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The Role of International Investment Law in Armed Conflicts, Disputed Territories, and "Frozen" Conflicts – A Workshop Report

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On 1 and 2 March 2019, a group of international humanitarian law (IHL) and international investment law (IIL) experts came together for a workshop at Ruhr-University Bochum, Germany. The event, organized and hosted by Tobias Ackermann (Bochum) and Sebastian Wuschka (Hamburg / Bochum), dealt with the interplay between IIL and the legal regimes that apply in armed or "frozen" conflicts and to disputed territories. Such conflicts heavily expose foreign investments to risks, as already the example of the first BIT-based ICSID case, *AAPL v. Sri Lanka*, shows. While doubts might be raised regarding the benefit IIL could bring to conflict situations, it is ultimately rooted in the minimum standard for treatment of foreigners, which was not only designed to protect foreigners but also foreign property in times of conflict. IIL could therefore even mitigate the effects of conflicts, similar to the goal of IHL. Territorial disputes and "frozen" conflicts raise additional sets of issues from the perspective of IIL. The workshop's purpose was to contribute to the understanding of these complex and multifaceted legal relationships.

Panel 1 – Investment Law and Armed Conflicts

Moderated by Prof. Marco Sassòli (Geneva), the first panel examined whether and how notions from IIL and IHL influence or even exclude each other. First, Dr. Tillmann Rudolf Braun (Berlin) presented on the tension between IIL and IHL with a focus on non-international armed conflicts. He discussed whether IHL or IIL should be considered *lex specialis* in times of conflict, before questioning the value of the *lex specialis* principle given the potential lack of a normative conflict in the strict sense – after all, IHL does not oblige states to destroy foreign investments. Dr. Braun then turned to the meaning of the term "necessity" in BITs as compared to the concept of military necessity in IHL and to how the 'extended war clauses' in BITs relate to other protection standards in the same treaty. Building on the same extended war clauses and notion of "necessity" in IHL and BITs, Ira Ryk-Lakhman (London) argued for continuity across both legal regimes. Her main proposition was that the investment treaty provisions do in fact incorporate certain rules of customary IHL and thereby provide for a continuity between notions from IHL to IIL. The topics of the presentations were discussed lively and passionately among the speakers and workshop participants. The discussion revolved around the transferability of IHL notions to IIL while the positions emphasized the history of the "necessity" terminology on the one hand and the singularity and autonomy of BITs on the other hand.

After a break, Prof. Christina Binder (Munich) elaborated on the effect of occupation and armed

hostilities on investment treaty obligations with a focus on the *force majeure* rule. In her view, this rule can connect the worlds of IIL and IHL in armed hostilities. Her presentation suggested some modifications to the burden of proof threshold for the invocation of *force majeure* in longer lasting conflicts. As the *force majeure* rule could leave investors uncompensated in cases of damages to their investments, Prof. Binder made a case for equity-based compensation in certain cases. Dr. Emily Sipiorski (Hamburg) then set out to identify the limits of the full protection and security investment treaty standard during armed conflicts. She analyzed the effects of different types of interventions in an armed conflict depending on the role that the investor plays therein, e.g. by supporting the intervening state or taking the side of the intervened state. According to Dr. Sipiorski, the standard of protection under IHL as well as IIL's full protection standard will be informed by such considerations. The discussion of the two presentations addressed the relationship of treaty based *force majeure* clauses and the corresponding customary rule of state responsibility in addition to different hypothetical conflict scenarios – in particular from the perspective of the full protection and security standard.

Panel 2 – Investment Law and Disputed Territories

Marco Benatar (Luxembourg) opened the second panel – moderated by Prof. Pierre Thielbörger (Bochum) – with a presentation on investments in disputed maritime zones. After a short introduction about disputed maritime zones and their legal framework, he elaborated on the territorial scope of international investment agreements and in how far they follow or depart from the general rule codified in Article 29 of the Vienna Convention on the Law of Treaties (VCLT). The presentation concluded with a discussion of the positive and negative effects which the exercise of jurisdiction by tribunals could have in certain potential investor-state controversies with an underlying territorial dispute between states. The following discussion focused *inter alia* on the legitimate expectations investors can have with respect to investment protection when choosing to operate in disputed territories.

In the following presentation, Marina Reznichuk (Augsburg / Kyiv) addressed current issues and challenges in the Ukrainian Donbass region. She emphasized the importance of accurately determining the legal status of the occupied territories of Ukraine and the degree of involvement of actors such as Russia in these. She then argued in favor of a special protective legal regime in these areas in order to close existing legal gaps. Her contribution sparked a discussion about the competence to legislate in occupied territories.

