

# Kluwer Arbitration Blog

## Asia ADR Week 2022 Recap: Here Comes Sparta – The Impact of Armed Conflicts on International Arbitrations

Prissilla John (Asian International Arbitration Centre) · Thursday, October 13th, 2022 · Asian International Arbitration Centre (AIAC)

On Thursday, 6<sup>th</sup> October 2022, the Asian International Arbitration Centre (“AIAC”) kickstarted its first-ever hybrid Asia ADR Week conference, themed *Compassus: The Odyssean Course to the Modern ADR* with a session titled *Here Comes Sparta – The Impact of Armed Conflicts on International Arbitrations*.

The insightful discussion was moderated by Dr Ana Maria Daza-Clark (University of Edinburgh) and featured Tan Sri Dato’ Cecil Abraham (Cecil Abraham & Partners), Dr Kabir Duggal (Fordham Law School), Ms Amanda Lee (LML Arbitration), Ms Aisya Abdul Rahman (International Committee of the Red Cross), and Mr Paul Comrie-Thomson (Meredith Connell).

### Foundations of Laws of War/International Humanitarian Law (“IHL”) and International Investment Law (“IIL”)

Dr Duggal started his presentation by explaining the general framework that serves as the foundation of the Laws of War/IHL and IIL. In general, the Laws of War/IHL consists of two closely related but distinct regimes – Law **of** War (*Jus Ad Bellum*) as envisaged in Articles 2(4) and 51 of the [UN Charter 1945](#) and Law **in** War (*Jus in Bello*) as envisaged in the four Geneva Conventions, their accompanying protocols, and other specialized IHL-related legal instruments. When discussing investor-state arbitration, he highlighted the specialized regimes that were introduced in the form of international treaties containing foreign investment protections such as bilateral investment treaties (“BITs”) and multilateral investment treaties (“MITs”).

He also explored the intersection between the Laws of War/IHL and IIL, first, by drawing distinctions between these areas and, second, by focusing on armed conflicts’ impact on the viability and enforceability of BITs. In the context of foreign investment, the provisions of the Fourth Geneva Convention, which deals with protection of civilians, was discussed and contrasted with the prohibition of discrimination and expropriation as provided in the Treaties. He noted that there are limited provisions in BITs that provide remedies for foreign investors in the event of armed conflict such as the “war” clause or the “Denial of Benefits” in case of the absence of diplomatic relations between the states. In this discussion, Dr Duggal posed the pertinent question of whether the tribunal may consider and apply the Laws of War? He noted that whilst such

application is possible, certain conditions such as the need to establish a clear nexus of how the Laws of War impact obligations found within the relevant BIT should be met first. Other considerations include a robust dispute resolution clause and a broad applicable law provision to encompass other obligations outside the treaty. Systemic integration pursuant to Article 31(3)(c) of the [Vienna Convention on the Law of Treaties](#) may be another option to permit greater engagement between these two systems.

Dr Duggal prompted the panel to consider whether the existing regimes are sufficient to address and solve the present armed conflicts between Russia and Ukraine.

### **IHL and International Committee of the Red Cross (“ICRC”)**

Ms Abdul Rahman presented the recent statistics gathered by the ICRC to illustrate the global trends of armed conflicts and its humanitarian impacts. The statistics show that to date, there are more than 100 active armed conflicts happening around the world, and these involve more than 60 countries and more than 100 armed groups. According to Ms Abdul Rahman, since 2000, the number of non-international armed conflicts has doubled. She also mentioned that one in three of these conflicts involves more than three parties and has been ongoing for decades now. Based on this data, she observed that conflicts today are protracted and complex in nature. Some of the compounding factors that lead to conflicts are pandemics, climate change, digital harms and more. From an IHL perspective, these conflicts have various negative effects on humanitarian objectives.

In addition to providing an overview of the ICRC’s roles and missions, Ms Abdul Rahman briefly discussed the basic principles of IHL to businesses in the context of an armed conflict. She further discussed the various types of protections afforded to businesses or companies under IHL, which prohibits attacks against civilians and civilian infrastructure and using them as collateral damage.

