

Investment Protection and Revolutionary Movements

Finnur Magnússon

1	Introduction	220
2	Evolution of the Investment Protection Regime	221
3	Use of Force and its Effect on Investment Treaties	222
4	Singularities of Protection and Security Investment Protection Through Treaties	225
5	Different Treaty Clauses Involving Varying Scenarios	227
	5.1 Army Takeover of the Investment or Facilities that Form a Part of the Investment	227
	5.2 Damage Owing to War or Other Armed Conflict	228
	5.3 Damage Owing to Revolution, Insurrection and Civil War	231
6	The Concept of Due Diligence	233
	6.1 Duty to Prevent Damage to the Investment	235
	6.2 Duty to Restore the Investor to his Previous Situation	237
	6.3 Duty to Investigate, Charge and Punish Parties Responsible	239
3	Conclusion	242

1 Introduction

Many of the most important principles of international investment law have been greatly influenced by armed conflict between different factions engaged in a struggle for power within a particular state. In his famous obiter dictum, Max Huber concluded that even though a state could not be held responsible for the revolutionary events themselves, it did not exclude the duty of a state to exercise a certain degree of vigilance or diligence. Therefore, if a state was not responsible according to international law for the revolutionary events themselves, it could be held responsible if it did not act to protect foreign nationals and their property.¹

In 2010, popular movements in North Africa toppled governments that have for decades reigned over national industries of considerable size, such as a petroleum industry (Libya) and a tourism industry (Egypt, Algiers and Tunisia). With the social unrest and revolutionary movements of recent years, the question arises what the obligation of states, which have received considerable inflows of capital, might be towards foreign investors, in particular during social unrest or even armed hostilities during civil war.

It is clear and undisputed that states are subjected to various investment standards and as a result have an obligation to protect foreign investments made within their borders. However, it is considerably easier to have an opinion on whether an investment standard providing for a certain level of investor protection has been violated than understanding its legal foundation. While this applies when the host state is able to provide for stability for the investor and his investment, it becomes particularly challenging during events that start as social unrest but later develop into revolutionary disturbances.

Scholars and practitioners have frequently addressed state responsibility within the context of the protection of aliens during revolutionary times of the first half of the 20th century. The US Mexican Claims Commission addressed claims submitted as a result of the revolutionary period in Mexico during the latter half of the 19th century. Case law stemming from the Claims Commission greatly contributed to the development of the concept of due diligence prior to the emergence of a treaty framework providing for the protection of investments. The International Court of Justice addressed the Iranian Government's violation of its obligations during the storming of the US Embassy in Iran in 1979 and the US-Iran Claims Tribunals is still adjudicating disputes that arose as a result of the Iranian revolution. Taking into account the number of judgments and decisions of recent decades, it might come as a surprise that ICSID arbitration tribunals adjudicating disputes between investors and states have generally not dealt with scenarios involving incidents of revolutionary proportions. This reality can also be seen in academia. Earlier scholars dealt extensively with the protection of aliens and

1 See Opinion of Max Huber in the *Spanish Zone of Morocco case* in 2 UNRIAA (1924), p. 615, at 642.

their property during civil wars,² while later scholars have not focused as extensively on the issue.³

The determination of whether a state has become responsible according to international law when different factions within a state engage each other in armed conflict is not an easy task. The general formulation of investment standards, most importantly the full protection and security standard, demands a casuistic approach where all facts are taken into account.⁴ This article will address the nature of a state's obligation during a time of crisis that starts in the form of social unrest but later escalates into civil war. This article proposes to examine the substantive elements derived, firstly, from awards of the US Mexican Claims Commission and, secondly, from ICSID case law in order to contribute to the clarification of the concept of state responsibility within the context of investment protection during civil war. It will discuss the effect of customary international law on treaty based BITs, most notably the full protection and security standard.

2 Evolution of the Investment Protection Regime

One might think that enough ink had been spilt on the issue of state responsibility during a revolutionary crisis. Multiple examples can be found where international courts and tribunals have dealt with attacks on foreigners during social unrest and civil wars.⁵ In the late 1920s, the US-Mexican

2 See e.g. E.M. Borchard, *International Responsibility of the State for Injuries Sustained by Aliens During Civil War*, Proceedings of the American Political Science Association, Vol. 10 (1913), p. 117-124, C. Eagleton, *The Responsibility of States in International Law*, New York University Press (1928), p. 125-156 and M.M. Whiteman, *Digest of International Law*, Vol. 8, Washington DC, Department of State Publications (1967) p. 819 et seq.

3 Exceptions can be found where scholars address the obligations of a state towards investors during armed conflicts. See C. Schreuer, *The Protection of Investment in Armed Conflicts*, Transnational Dispute Management, Advance Publication on 28 June 2011, available at: "www.transnational-dispute-management.com/about-author-a-z-profile.asp?key=792" (visited at 20 August 2016).

4 The full protection and security standard is to be found in most BITs. In recent years, its scope has been overshadowed by a more recent investment standard, the fair and equitable treatment standard. However, the full protection and security standard will most likely continue to be of relevance for two reasons. First, this standard is the only absolute investment standard that obliges a state not only to refrain from taking action that might negatively affect an investment, but also to provide protection from action of *third private parties* that could have adverse effect on an investment. Second, as of late the full protection and security standard has been invoked in connection with state action that goes beyond physical protection and has as a result been expanded to a more abstract kind of security. See C. Schreuer, *International Investment Law*, Oxford University Press 2008, p. 150-151, and G.C. Moss, *Full Protection and Security*, in A. Reinisch, *Standards of Investment Protection*, Oxford University Press 2008, p. 131.

5 For an overview of various cases that dealt with injuries caused to aliens during various civil wars and insurrections during the 19th century, see J. Goebel, *The International Responsibility of States for Injuries Sustained by Aliens on Account of Mob Violence, Insurrections and Civil Wars*, 8 AJIL (1914), p. 802 et seq.

General Claims Commission adjudicated cases dealing with attacks on aliens and damage caused to their property.⁶ Following the hostage taking by Iranian students in November 1979, the United States instigated legal proceedings before the International Court of Justice.⁷ The US-Iran Claims Tribunal is still dealing with legal disputes that arose out of the Iranian revolution and has contributed *inter alia* to the evolution of the concept of “expropriation” in international law.⁸ All of these venues provide for cases that deal with scenarios where a state’s government gradually loses control of the country – a development that starts as social unrest or acts of violence perpetrated by private actors and finally ends in a revolution or civil war.

It must be noted that none of these cases were adjudicated by applying principles forming part of an investor-state investment regime, but with the application of international law through state versus state legal proceedings or through diplomatic protection. The current regime of bilateral investment treaties (BITs) differs from the aforementioned reality as it stems from an initiative designed to provide for investment protection independent of national politics and policies. Following the end of the Second World War, Germany sought to gain control of its foreign private investment. These attempts remained unsuccessful due to the fact that states refused any such German claims by arguing that because Germany had started the illegal war, they could not be entitled to recuperate their foreign investments. This led to an initiative by German businessmen to enter into bilateral investment treaties with the purpose of protecting foreign investment. The result was the first BIT concluded between Germany and Pakistan in 1959.⁹ Therefore, the current investment treaty regime has not dealt extensively with possible violations of foreign investment standards through the prism of revolutionary occurrences. That does not, however, mean that investment treaties are silent about what standards apply during revolutionary occurrences or during civil war.