The second panel concluded with a presentation via Skype, delivered by Prof. Vasilka Sancin (Ljubljana), on the potential of the European Convention on Human Rights (ECHR) in general and Article 1 of the First Additional Protocol to the ECHR specifically as an alternative to investment arbitration for investors in case of a territorial conflict. Prof. Sancin's assessment included factors such as the duration of the proceedings before the European Court of Human Rights (ECtHR), the possible remedies to be awarded by the Court and the enforcement of judgements, compared to duration, remedies and enforcement of arbitral proceedings and awards. During the subsequent discussion, the experts exchanged views with Prof. Sancin on the admissibility of cases before the ECtHR which have previously been submitted to an arbitral tribunal and related questions, such as issues of double recovery. The workshop participants were in agreement that also the ECtHR would likely be reluctant to engage with questions of territorial sovereignty.

Panel 3 – Investment Law and Annexed Territories and "Frozen" Conflicts

The final panel, moderated by Dr. Isabella Risini (Bochum), raised a number of questions regarding the applicability of investment treaties to conflict territories as well as possible implications of the duty of non-recognition. Precisely the potential contradiction between this duty and the territorial scope of investment treaties was addressed by Sebastian Wuschka, who presented on the difficulties of applying investment treaties in occupied or annexed territories. He argued in favor of a broad interpretation of territorial clauses contained in investment treaties in line with Article 29 VCLT, which – as he stressed – provides that treaties bind states on their "*entire* territory" (see also here). He then illustrated the reasoning recently employed by the Swiss Federal Tribunal, which confirmed two awards on jurisdiction in cases filed by Ukrainian claimants against Russia regarding "internationalized" investments in Crimea (for a summary of the decision, see here). A topic of the ensuing discussion was to what extend also Article 43 of the Hague Regulations could lead to the application of investment treaties in annexed or occupied territories.

For the perspective of the European Union and its free trade agreements, Dr. Stefan Lorenzmeier (Augsburg) shared his views on the lessons the European Union can and should draw from the *Front Polisario* case with regard to the duty of non-recognition. After establishing its content, legal basis and reasons for the application at the European level, Dr. Lorenzmeier elaborated on the effects of said duty for European free trade agreements and investment treaties in general. The discussion recurred to the legal basis of the duty of non-recognition in general international law.

In the last presentation, Prof. Vlada Lisenco (Tiraspol) and Prof. Karsten Nowrot (Hamburg) assessed "national" investment laws in frozen conflict situations by using the example of Transnistria. Prof. Lisenco first offered insights into the legal framework applicable in Transnistria and its differences to the general Moldovan rules for investments. Prof. Nowrot then illustrated Transnistria's situation as an unrecognized state in general, as well as its foreign investment policy in particular, which he compared to international standards of investment protection. The subsequent discussion – in addition to issues of investment law – also focused on the specifics of the situation in Transnistria as a non-recognized territorial entity.

Résumé

In sum, the workshop provided for two days of intense and detailed discussions of an emerging topic in international investment law and arbitration, as well as much food for thought. The discussions at the workshop also showed the need for further reflections on the topics debated in Bochum.

The clarification of the applicable legal framework and its exact content for investment protection in times of armed conflicts will be essential for arbitral tribunals, states and investors alike. The potential normative conflicts between IIL and IHL and the legal insecurity resulting from them may be a serious hurdle to effective investment protection in times of conflict, when foreign investments are especially vulnerable. It is, however, likely that the IIL regime remains applicable in times of armed conflict, as most BITs envisage a conflict scenario and the UN International Law Commission's Articles on the Effects of Armed Conflicts on Treaties also generally establish a presumption of continued application. The extent to which protection is provided, however, will mostly still have to be determined conclusively. The contributors to the workshop dealt with the notion of necessity in that context and asked whether the IIL notion of that term is congruent with the concept of necessity under IHL. An argument for the reconciliation of the two terms and the regimes of IIL and IHL in general, which did not take center stage during the workshop, but might

provide for some insights, is that reconciliation could be achieved through the application of Article 31(1)(c) VCLT in interpreting the investment treaties. In general, the discussion about the interactions between IIL and IHL will potentially also have implications for the overarching discussion about fragmentation and constitutionalism in international law.

Another aspect that needs to be dealt with rather sooner than later is the complicated role of investment tribunals in conflict scenarios, especially in cases that involve disputes concerning territory. While judicial restraint by tribunals in order not to escalate conflicts any further might be wise from a political perspective, it may undermine the very purpose of IIL. Investment tribunals therefore need to find a way to handle the cases before them without explicitly or implicitly taking a stand on the underlying territorial conflict. Only in that way can the law be upheld effectively without fueling a territorial conflict. Whether tribunals could do so by assuming jurisdiction without prejudice to any territorial claims, whether the interpretation of the term "territory" in investment treaties to merely denote *de facto* control over a piece of land as accepted by the Swiss Federal Tribunal is really apposite (see to the contrary, for instance, Prof. Matteo Vaccaro-Incisa's position), or whether other legal bases for effective investment protection regardless of BIT territorial clauses (such as property protection claims before human rights courts) might be a promising alternative, can by far not be considered settled issues. The workshop organizers hope to contribute to the further clarification of these questions by publishing a collection of the papers presented at the workshop.

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