GAR Global Arbitration Review

The Guide to Telecoms Arbitration - Third Edition

Civil unrest and investor-state claims in the telecommunications sector

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Civil unrest and investor-state claims in the telecommunications sector

Michael Darowski and **Romilly Holland**
McDermott Will & Emery UK LLP

Summary

The rise in recent years in the number of investor-state disputes in the telecommunications sector has been well documented.[2] The growth in disputes reflects the universal and critical nature of the sector – a functioning telecommunications sector is an essential precondition to economic development[3] – as well as its burgeoning value[4] (the global telecommunications market size is expected to reach US$2.47 trillion by 2028[5]).

Greater demand for cloud-based technology and higher-speed connectivity, as well as the proliferation of consumer-generated multimedia content and the widespread adoption of smartphone devices, all fuel such growth.

The competition to capture a share of this lucrative market is fierce, with several key players 'aggressively investing'[6] in next-generation (5G) network infrastructure, with some commentators dubbing 5G as the driver of the fourth industrial revolution.[7]

Although 5G has chiefly been deployed in South Korea, the United States, Japan, China and Europe, the availability of affordable handsets and high-speed networks will follow in Latin America, the Commonwealth of Independent States, the Middle East, North Africa and sub-Saharan Africa.[8] China, Indonesia and India are earmarked to become 'smartphone superpowers' by 2025, and countries including Brazil, Russia, Pakistan, Nigeria and Bangladesh are in hot pursuit.[9]

Aside from the sheer value of the global mobile telecommunications ecosystem (60 per cent of which is accounted for by mobile operators[10]), a number of factors explain why it lends itself to disputes between investors and states.

First, national telecommunications operators tend to be highly regulated (in particular in developing economies), meaning a high degree of interaction between the investor and host state and, therefore, a high degree of sensitivity on the part of the investor to the states' actions or omissions.

Second, and in keeping with its high-regulated nature, state-owned enterprises (or former state-owned enterprises) often compete with foreign mobile network investors, raising the prospect of discriminatory treatment by the host state in favour of its domestic operator.[11]

Third, the evolution of mobile technology rests on the availability of a scarce resource, namely spectrum (i.e., radio frequencies used for communication over the airwaves). States increasingly consider that spectrum should be allocated in accordance with (national) public interest principles, which again militates against equality of treatment towards foreign investors.[12]

Fourth, many long-term telecommunications operating licences and concession agreements were entered into between states and foreign investors following the liberalisation of markets in the 1990s, when the sector was in its nascent stages and its potential value was not apparent. A belated realisation of the profit opportunities in the sector has prompted certain states to adopt unlawful measures to regain control of operators held by investors or claw back greater value from foreign investors.[13]

Accordingly, in the past couple of decades, investor-state disputes in the telecommunications sector have concerned, inter alia, the adoption of nationalisation measures (***Dunkeld v. Belize***,[14] ***Telecom Italia v. Bolivia***[15] and ***Brandes v. Venezuela***[16]), forced transactions at an undervalue (***Rumeli v. Kazakhstan***[17]), changes in legislation and regulations (***GTH v. Canada***[18]), licence or concession renewal negotiations (***Orange***

v. Jordan,[19] *Neustar v. Colombia*[20] and *Millicom v. Senegal*[21]), the imposition of fines and taxes (*Vodafone v. India*[22] and *Fouad Alghanim v. Jordan*[23]), harassment campaigns waged against foreign operators (*MTS v. Uzbekistan*[24] and *Orascom v. Egypt*[25]) and allegedly discriminatory exclusion of mobile network operators from frequency auctions (-*Huawei v. Sweden*).[26]

As with other industries and sectors, civil or military conflict has been the backdrop to a number of disputes in the telecommunications sector. In such instances, the foreign investor is not necessarily the target of a state's unlawful actions but may suffer collateral damage as a result of the prevailing political circumstances.

For instance, a consortium of investors in Iraq, led by Jordanian investor Itisaluna, were awarded a licence to launch voice data and internet services in 2006, which included the right to operate international gateways. However, from 2008 onwards, amid an increasingly hostile security situation, Iraq adopted a series of measures that made operations impossible, including demanding that Itisaluna should cease operating the gateway and laying optical fibre cables and directing an internet shutdown. Itisaluna and others claimed that Iraq had breached, inter alia, its obligation to protect investors (although the International Centre for Settlement of Investment Disputes (ICSID) tribunal declined jurisdiction to hear the claims).[27]

In 2009, Global Voice Group, a Seychelles-based operator, signed a contract with the Guinean Postal and Telecommunications Regulatory Authority to monitor international calls and determine operator fees and taxes owed to the state. Guinea subsequently alleged that the contract was entered into at a time of profound political instability when there was a military government in place, in violation of principles of international public policy.[28]

In 2010, Penwell Business Limited's holding in Kyrgyzstan's mobile operator Megacom was forcibly transferred to the Kyrgyz State Property Management Fund following the ousting of President Bakiyev in Kyrgyzstan's April 2010 revolution, leading to Penwell filing a US$300 million claim for alleged expropriation.[29]

Crucially, political insecurity and military conflict not only can give rise to the adoption of measures by governments that, in turn, trigger disputes with investors in the telecommunications sector but also can render the resolution of those disputes more complex if the resolution is sought prior to political stability being achieved (whether for commercial or legal reasons).