3 Use of Force and its Effect on Investment Treaties

The effect of armed conflict on the applicability of international treaties is one of the fundamental challenges of international law. It is not only politically sensitive, but also challenging due to its high level of complexity. Will an armed conflict between two states that must fulfill various treaty obligations

6 The General Claims Commission Convention of 8 September 1923 is published in IV UNRIAA (1923), p. 11. One example of the commission’s contribution to international law is the way in which it addressed the international minimum standard of customary international law in the *Neer case*. See *L.F. Neer (USA) v United Mexican States*, IV RIAA (1926), p. 61-62.

7 *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* ICJ, Decision rendered on 24 May 1980, ICJ Reports (1980).

8 C.N. Brower and J.D. Brueschke, *The Iranian-United States Claims Tribunal*, Martinus Nijhoff Publishers (1998), p. 655.

9 C. Schreuer and R. Dolzer, *Principles of International Investment Law*, Oxford University Press (2008), p. 18.

automatically annul those obligations? What is the effect of an armed conflict on the treaty relations between the two states engaged in the conflict and third states? These political challenges were reflected in the work of the International Law Commission during the formulation of the draft articles on the Law of Treaties in 1963. Therefore, the Vienna Convention of the Law of Treaties of 1969 does not address the various problems that can arise concerning the effect of armed conflict on treaties:

The provisions of the present Convention shall not prejudice any question that may arise in regard to a treaty from a succession of States or from the international responsibility of a State or from the *outbreak of hostilities between States*.¹⁰ (emphasis added)

The International Law Commission's study on the effects of armed conflicts on treaties, which resulted in Draft Articles on the topic,¹¹ began where the Vienna Convention left off as it directly applied to the effects of armed conflict on the relations between states under a treaty. However, the concept of armed conflict presents a challenge from the very outset. The Draft Articles take note of this difficulty of addressing the issue through the prism of international conflicts (hostilities between states) and non-international conflicts (resurrections and civil wars). As a result, the Draft Articles distinguish between three scenarios: (i) treaty relations between two states engaged in an armed conflict; (ii) treaty relations between a state engaged in an armed conflict with another state and a third state not party to that conflict; and (iii) the effect of non-international armed conflict on the treaty relations of the state in question with third states. The International Law Commission addressed this third category of conflicts in the following way:

Contemporary developments have blurred the distinction between international and non-international armed conflicts. Non-international armed conflicts have increased in number and are statistically more frequent than international armed conflicts. [...] Non-international armed conflicts could affect the operation of treaties as much as international ones. The draft articles therefore include the effect on treaties of non-international armed conflicts, which is indicated by the phrase "resort to armed force between governmental authorities and organized armed groups".¹²

But what is the effect of armed conflict on the operation of treaties? According to Article 3 of the Draft Articles the existence of an armed conflict does not *ipso facto* terminate or suspend the operation of treaties between state parties to the conflict or between a state party to the conflict and a state that is

10 Vienna Convention on the Law of Treaties, Article 73. 1155 United Nations Treaty Series 331.

11 Draft Articles on the Effects of Armed Conflicts on Treaties, adopted by the International Law Commission at its sixty-third session, in 2011. See Report of the International Law Commission, General Assembly Official Records, Sixty-sixth Session, Supplement No. 10, A/66/10), para 100.

12 Yearbook of the International Law Commission, 2011, Vol. II, Part Two, para 101.

not party to the conflict. In addition, the Draft Articles state in Article 4 that if a treaty contains provisions on its operation in situations of armed conflict, the provisions shall apply. Finally, the Draft Articles prescribe in Article 7 that an indicative list of treaties, which are by implication thought to apply during armed conflict, is to be found in an Annex to the Draft Articles. The list includes reference to “treaties of friendship, commerce and navigation and agreements concerning private rights”.

In its work on the effect of armed conflicts on treaties, the International Law Commission addressed state practice in particular. In the overwhelming majority of cases researched, states had argued that FCN treaties continued to be in force despite hostilities.¹³ However, there is difficulty in focusing on FCN treaties for the simple reason that such a reference does not necessarily lead to the same conclusion with regard to BITs or other agreements dealing with the protection of foreign investment. Furthermore, the scope of FCN treaties is considerably wider compared to BITs. The former group of treaties is generally designed to promote relations of harmony and peace between nations, whereas the latter group of treaties focuses in particular on protecting foreign investors from adverse actions taken by the state or third entities.¹⁴ However, the annex’s reference to “agreements concerning private rights” cannot be interpreted in any other way as to include such international investment agreements, such as BITs, as they deal with property rights and how these rights are affected by state action or inaction and the actions of third parties.

The conclusion must be that, as stated in Article 4 of the Draft Articles, that it is the treaty itself which governs whether its application should be suspended by armed conflict. Such an approach has been argued by scholars. In his modern commentary on international agreements, Professor Anthony Aust noted:

Certain commercial treaties, such as air services agreements may be suspended. Treaties like investment protection agreements may not be suspended, given that their purpose is the mutual protection of nationals of the parties.¹⁵

Therefore, it is important to locate the relevant treaty provisions of a BIT in order to understand the obligation of a state when determining the obligation owed to an investor. It is clear when various provisions of BITs are reviewed

13 UN General Assembly, *The effect of armed conflict on treaties: an examination of practice and doctrine*, Memorandum prepared by the Secretariat, UN Doc. No. A/CN.4/550, para 74.

14 However, both treaties share in part the same purpose, namely to protect foreign individuals and entities. As the jurisprudence of the International Court of Justice reveals, FCN treaties have played an important role in that regard. See e.g. *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* ICJ, Decision rendered on 24 May 1980, ICJ Reports (1980), para 50, and *Oil Platforms (Iran v United States of America)*, ICJ Decision rendered on 6 November 2003, ICJ Reports (2003), para 125.

15 A. Aust, *Modern Treaty Law and Practice*, Cambridge University Press (2000), p. 243-244.

that a number of provisions included in most BITs do address scenarios dealing with armed conflict directly or indirectly.¹⁶ In addition, the state's obligation according to other sources of international law is also of importance despite the fact that a state is subjected to treaty law. As will be discussed a state cannot escape its obligation according to customary international law and general principles of law in its treatment of foreigners that live or are presently located within its borders.¹⁷

4 Singularities of Protection and Security Investment Protection Through Treaties

FCN treaties and investment treaties alike have included provisions prescribing protection and security to aliens that travel or reside in the host country.¹⁸ These provisions are, in their clearest form, independent and without any reference to certain factual scenarios. The full protection and security standard in the Treaty of Amity, Economic Relations and Consular Rights between the United States of America and Iran and the Austria-Saudi Arabia BIT is formulated in the following manner:

Nationals of either High Contracting Party shall receive the most constant protection and security within the territories of the other High Contracting Party.¹⁹

16 UNCTAD, *World Investment Report, FDI Policies for Development: National and International Perspectives*, United Nations (2003), p. 89.

