025 on the approval by the Union of the agreement on the interpretation and application of the Energy Charter Treaty.
- Convention Establishing the Multilateral Investment Guarantee Agency (Seoul, 1985), in particular Articles 12, 14 and 18. US Model Bilateral Investment Treaty (2012), Article 26(1).
- Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958). UNCITRAL Arbitration Rules. Bilateral investment treaty between the United States and Argentina, Article XI. Code of Civil Procedure, Article 1519, and Decree No. 2026-741 of 6 August 2026. Regulations (EU) No. 833/2014 and No. 269/2014, Article 11. CJEU, 6 March 2018, *Achmea*, C-284/16. Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union (5 May 2020). Register of Damage Caused by the Aggression of the Russian Federation against Ukraine (Council of Europe). Convention Establishing an International Claims Commission for Ukraine (16 December 2025).

– Regulations respecting the Laws and Customs of War on Land annexed to the Fourth Hague Convention (1907), in particular Articles 23(g), 46, 52 and 55. Geneva Conventions (1949), including common Article 3, and the Fourth Convention, in particular Article 53. Additional Protocol II (1977) (destruction and requisition, the law of occupation and non-international armed conflicts).

Verification. The law is stated as at 21 November 2026. References were checked as at that date against the instruments and decisions cited.

Keywords

investment arbitration · armed conflict · full protection and security · obligation of vigilance · war clause · compensation for losses · fair and equitable treatment · legitimate expectations · indirect expropriation · state of necessity · force majeure · essential security clause · attribution · 2001 ILC Articles · ICSID · UNCITRAL · BIT · Energy Charter Treaty · survival clause · occupation · MIGA · enforcement of awards · immunity from execution · Hennebel Avocats

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