This requires, therefore, the allegedly wronged telecommunications investor to carefully consider the challenges of bringing a claim against a politically unstable state.

On a purely practical level, such challenges may include a counterparty's failure to participate in the arbitral proceedings (or inability to participate in a timely fashion), which will not necessarily hinder the arbitration from proceeding up to the issuance of a final award but will undoubtedly have consequences for the claimant party (including costs consequences).-[30] For instance, tribunals will need to guarantee the non-participating party's due process rights,[31] and will consequently be highly cautious in their approach to the conduct of the proceedings (not least in light of multiple possible grounds for annulling or resisting enforcement of the resultant award in the absence of one party's participation).[32]

Conflict and instability could equally hinder a claimant party's ability to access documents, witnesses and other evidence, and also to have claims adjudicated before local courts (which

might be a precondition to bringing a claim against the state before an international arbitral tribunal).

Similarly, any attempts at settling a dispute against a state are rendered harder if the state is in political turmoil. In normal circumstances, by contrast, there is a relatively high rate of settlement of investor-state disputes in the telecommunications sector because of the long-term nature of the investor's investment (e.g., a 30-year operating licence) and the fact that operational networks are essential to the everyday functioning of civil society.[33]

For instance, political unrest in Sudan complicated the resolution of a dispute involving local network operator Jet Net, which was building a country-wide wireless communications network under a licence issued to Michael Dagher by the Ministry of Communications. Following the state's alleged failure to provide the promised network frequencies, in 2014, Mr Dagher brought the first ever ICSID case registered against Sudan. Proceedings were suspended in December 2017 and discontinued in August 2020, with extended dialogue between the parties coming amid political unrest in Sudan, which led to the overthrow of the country's former president, Omar al-Bashir, in 2019.[34]

A more academic consideration concerns the extent to which the protections afforded to telecommunications investors by bilateral or multilateral investment treaties may be affected by armed conflicts. Although the dominant narrative suggests that treaties dealing with the protection of foreign investment continue to apply following the outbreak of armed hostilities,[35] certain commentators opine that it may be possible to lawfully suspend the provisions of such treaties once an extensive armed conflict emerges.[36] More specifically, the International Law Commission's Draft Articles on the Effects of Armed Conflicts on Treaties[37] are considered a possible source of relief for states suffering the consequences of war from the obligation to provide compensation for breach of treaty provisions.[38] States might also seek to invoke internal laws to repudiate commercial arbitration agreements, or exercise police powers to interfere with the arbitration process in periods of crisis.[39]

Three key legal questions merit particularly close analysis by investors when contemplating bringing a claim against a state that is in civil conflict, or has been subject to an insurrection, or where competing factions claim to represent the state.

First, who bears responsibility for the damage incurred during the civil unrest? Second, what claims may be available to investors in the event of losses incurred during civil unrest? Third, which regime legitimately represents the state and therefore is the right party against whom to bring the investor's claims?

Each of these questions is examined in turn below.

ATTRIBUTION OF CONDUCT DURING CIVIL UNREST

International law on state responsibility is codified in the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts (the ILC Articles).-[40]

Article 4 of the ILC Articles provides that states are responsible for the acts of their organs, including any person or entity that has that status in accordance with the internal law of the state. States are equally responsible for persons or entities exercising 'elements of the governmental authority' (ILC Articles, Article 5), for those acting on the instructions of, or under the direction or control of, the state (ILC Articles, Article 8), and for conduct adopted by the state as its own (ILC Articles, Article 11).

Thus, in line with the foregoing and in keeping with the principle of continuity (whereby a state's existence and international rights and obligations remain constant despite political and governmental changes), in the normal course of events, a nation is responsible for the actions of its past and present governments.[41] However, internal political or civil unrest can lead to a battle for control for power of sovereignty and the consequent establishment of a *de facto* government displacing the *de jure* government.[42]

Of greater relevance, however, in this context of civil unrest, is Article 10 of the ILC Articles, which provides for the state's responsibility for the actions of an insurrectional movement during civil war:

1. The conduct of an insurrectional movement which becomes the new Government of a State shall be considered an act of that State under international law.
2. 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.