17 When asked whether FCN treaties should be deleted from the list of treaties included in the Annex to the Draft Articles, Professor Lucius Caflisch, special rapporteur on the topic, emphasized that Article 10 applied regardless of the categories included in the Annex. Article 10 of the Draft Articles states: "The termination of or the withdrawal from a treaty, or the suspension of its operation, as a consequence of an armed conflict, shall not impair in any way the duty of any State to fulfil any obligations embodied in the treaty to which it would be subject under international law independently of that treaty." See Report of the International Law Commission, General Assembly Official Records, Sixty-second Session, Supplement No. 10, A/65/10, para 232.

18 For an example of a FCN treaty provision, see the Treaty of Friendship, Commerce and Navigation between Argentina and the United States of 1853. Article 2 stated: "There shall be between the territories of the United States and all the territories of the Argentine Confederation a reciprocal freedom of commerce. The citizens of the two countries, respectively shall [...] generally [...] enjoy, in all their business, the most *complete protection and security*, subject to the general laws and usages of the two countries respectively." (emphasis added) The treaty is available through the Avalon Project at the webpage of Yale law school "avalon.law.yale.edu/19th_century/argen02.asp" (visited 20 August 2016).

19 Article II(4) of the Treaty of Amity, Economic Relations and Consular Rights between the United States of America and Iran.

Investments by investors of either contracting party shall enjoy full protection and security in the territory of the other contracting party.²⁰

However, in other cases the standard is more elaborate and connected with other investment standards and certain factual scenarios where certain government action is specifically targeted. An example of such an approach is the UK-Sri Lanka BIT:

Investments of nationals or companies of either Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable discriminatory measures the management, maintenance, use, enjoyment disposal of investments in its territory of nationals or companies of the other Contracting Party. [...].²¹

Other formulations are frequently used, such as when the standard is formulated with reference to international law or the fair and equitable treatment standard.²² At times the standard is not only included in the same provision as the fair and equitable treatment standard, but also in the same provision dealing with expropriation. The German-Chinese BIT includes a general standard in its Article 2(2),²³ but also specific provision in Article 4(1) which covers expropriation and compensation.²⁴ In other BITs the protection and security standard is included with provisions national treatment and the most-favoured-nation treatment.²⁵

The basic formulation of the standard is the one most often invoked following violations perpetrated against foreign nationals. In the famous *Iranian Hostages case*, the United States referred to various articles of the 1963 Vienna Convention on Diplomatic Relations with regard to the seizure of its embassy in Tehran and the kidnapping of its diplomatic staff. As to the two private US nationals that were also taken hostage, the United States referred to Article II(4) of the Treaty of Amity, Economic Relations and Consular Rights. The International Court of Justice found that Iran had not only violated Article II(4) the Treaty of Amity, Economic Relations and Consular Rights but also its obligations according to general international law:

20 Article 4(1) of the Austria-Saudi Arabia BIT.

21 Article 2(2) of the UK-Sri Lanka BIT.

22 See e.g. Article 3(a) of the United States-Estonia BIT (standard formulated with reference to international law) and Article 2(2) of the Czech Republic-South Africa BIT (standard formulated with the fair and equitable treatment standard).

23 Article 2(2) of the German-Chinese BIT states: "Investments of the investors of either Contracting Party shall enjoy constant protection and security in the territory of the other Contracting Party."

24 Article 4(1) of the German-Chinese BIT states: "Investments by investors of either Contracting party shall enjoy full protection and security in the territory of the other Contracting Party."

25 Article 2(3) of the Egypt-Nigeria BIT.

So far as concerns the two private United States nationals seized as hostages by the invading militants, that inaction entailed, albeit incidentally, a breach of its obligations under Article II, paragraph 4, of the 1955 Treaty of Amity, Economic Relations, and Consular Rights which, in addition to the obligations of Iran under general international law, requires the parties to ensure “the most constant protection and security” to each other’s nationals in their respective territories.²⁶

Thus, the state cannot escape its obligation according to customary international law and general international law when it comes to the protection of aliens within its borders.

5 Different Treaty Clauses Involving Varying Scenarios

The provisions in BITs that deal with the protection and security of foreign investors can be divided into two categories. The first category consists of general provisions that prescribe the general obligation of the host state to provide an investor with protection and security. The second category includes provisions that address specific scenarios whereby the investor loses control of his investment. This chapter will deal with the latter category of investment provisions.

5.1 Army Takeover of the Investment or Facilities that Form a Part of the Investment

Some BITs include provisions that are designed to deal with specific situations. These provisions establish a standard of responsibility for the host state that is limited due to this degree of particularity. As a result, its applicability presupposes that the investor can prove that its substantive requirements have been fulfilled.

An example of this approach is a standard that deals with the government take-over of the investment by the host state’s armed forces. After having described a general standard of full protection and security, the UK-Sri Lanka BIT includes a provision that prescribes the following:

Without prejudice to paragraph (1) of this Article, nationals and companies of one Contracting Party who in any of the situations referred to in that paragraph suffer losses in the territory of the other Contracting Party resulting from

- (a) requisitioning of their property by its forces or authorities, or

²⁶ Case concerning United States Diplomatic and Consular Staff in Teheran (United States of America v Iran) ICJ Decision rendered on 24 May 1980, ICJ Reports (1980), para 67.

- (b) destruction of their property by its forces or authorities which was not caused in combat action or was not required by the necessity of the situation, shall be accorded restitution or adequate compensation [...].²⁷

The effects of this provision is that an investor does not need to prove that the state has acted unlawfully, only that he has suffered damage due to the actions of the state listed in the relevant provision.²⁸ These elements are: (i) the requisition has to be committed by governmental forces or government authorities; (ii) the destruction must not be caused in combat action; (iii) the destruction may not be required by the necessity of the situation.

A provision of this nature became topical in *AAPL v Sri Lanka*, the first ICSID case addressing the full protection and security standard. The investor owned and operated a shrimp farm in Sri Lanka. The army organized and executed a special operation against revolutionary forces under which the investment was completely destroyed. The investor argued that the Sri Lankan army had requisitioned its facilities and subsequently destroyed it. Furthermore, the investor argued that the damage caused to the investment, including the killing of its employees, could not be considered to be planned pursuant to any combat action. And finally, the investor argued that the special operation had been “completely out of proportion” and was not required by the necessity of the situation.²⁹ The tribunal acknowledged the special nature of the provision. According to the tribunal the investor assumed “a heavy burden of proof” by invoking this provision. As it was objectively impossible due to lack of convincing evidence for the tribunal to conclude who had destroyed the investor’s property, it rejected the investor’s arguments.³⁰

5.2 *Damage Owing to War or Other Armed Conflict*

A number of BITs contain provisions dealing with damage owing to war or other armed conflict. These clauses prescribe that an investor should be treated in a certain way if he suffers damage caused during such circumstances. An example of such a provision is the Italy-Egypt BIT. Article 4, which deals with “Compensation for Damage or Loss”, states:

- (1) Investments by nationals or companies of either Contracting party shall enjoy full protection in the territory of the other Contracting Party.
- (2) Nationals or companies of either Contracting Party whose investments suffer losses in the territory of the other Contracting Party owing to war, other

27 Article 4(2) of the UK-Sri Lanka BIT.

28 S. Ripinsky and K. Williams, *Damages in International Investment Law*, British Institute of International and Comparative Law (2009), p. 25.