Ms Abdul Rahman concluded by highlighting some of the concerns arising in the ICRC. Notable concerns include the rise of Private Military & Security Companies and the advancement of new weapons technology, as well as sanctions and restrictive counter-terrorism measures.

### **Investment Treaty**

Tan Sri Abraham focused on the various protections and remedies that are afforded to foreign investors whose investments are destroyed due to civil war. Such protections and remedies are found in BITs and MITs, such as [ASEAN Trade in Goods Agreement](#), the Trans-Pacific Partnership Agreement, and the Energy Charter Treaty. In the case of armed conflicts, provisions on investment protection entitle the investors to restitution and compensation.

Tan Sri Abraham then addressed the various aspects of international investment law, in particular the application of investment treaties throughout the duration of armed conflicts. When discussing this, Tan Sri Abraham highlighted the role of arbitration under an investment treaty. He emphasised that arbitrators can play a crucial role in interpreting war clauses in investment treaties by providing equal treatment and compensation. Tan Sri Abraham opined that war clauses display a striking diversity in degree in the type of protection afforded. He opined that war clauses should be treated independently and should not be interpreted as replacing other investment protection

standards in the context of war.

In illustrating how tribunals have dealt with civil unrest – Tan Sri Abraham referred to several cases. Notably, he summarized the first ICSID-administered investment treaty-based arbitration, the case of *Asian Agricultural Products Ltd. v. The Republic of Sri Lanka*. This case extensively covers the scope and nature of the host State’s obligations under the Sri Lanka – United Kingdom BIT. Reference was made to [Article 4\(2\) of the said BIT](#), which provides for compensation by the host-state for losses due to civil war. For such provision to apply, three conditions must be satisfied: (1) the destruction of the property only occurred during hostilities, and it was committed by the government forces and authorities, (2) the destruction was caused not only by combat actions but also outside of combat and the destruction must be unjustified destruction, and (3) the destruction was not required by the necessity of the situation.

Tan Sri Abraham also briefly discussed, among others, recent investment disputes involving Turkey and Syria. In *Gu?ri? Construction & Engineering, Inc. v. Syrian Arab Republic*, the tribunal decided in favour of the investor and held that Syria had breached its obligations under the [Turkey – Syria BIT](#)). The tribunal took a due diligence approach, which imposed a higher threshold of liability. He then concluded his presentation by stating that BITs and other investment treaties do provide protection to investors who are affected by civil war and much would depend on the arbitrators who are sitting in the tribunals and how they interpret such clauses in treaties utilising concepts such as fair and equitable treatment.

### **Relevant investment arbitration claims**

Mr Comrie-Thomson discussed some of the most relevant investment arbitration claims brought in the context of Russia’s annexation of Crimea. It was noted that following Russia’s annexation of Crimea in 2014, there were a wide range of investment claims brought forward by Ukrainian nationals against Russia in a variety of different sectors, including claims in oil and gas, civil services, real estate, air transportation and many more. He also shared some considerations about issues of control of territory and occupation.

### **Critical Overview**

Ms Lee played the devil’s advocate and spoke on the coherence of IIL and the legal frameworks surrounding IHL. She explained how foreign investment is protected in times of armed conflict, and the extent to which the outbreak of armed conflict affects the application of investment treaties. She further addressed the growing uncertainty surrounding customary obligations of foreign investment protection during armed conflicts and highlighted that this is exactly where IIL and IHL intersect.

She further elaborated on jurisdictional conflicts in investment treaties and commercial arbitration. Tribunals in investment arbitration have limited power in adjudicating disputes as determination of the subject matter is influenced by the underlying treaties. Addressing compensation, she observed that many investment arbitration tribunals unsatisfyingly favor the application of customary investment protections for foreign investors while commercial arbitration tribunals would hold States accountable for breaching their obligations under the applicable laws and treaties.

## Conclusion

The panel enlightened the audience by discussing how the outbreak of armed conflicts extends far beyond casualties. Apart from destroying an investor's investment, armed conflicts can also result in the termination or suspension of investment treaties which in turn can have a significant impact on the enforceability of BITs and MITs in the long run. This reflects the dichotomy of IHL and IIL, both in theory and practice. To that end, reform of these treaties is necessary given that these treaties are the only way for investors to seek protection in the event of expropriation or civil unrest.

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