29 *AAPL v Sri Lanka*, ICSID Case No. ARB/87/3, Award 21 June 1990, 30 ILM 577 (1991) paras 27-29.

30 *AAPL v Sri Lanka*, ICSID Case No. ARB/87/3, Award 21 June 1990, 30 ILM 577 (1991) paras 57-64.

armed conflict, or to other incidents considered as such by the international law [sic], shall be accorded treatment not less favourable by such other Contracting Party than that Party accords to its own nationals or companies, as regards indemnification or compensation.

- (3) Nationals or companies of either Contracting Party shall enjoy most-favoured-nation treatment in the territory of the other Contracting Party in respect of the matters provided for in the present Article.³¹

Here, Articles 4(2)-4(3) do not provide for that the investor should be compensated, but only that he should not be treated less favourably, if nationals of the host state or nationals of third states are compensated. Here, the two relative standards of international law – the standards of national treatment and most-favoured-nation – are used to increase the host state’s level of protection in the event that a higher standard of protection is granted to nationals of the host state or nationals of third states. It is worth noting that this provision does not necessarily mean that the investor should be treated the same way as nationals of the host state or nationals of third states, but that he should not be treated less favourably. Different treatment by the host state that leads to the same result would not necessarily entail a violation of the treaty.

The reference to relative standards in bilateral treaties has turned out to be a complex matter in practice. By referring to either national treatment or most-favoured-nation-treatment the investor seeks to increase the level of protection if cases can be found where investments of nationals or nationals of third states enjoy a higher level of protection. However, international courts and tribunals have been reluctant to widen the scope of the substantive provisions provided for in FCN treaties and BITs. In the *Anglo-American Oil case*, the International Court of Justice denied claims put forth by the United Kingdom following Iran’s nationalization of its oil industry.³² Here, the United Kingdom sought to use a most-favoured-nation provision in its treaty with Iran in order to benefit from more preferential treatment accorded to Danish nationals. The International Court of Justice did not agree with the United Kingdom’s position on jurisdictional grounds,³³ but emphasized the importance of the “basic treaty” within the context of the most-favoured-nation standard:

31 See e.g. Article 5 of the Italy-Egypt BIT and *Waguih Elie George Siag and Clorinda Vecchi v Egypt*, ICSID Case No. ARB/05/15, Award 1 June 2009, para 539.

32 In contrast, tribunals have in individual cases widened the jurisdiction of investment tribunals to deal with legal disputes between investors and states despite the fact that treaty law prescribes that an investor should fulfill certain jurisdictional requirements before commencing arbitration. See *Emilio Augustin Maffezini v Spain*, ICSID Case No. ARB/97/7, Decision of Jurisdiction 25 January 2000, para 54.

33 The treaties, to which the United Kingdom referred in the proceedings, were the Treaty between the United Kingdom and Persia on 4 March 1857 and the Commercial Convention between the United Kingdom and Persia on 9 February 1903. However, Iran had limited its acceptance of the Court’s compulsory jurisdiction to disputes arising after the ratification of its declaration. The declaration was signed on 2 October 1930 and ratified on 19 September 1932. See *Anglo-Iranian Oil Company Case (United Kingdom v Iran)*, Preliminary Objection, Judgment 22 July 1952, ICJ Reports (1952), p. 103 and 108.

...in order [to] enjoy the benefit of any treaty concluded by Iran with a third party by virtue of a most-favoured-nation clause contained in a treaty concluded by the United Kingdom and Iran, the United Kingdom must be in a position to invoke the latter treaty. The treaty containing the most-favoured nation clause is the basic treaty upon which the United Kingdom must rely. It is this treaty which establishes the juridical link between the United Kingdom and a third-party treaty and confers upon that State the rights enjoyed by the third party. A third-party treaty, independent of and isolated from the basic treaty, cannot produce any legal effect as between the United Kingdom and Iran...³⁴

In the context of investment protection in its current form, *AAPL v Sri Lanka* serves as an example about the challenges an investor faces when invoking the most-favoured-nation clause in individual cases. In this case, the investor argued that the fact that the Sri Lanka-Switzerland BIT did not include a “war clause” or a “civil disturbance” clause, should lead to the conclusion that a stricter protection and security standard was applied to investments of Swiss nationals or companies in Sri Lanka. As a result, general international law rules were not to be applied in the case. Due to this higher level of investment protection, the investor invoked the Sri Lanka-Switzerland BIT with reference to Article 3 of the UK-Sri Lanka BIT. The tribunal rejected these arguments by concluding:

Both assumptions are unfounded, as the Tribunal has no reasons to believe that the Sri Lanka/Switzerland Treaty adopted a “strict liability” standard, and the Tribunal is convinced that, in the absence of a specific rule provided for in the Treaty itself as *lex specialis*, the general international law rules have to assume their role as *lex generalis*.³⁵

As the investor was unable to prove that the Sri Lanka-Switzerland treaty contained rules more favourable than those to be found in the UK-Sri Lanka BIT, the tribunal refused the investor’s argument that Article 3 should be invoked in the case.

In another investment case – *AMT v Zaire* – the respondent attempted to employ arguments related to the most-favoured-nation standard. It is important to stress from the outset that the most-favoured-nation standard was not included in the treaty-based full protection and security standard applicable to the dispute. However, the tribunal addressed an argument submitted by the respondent that touched upon national treatment. The case concerned looting that had taken place on two occasions, but it was disputed whether the perpetrators had been government entities or third parties. The respondent argued that it had not violated its obligation to provide protection and security because the claimant had not adduced evidence to show that the state had “accorded in like circumstances a treatment less favourable [...] than

34 See *Anglo-Iranian Oil Company Case (United Kingdom v Iran)*, Preliminary Objection, Judgment 22 July 1952, ICJ Reports (1952), p. 109.

35 *AAPL v Sri Lanka*, ICSID Case No. ARB/87/3, Award 21 June 1990, 30 ILM 577 (1991) para 54.

that accorded to its own nationals or companies.” The tribunal rejected this argument in the following way:

If the argument advanced by Zaire does not seem altogether unfounded, the fact remains that Zaire has manifestly failed to respect the minimum standard required of it by international law. It should be added that Zaire has equally failed to perform a similar obligation with regard to a third state or all other third States. In effect, the argument advanced by Zaire that it has not accorded to nationals and companies of these States any protection or reparation, is not pertinent to the Tribunal. Since the repetition of breaches and failures to perform similar obligations it owes to third States will not in any way exonerate the objective responsibility of the State of Zaire for the breach of its obligation of the treatment of protection and security it owes to AMT by virtue of Article II paragraph 4 of the BIT.³⁶

However, while the tribunal was not susceptible to this line of argument, it did take into account the respondent’s level of development when deciding damages in the case.

5.3 *Damage Owing to Revolution, Insurrection and Civil War*

Numerous BITs include provisions that deal with revolutionary occurrences, state of national emergency, insurrection or riots. These provisions address, in particular, these scenarios, but do not provide for any substantive elements as in the cases of fair and equitable treatment or full protection and security. These provisions are formulated in order to ensure that an investor is not treated less favourable than the host state’s own nationals or nationals of third states when it comes to compensation or indemnification. Article 4(1) of the UK-Sri Lanka BIT states:

Nationals or companies of one Contracting Party whose investments in the territory of the other Contracting Party suffer losses owing to war or other armed conflict, revolution, a state of national emergency, revolt, insurrection or riot in the territory of the latter Contracting Party shall be accorded by the latter Contracting party treatment, as regards restitution, indemnification, compensation or other settlement, no less favourable than that which the latter Contracting Party accords to its own nationals or companies or to nationals or companies of any third State.

This issue became topical in one investment case, *LESI et al v Algeria*, which dealt with security issues that threatened the investment. The relevant BIT included two formulations of the standard, one general in nature³⁷ and another

36 *AMT v Zaire*, ICSID Case No. ARB/93/1, Award 21 February 1997, 36 ILM 1531 (1997), para 6.10.

37 Article 4.1 of the Algeria-Italy BIT prescribes: “Les investissements effectués par des nationaux ou personnes morales de l’un des Etats contractants, bénéficient sur le territoire de l’autre Etat contractant, d’une protection et d’une sécurité constantes, pleines et entières, excluant toute mesure injustifiée ou discriminatoire qui pourrait entraver, en droit ou en

specific to damage caused in war and during revolutionary times.³⁸ The tribunal argued that it could not employ both articles cumulatively, but understood the latter article to be an exception to the general principle of full protection and security – a fact that should lead to a restrictive interpretation.³⁹ The tribunal then entered into an assessment whether the respondent had undertaken measures to ensure the full protection and security of the investor and his investment. The tribunal noted that the parties to the dispute were in agreement that fighting had taken place between government forces and terrorist groups that affected the investment and that the disagreement concerned whether the security measures undertaken by the respondent had been reasonable and not less favourable than that accorded to the respondent's own nationals or nationals of the most favoured nation. The tribunal described the various security measures undertaken by the respondent – these measures included meetings with local authorities to discuss security issues, providing for the services of a private security company to increase security, allocation of army personnel to deal with security issues and other support provided for by the host state's army. Having compared these measures to the treatment accorded to nationals in general, the tribunal then concluded:

The Defendant, having taken several security measures to provide protection to the Group, has fulfilled its obligation of means of protecting the investor treatment no less favorable than that accorded to its own nationals. Section 4.5 of the Agreement is not violated.⁴⁰

The question arises why BITs include provisions of this nature – provisions that only require that damage be caused by the state in question. According to UNCTAD there seem to be two principal reasons. First, the organization argues that customary international law does not state that property destruction caused in military action should be compensated – such provisions are meant to deal with this vacuum of customary international law. Second, the organization notes that the rationale for clauses addressing war and civil disturbance is that these are exceptional situations that are often excluded from investment insurance agreements.⁴¹

fait, leur gestion, leur entretien, leur utilisation, leur jouissance, leur transformation, ou leur liquidation sous réserve des mesures nécessaires au maintien de l'ordre public." See *LESI et al v Algeria*, ICSID Case No ARB/05/3, Award of 12 November 2008, para 173.

38 Article 4.5 of the Algeria-Italy BIT prescribes: "Les nationaux ou personnes morales de l'un des Etats contractants dont les investissements auront subi des pertes dues à la guerre ou à tout autre conflit armé, révolution, état d'urgence national ou révolte survenus sur le territoire de l'autre Etat contractant, bénéficient, de la part de ce dernier, d'un traitement non moins favorable que celui accordé à ses propres nationaux ou personnes morales ou à ceux de la nation la plus favorisée." See *LESI et al v Algeria*, ICSID Case No ARB/05/3, Award of 12 November 2008, para 173.

39 *LESI et al v Algeria*, ICSID Case No ARB/05/3, Award of 12 November 2008, paras 174-175.

40 *LESI et al v Algeria*, ICSID Case No ARB/05/3, Award of 12 November 2008, para 182.

41 UNCTAD, *Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking*, United Nations (2007), p. 52.

6 The Concept of Due Diligence

According to general international law a state is responsible for internationally wrongful acts committed by its organs and public officials. With regard to responsibility of a state for actions of private individuals and entities taken within its borders, the general notion is that the state is not responsible unless special circumstances so dictate – or in other words, the responsibility is not to be presumed.⁴²

Historically, the origins of due diligence as a concept in international law can be linked to occurrences that took place during the American Civil war. In the course of the war, the Confederates commissioned warships to be built in England. These warships later caused considerable damage to the Union ships and that led to claims being made by the United States against Great Britain. According to the Treaty of Washington of 1871 a tribunal was established that was to assess the claims made by the United States according to a set of rules that included the concept of due diligence. The tribunal concluded that Great Britain had not exercised due diligence “in exact proportion to the risks to which either of the belligerents may be exposed, from a failure to fulfil the obligations of neutrality on their part.”⁴³

Therefore, a distinction has to be made between the act of a private party and the act or omission of a state in connection to the private act in question. Here, the conclusion in the *Janes case* – an award of the General Claims Commission dealing with whether Mexico could be held responsible for not having apprehended and punished a murderer of an American – is descriptive of this distinction:

“Nobody contends either that the Mexican Government might have prevented the murder of Janes, or that it acted in any other form of connivance with the murderer. The international delinquency in this case is one of its own specific type, separate from the private delinquency of the culprit. The culprit is liable for having killed or murdered an American national; the Government is liable for not having measured up to its duty of diligently prosecuting and properly punishing the offender. The culprit has transgressed the penal code of his country; the State [...] has transgressed a provision of international law as to State duties.”⁴⁴

Obviously, this case does not deal with investment. However, cases published during the work of the General Claims Commission reveal that a distinction was made between revolutionary movements and government action or inaction with regard to the protection of property. In the *Home Insurance Company case* a dispute arose whether Mexican authorities had failed to take

42 See J. Crawford, *The International Law Commission's Articles on State Responsibility – Introduction, Text and Commentaries*, Cambridge University Press (2002), p. 91-92, and the statement of umpire Max Huber in the *Tanger Horses case* that formed a part of the Spanish Zone of Morocco arbitration, 2 UNRIIAA, p. 699.

43 J.B. Moore, *International Arbitrations*, Vol. I, Government Printing Office (1898), p. 654.

44 *Laura M.B. Janes (USA) v United Mexican States*, IV RIAA (1926), p. 87.

all reasonable measures to protect alien property during the Huerta revolt. The claimant was an insurance company that had paid out compensation due to damage caused to their client's property in Mexico:

The question then arises in this case, Did (sic) the Government of Mexico fail in the discharge of its duty as sovereign to take all reasonable measures to protect the coffee in question. The Commission decides that the record as presented discloses no such failure. The de la Huerta revolt against the established administration of the Government of Mexico – call it conflict of personal politics or a rebellion or a revolution, what you will – assumed such proportions that at one time it seemed more than probable that it would succeed in its attempt to overthrow the Obregón administration. The sudden launching of this revolt against the constituted powers, the defection of a large proportion of the officers and men of the Federal Army, and the great personal and political following of the leader of the revolt, made of it a formidable uprising. President Obregón himself assumed supreme command. Through the vigorous and effective measures taken by the Obregón administration what threatened at one time to be a successful revolution was effectually suppressed within a period of five months from its initiation. General Torruco, who seized and personally receipted for the coffee in question was the military commander of the de la Huerta forces on the Isthmus, including Puerto Mexico and the country contiguous thereto. He succeeded in holding this territory on behalf of the revolutionists under de la Huerta and against the established authorities of the Obregón administration. Communication between Puerto Mexico and the outside world was cut off during a period of nearly five months. In these circumstances the Commission finds that on the record submitted the Government of Mexico, then under the administration of President Obregón, did not fail in the duty which in its sovereign capacity it owed to Westfeldt Brothers to protect their property.⁴⁵

This approach is well documented in the work of the International Law Commission. According to Article 10(1) of the Articles on State Responsibility the conduct of an insurrectional movement that succeeds in becoming the new government of a state is considered an act of that state under international law. Moreover, Article 10(2) states that the conduct of a movement, insurrectional or other, which succeeds in establishing a new state in part of the territory of a pre-existing state or in a territory under its administration shall be considered an act of the new state under international law. Finally, Article 10(3) prescribes that Article 10 is without prejudice to the attribution to a state of any conduct, however related to that of the movement concerned, which is to be considered an act of that state by virtue of Article 4 to 9. It is Article 10(3) which is of particular importance as it addresses the situation when a state, which is fighting a revolutionary movement, is in a position to take action to prevent, prosecute or punish individuals that are a part of the movement, but fails to do so. Here, the failure of a state to protect an investment from an attack by the movement (preventive measures) or

⁴⁵ *Home Insurance Company (United States) v United Mexican States*, IV UNRIAA (1926), p. 52.

prosecute and punish the perpetrators (prosecute or punish measures) is a conduct attributable to the host state.⁴⁶

The question arises what effect it has when no “war provision” or “army take over provision” apply to the investor’s situation. In such cases an investor’s only option is to argue that the host state owes him investment protection according to the general provision of full protection and security. It becomes particularly interesting to assess this obligation of protection and security through the prism of the due diligence principle within the context of the host state’s obligation during a revolt. So, despite the ever growing number of BITs, the general principle must be that state responsibility for private acts which cause damage to an investment is not to be presumed. However, that is not to say that the host state does not have any obligation to prevent attacks on the property of foreign investors and investigate, prosecute and punish those responsible if the revolt is suppressed by the government.

6.1 Duty to Prevent Damage to the Investment

Arbitral practice reveals that arbitral tribunals rely heavily on the customary international law concept of due diligence when applying the full protection and security standard in individual cases. Therefore, the concept becomes important when analyzing the obligation of the state within the context of investment protection during social unrest or revolutionary hostilities.

Even though a government is generally not responsible for damage caused by a revolutionary movement, it still has an obligation to take reasonable measures to prevent that damage be caused to the investment. In the *Sambiaggio case*, the Italian-Venezuelan commission addressed whether a state could be held accountable for actions taken by a revolutionary movement. Article 4 of the Treaty of Amity, Commerce and Navigation between Italy and Venezuela stated that “[t]he citizens and subjects of one state shall enjoy in the territory of the other the fullest measure of protection and security of person and property...”. In its conclusion, the umpire acknowledged both that a distinction should be made between state action and actions of third parties and that the state could only be held accountable for its own actions – not unless special circumstances applied. With regard to this last point, the umpire noted:

The umpire therefore accepts the rule that if in any case of reclamation submitted to him it is alleged and proved that Venezuelan authorities failed to exercise due diligence to prevent damages from being inflicted by revolutionists, that country should be held responsible.⁴⁷

46 Article 10(3) is designed to address exceptional cases where a state can adopt preventive measures but fails to do so. See further J. Crawford, *The International Law Commission’s Articles on State Responsibility – Introduction, Text and Commentaries*, Cambridge University Press (2002), p. 119-120.

47 *Sambiaggio case*, X UNRIAA (1903), p. 524.

Similarly, the claims commission in the *Fischbach and Friedericy cases* addressed the possibility whether a state would incur liability because of actions taken by revolutionists. In this case, individuals had taken the claimants as prisoners, robbed and assaulted them and threatened them with death. These perpetrators were duly recognizable as belonging to the “Libertador Army”. The commission concluded that they could not be considered as individuals but as a part of the revolutionary movement. As to the responsibility of Venezuela, the tribunal noted:

[s]ubstantially all the authorities on international law agree that a nation is responsible for acts of revolutionists under certain conditions such as lack of diligence, or negligence in failing to prevent such acts, when possible, or as far as possible to punish the wrongdoer and make reparation for the injuring.⁴⁸

In *AAPL v Sri Lanka*, the tribunal relied heavily on the due diligence principle of customary international law despite the fact that a clear provision of “full protection and security” applied to the legal dispute in question. The tribunal noted:

Once failure to provide “full protection and security” has been proven (under Article 2(2) of the Sri Lanka/U.K. Treaty or under similar provision existing in other bilateral Investment Treaties extending the same standard to nationals of a third State), the host State’s responsibility is established, and compensation is due according to the general international law rules and standards previously developed with regard to the States failure to comply with its “due diligence” obligation under the *minimum standard* of customary international law.⁴⁹

The International Court of Justice addressed the obligation of Iran to prevent the seizure of the US Embassy in Tehran. The Court acknowledged that Iran was under a treaty obligation to provide for “most constant protection and security” according to the Treaty of Amity, Economic Relations and Consular Rights of 1955. Having stated, in addition, that Iran had the obligation to use all appropriate means according to the Vienna Convention on Diplomatic Relations, it concluded, after having taken into account that Iranian authorities had prevented attacks on other embassies, that “the failure of the Iranian Government to take such steps was due to more than mere negligence or lack of appropriate means.”⁵⁰

The obligation to prevent has played a considerable role in a case involving foreign investment in Egypt. In *Wena Hotels v Egypt*, an investor became aware that a government-controlled company, EHC, which was responsible for Egypt relationship with foreign investors in the country, would take action

48 *Fishbach and Friedericy cases*, X UNRIAA (1903), p. 397-398. See also *Kommerow case*, X UNRIAA (1903), p. 370.

49 *AAPL v Sri Lanka*, ICSID Case No. ARB/87/3, Award 21 June 1990, 30 ILM 577 (1991) para 67.

50 *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* ICJ, Decision rendered on 24 May 1980, ICJ Reports (1980), para 61-68.

against his investment. He requested assurances from the Ministry of Tourism that the license to operate the investment would not be withdrawn and that the government would not seize the investment. Despite assurances given by the Ministry of Tourism, the investment was seized from the investor. The tribunal noted that there was difference of opinion between the parties as to whether the Ministry had authorized the seizure – taking that into account the tribunal concluded:

Although it is not clear that Egyptian officials other than officials of EHC directly participated in the [...] seizures, there is substantial evidence that Egypt was aware of EHC's intentions to seize the hotels and *took no action to prevent* EHC from doing so. Moreover, once the seizures occurred, both the *police and the Ministry of Tourism* took no immediate action to restore the hotels promptly to [the investor's] control.⁵¹ [emphasis added]

Therefore, the obligation to prevent that a part of the state or a private entity causes damage to the investment presupposes that a state must have under its control a system, e.g. a police force, which enables the state to act on a threat that most likely will cause damage to the investment. It is important here to note that the concept of due diligence does not require that the system be of certain design, but rather how the state *uses the resources* at its disposal.⁵² An investor cannot demand that a large police force protect his investment but more importantly, that his investment is sufficiently protected taking into account the circumstances of his position.⁵³

6.2 *Duty to Restore the Investor to his Previous Situation*

A state that commits an international wrong is under the obligation to wipe out the consequences of the illegal act. It is inherent in this obligation to restore the investor to his previous position as far as possible. This approach is reflected in Article 35 of the International Law Commission's Articles on State Responsibility. It states:

A State is responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:

- (a) is not materially impossible;

51 *Wena Hotels Ltd. v Republic of Egypt*, ICSID Case No. ARB/98/4, Award of 8 December 2000, 41 ILM 896 (2002) para 84.

52 H.E. Zeitler, *The Guarantee of "Full Protection and Security" in Investment Treaties regarding Harm caused by Private Actors*, Stockholm International Arbitration Review (2005), p. 12.

53 *Pantechniki S.A. Contractors & Engineers v Republic of Albania*, ICSID Case No. ARB/07/21, Award of 30 July 2009, para 76.

- (b) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.⁵⁴

International courts and tribunals have emphasized that if an unlawful situation arises the state is to restore the situation – namely to the situation that existed prior to the occurrence of the wrongful act. The Permanent Court of Justice provided guidance as to how extensive this obligation of the state might be. When dealing with reparation, the Court argued that the obligation to compensate arose only after restitution in kind was not possible:

Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it – such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.⁵⁵

This principle also forms a part of the due diligence principle. If a state is not able to prevent an occurrence, e.g. because it could not have known that an attack on the investment was to be executed, it has an obligation to restore the investor to his previous position if possible. Therefore, the state's reaction to the actions which affect negatively the investor's position is of considerable importance when assessing whether a state has acted with due diligence. This is particularly clear when an investor loses control of his investment, but the host state has it within its capacity to influence the illegal state of affairs that has occurred. A state which does not take action to restore the investor by handing the investment over to the investor does not exercise sufficient due diligence and violates its obligation.

This became topical in the *Iranian Hostages case*. Here, the International Court of Justice needed to deal with a treaty violation that began with mob violence, but later developed into state acceptance of an international wrong in the form of the storming of an embassy. The treaty violation consisted *inter alia* of failure to protect the inviolability of the premises and the consular staff of the US embassy in Tehran according to the Vienna Convention on Diplomatic Relations. The Court argued:

Its plain duty was at once to make every effort, and to take every appropriate step, to bring these flagrant infringements of the inviolability of the premises, archives and diplomatic and consular staff of the United States Embassy to a speedy end, to *restore* the Consulates at Tabriz and Shiraz to the United States control, and in general to *re-establish* the status quo and to offer reparation for the damage.⁵⁶ [emphasis added]

54 Article 31 is reproduced in the Report of the International Law Commission on the work of its 53rd Session, UN Doc A/56/10 (2001), p. 52.

55 *The Factory at Chorzow (Germany v Poland) (Merits)*, (1928) PCIJ Rep., Ser. A. No. 17, p. 47. See also the discussion of Professor Dupuy in *Texaco Overseas Petroleum Co. and Californian Asiatic Oil Co. v Libya*, 17 ILM 1 (1978), paras 97-109.

56 *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* ICJ, Decision rendered on 24 May 1980, ICJ Reports (1980), para 69.

In *Amco v Indonesia*, the investor had been granted a concession to build and run a hotel. The investor did so with a local partner that later took over the investment. The investor argued that its local co-investor had taken over the hotel with the assistance of the Indonesian army. The tribunal did not go as far as attributing the take over to the Indonesian state. However, it acknowledged that the armed forces had actively assisted in the take over, but such behavior should be considered as a failure to protect the investor:

It is a generally accepted rule of international law, clearly stated in international awards and judgments and generally accepted in the literature, that a State has a duty to protect aliens and their investment against unlawful acts committed by some of its citizens [...] If such acts are committed with the active assistance of state-organs a breach of international law occurs.⁵⁷

Similarly, the arbitral tribunal in *Wena Hotels v Egypt* noted that the investment had been seized by an independent entity established by the government to supervise foreign investment in the country's tourism industry. While acknowledging that a distinction had to be made between the government as such and the government entity, the tribunal was critical about the state's inaction to assist the investor before and after his investment was seized. The tribunal argued:

Even if the Tribunal were to accept this explanation for Egypt's failure to act before the seizures, it does not justify the fact that neither the police nor the Ministry of Tourism took any immediate action to protect Wena's investment after EHC had illegally seized the hotels [...] Egypt could have directed EHC to return the hotels to Wena's control and make reparations. [...] Instead, neither hotel was restored to Wena until nearly a year later [...].⁵⁸

Therefore, the state was not only under the obligation to prevent the seizure before it happened, but had also an obligation to restore the investment after it had been illegally seized by the government-controlled entity.⁵⁹

6.3 Duty to Investigate, Charge and Punish Parties Responsible

As prescribed by Article 10(1) of the Articles on State Responsibility, the conduct of an insurrectional movement, which becomes the new government of a state, is considered an act of that state according to international law. However, if the insurrectional movement fails in its attempt to become the

⁵⁷ *Amco Asia Corporation and Others v. The Republic of Indonesia*, Award, 20 November 1984, 1 ICSID Reports 413, at para 249.

⁵⁸ *Wena Hotels Ltd. v Republic of Egypt*, ICSID Case No. ARB/98/4, Award of 8 December 2000, 41 ILM 896 (2002), paras 88, 90-91.

⁵⁹ See also *Waguih Elie George Siag and Clorinda Vecchi v Egypt*, ICSID Case No. ARB/05/15, Award 1 June 2009, para 448 where the tribunal emphasized the duty of the host state to return the investment to the investor when state courts had decided that the taking of the investment was illegal.

new government, the government will most likely investigate the actions of the main perpetrators, charge them and punish accordingly. Failure to do so can be considered a violation of the due diligence principle of customary international law. Or as described in comments to Article 10(3) of the Articles on State Responsibility:

Exceptional cases may occur where the State was in a position to adopt measures of vigilance, prevention or punishment in respect of the movement's conduct but improperly failed to do so. This possibility is preserved by *paragraph 3* of article 10, which provides that the attribution rules of paragraphs 1 and 2 are without prejudice to the attribution to a State of any conduct, however related to the movement concerned, which is to be considered an act of that State by virtue of other provisions in Chapter II. [...] Thus the failure by a State to take available steps to protect the premises of diplomatic missions, threatened by attack by an insurrectional movement, is clearly conduct attributable to the State and is preserved by paragraph 3.⁶⁰

The due diligence principle obliges states, which have not been able to prevent actions of private entities that cause damage to an investment, to investigate, charge and punish the wrongdoers. This principle has a considerable history. In the *Ziat case*, umpire Max Huber dealt with the issue whether Spain could be held responsible for riots and acts of looting that occurred at Melilla, Spanish Morocco. The umpire held that for Spain to be held responsible, it was necessary to show actual negligence by the Spanish authorities in the prevention of the damage, suppression of the acts perpetrated or in the prosecution of the individuals responsible. With regard to the last issue, the umpire concluded:

Still to be investigated is the possibility of responsibility based on a lack of diligence in the prosecution in connection with the acts of looting. The authorities at once began the prescribed proceeding of a criminal investigation instituted by the military judge and continued by the ordinary criminal court. The investigation resulted in a temporary dismissal owing to insufficient evidence. This negative result is not at all surprising. It is, more over, not alleged that the manner in which the investigation was conducted did not meet the demands of proper administration of justice. Nor is it maintained that the interested party, having instituted legal action against either the State or any civil or military officials he might have considered guilty of negligence, encountered a denial of justice.⁶¹

Tribunals have subjected states to different standards of diligence depending on the circumstances of the case in question. In terms of a state's obligation to investigate, prosecute and punish a tribunal will most likely not find a state responsible for sporadic occurrences of violence that is difficult if not

60 J. Crawford, *The International Law Commission's Articles on State Responsibility – Introduction, Text and Commentaries*, Cambridge University Press (2002), p. 120.

61 See the *Ziat case*, II UNRIIAA (1924), p. 729, reprinted in M.M. Whiteman, *Digest of International Law*, Vol. 8, US Gov Washington DC (1967), p. 741-742.

impossible to predict. If the state begins an investigation into the offence, it has generally fulfilled its obligation of exercising due diligence. In *Parkerings v Lithuania*, the investor entered into an agreement that entitled it *inter alia* to run parking meters in the City of Vilnius. Unknown perpetrators damaged these parking meters and could not be found despite an investigation to the matter. The investor instigated arbitral proceedings and argued that the attempts made by the host state to investigate had not been sufficient. The tribunal rejected these arguments:

The Claimant alleges damages to its materials due to vandalism. However, the Claimant does not show that such vandalism would have been prevented if the authorities had acted differently. The Claimant only contends that the police did not find the authors of this offence. Both parties agree that Lithuanian authorities started an investigation to find the authors of the vandalism [...] The Arbitral Tribunal finds that the record does not show in which way the process of investigation amounted to a violation of the Treaty.⁶²

However, if the state or one of its agencies conducts an operation that is generally thought to increase the level of protection but causes damage to an investment or creates a situation whereby a private entity, e.g. a revolutionary movement, damages the investment, the state could be held responsible. In *AAPL v Sri Lanka*, the tribunal noted that the host state had started a counter-insurgency operation despite its obligation to provide protection and security. The tribunal concluded that the host state was under the obligation to plan a counter-insurgency operation in such a way to minimize killings and destruction of property:

The Tribunal notes in this respect that the failure to resort to such precautionary measures acquires more significance when taking into consideration that such measures fall within the normal exercise of governmental inherent powers – as a public authority – entitled to order undesirable persons out from security sensitive areas. [...] Accordingly, the Tribunal considers that the Respondent through said inaction and omission violated its due diligence obligation which requires undertaking all possible measures that could be reasonably expected to prevent the eventual occurrence of killings and property destructions.⁶³

In another case, *Wena Hotels v Egypt*, the tribunal took note that neither the government entity, EHC, which dealt with investment in Egypt's tourism industry nor its senior officials had been punished for forcibly expelling the investor and illegally possessing the investment. The tribunal argued:

62 *Parkerings-Compagniet A.S. v Lithuania*, ICSID Case No. ARB/05/8, Award of 11 September 2007, paras 356-357.

63 *AAPL v Sri Lanka*, ICSID Case No. ARB/87/3, Award 21 June 1990, 30 ILM 577 (1991) para 54.

Finally, neither EHC nor its senior officials were seriously punished for their actions in forcibly expelling Wena and illegally possessing the hotels for approximately a year. Although several representatives of EHC [...] were convicted for their actions, neither Mr. [K] nor Mr. [M] was sentenced to serve any jail time. Instead, both were fined only EGP 200, which Mr. [M] stated that he has never paid. Also neither official appears to have suffered any repercussions in their careers. As noted above, the Ministry of Tourism chose not to exercise its authority to remove Mr. [K] as Chairman of EHC [...]. Since the seizures, Mr. [M] has been promoted to become the Head of the Legal Affairs Division at EHC and is expecting a further promotion in the near future. This absence of any punishment of EHC and its officials suggest that Egypt condoned EHC's actions.⁶⁴

Needless to say, the tribunal concluded that Egypt had violated its obligations as it has not afforded the claimant with full protection and security.

7 Conclusion

When dealing with damage caused during civil war, arbitral tribunals, old and new, have emphasized the importance of protecting foreign nationals and their interests. However, tribunals have consistently held that as with other private violence, the state cannot be held responsible, not unless special circumstances can be found where it is proven that a state did not take all reasonable measures to protect the investor and his investment.

Despite the remarkable likeness between BITs, their structure and content, they differ with regard to the level of protection they provide during revolutionary times. Here, substantive provisions of BITs can be divided into general standards providing for full protection and security, particular standards providing for security in particular scenarios and provisions addressing civil unrest and revolutionary occurrence.

Needless to say, all revolutionary movements start as private violence against the established government. If such violence affects an investor and his investment, it is to be considered as such, acts of private individuals that the host state must protect the investor against if his investment is to be damaged. However, as the private violence develops into a revolutionary movement, the host state becomes incapable of providing protection. If such a revolutionary movement becomes the established government, it bears the responsibility of the damage caused as prescribed by the International Law Commission's Articles on State Responsibility.

It is difficult to predict in great detail the exact level of protection the host state must provide the investor with. That depends, first, on the level of protection prescribed in the BIT to which the investor is subjected, and, second, to the relevant facts of each case within the context of due diligence. It is this double-sided prism that an arbitrator must adhere to when deciding

⁶⁴ *Wena Hotels Ltd. v Republic of Egypt*, ICSID Case No. ARB/98/4, Award of 8 December 2000, 41 ILM 896 (2002), para 94.

upon state responsibility. While many of the arbitral awards discussed provide for a clearer picture, only future arbitral decisions will make the picture more complete.