Article 10 thus contemplates scenarios whereby the acts of non-state organs can exceptionally be attributed to a state.[43]

Professor Dumberry adduces the following principles in his seminal analysis of Article 10.[44]

First, he examines the scenario whereby the rebels succeed in establishing a new government and determines that (1) the new government is responsible for acts committed by the previous government and (2) the acts committed by the rebels during the civil conflict are attributable to the state after their victory.[45]

Second, he considers the consequences of an unsuccessful rebellion and determines that the acts committed by rebels are not generally attributable to the state except where (1) the rebels have succeeded in establishing a local *de facto* government (i.e., exercising effective control over part of a state's territory), (2) the rebels are responsible for an expropriation that benefits the state or (3) the state fails to discharge its duties of due diligence obligations to protect foreign investors.[46]

Third, Professor Dumberry considers the scenario whereby the rebels succeed in establishing a new state and determines that (1) the acts committed by the rebels are attributable to the new state but that (2) the new state is not responsible for the acts committed by its predecessor state in fighting the rebels during the civil conflict.[47]

Fourth, he examines the scenario whereby the rebels do not succeed in establishing a new state and concludes that (1) the rebels' acts are not attributable to the state and (2) the state is responsible for its failure to discharge due diligence to protect foreign investors.[48]

The foregoing analysis rests on a definitive determination of whether an insurrection has led to the successful establishment of a new government or state. Accordingly, the effect of the acts of a revolutionary group will be deemed suspended until it emerges as a new government or state. An investor should be aware, therefore, that if it enters into a contract with an insurrectional force, the contract might well not bind the *de jure* government.[49]

Article 10 of the ILC Articles has been little considered in practice by international investment treaty tribunals. Until recently, *AAPL v. Sri Lanka* (discussed further below) was one of the few

cases in which a tribunal had considered state attribution and responsibility in the context of armed conflict. Unrest in the Middle East has prompted other tribunals to examine the issue (although not necessarily through the prism of Article 10).[50] In both ***Strabag v. Libya*** and ***Cengiz v. Libya***, for example, the reasoning of the tribunals has been called into question.-[51] It remains to be seen how future tribunals will approach the subject in light of such criticism and given the growing number of conflicts that require an analysis of attribution and responsibility in the context of armed conflict.

INTERNATIONAL RESPONSIBILITY FOR CONDUCT DURING CIVIL UNREST

Naturally, a distinction is to be drawn between attribution and responsibility: it does not automatically follow that just because the conduct of an insurrectional force is attributable to the state, that state incurs international responsibility for the acts of the insurrectional force. A separate inquiry must be conducted to examine the state's substantive liability as a matter of international law.

The most common claims arising out of civil unrest brought by investors against states include breach of the full protection and security (FPS) standard, breach of the prohibition against expropriation and breach of what are known as war clauses (found only in certain international investment treaties).

The FPS standard is considered to impose a dual obligation on the state: first, the obligation to abstain from engaging in actions that jeopardise an investor's security; and, second, the obligation to protect investors from harmful activities carried out by third parties. The latter obligation is sometimes referred to as an obligation of due diligence.[52]

The contours of the FPS obligation were examined in ***AAPL v. Sri Lanka***, in which an investor's shrimp farm was demolished and the 21 employees lost their lives when the territory in which it was located came under the control of Tamil Tiger rebels. In the event, the tribunal held that FPS could not be construed as providing investors with an absolute guarantee of protection and security and thus did not entail the state's strict liability (following long-established arbitral precedent[53]), as alleged by the investor.[54]

In ***AMT v. Zaire***, soldiers of the Zairian armed forces were alleged to have looted and stolen the investor's property (including batteries and consumer goods). The investor did not allege strict liability but instead succeeded in arguing that Zaire had failed to comply with its obligation of vigilance and care by failing to take every necessary measure to protect and secure AMT's investment.[55] The case concerned two major attacks against AMT, the first of which was unforeseeable (so the tribunal determined), but Zaire should have anticipated the second and taken preventive measures.[56]

In a case arising out of the Arab Spring, the tribunal in ***Ampal v. Egypt*** held that Egypt had failed to protect the physical security of a pipeline from the attacks of saboteurs. The tribunal took the specific circumstances in which the damage occurred into account and determined, following the decision in ***Pantechniki v. Albani***a,[57] that the state's ability to provide FPS in respect of the first attack was inhibited by the prevailing 'political instability, security deterioration and general lawlessness'.[58] However, the state was held liable for subsequent attacks, as they demonstrated the state's failure to implement protection measures, as it had planned, in violation of its obligation of due diligence.[59]

Similarly, in ***Strabag v. Libya***, the tribunal held that FPS must be assessed taking into account the specific circumstances of the case, namely 'weak and uncertain state authority, recurring

armed conflict, and widespread breakdown of the law in wide areas of the country'.[60] The tribunal concluded that 'it was not reasonably possible for the Libyan authorities to take consistent and effective measures to protect the claimant's investment' (although certain reflective losses could be recovered in the event).[61]

In ***Cengiz v. Libya***, the investor entered into a series of construction and infrastructure contracts with a Libyan state entity. Following various acts of violence, destruction and robbery that arose in the context of Libya's civil war in 2011 and 2014, the tribunal awarded some US$50 million to the investor on the grounds that Libya breached its FPS obligation under the Libya–Turkey bilateral investment treaty (BIT).[62]

Documented unlawful expropriations of investors' assets are perhaps less common than breaches of the FPS standard, but the risk of such an expropriation is nonetheless augmented during a period of civil unrest, not least as a fight to gain control of a state will often entail a bid to establish control of certain key infrastructure.

In ***Wena Hotels v. Egypt***, the tribunal held that the state permitted a government-owned hotel company to seize the investor's hotels and strip them of furniture and assets without prompt, adequate and effective compensation (as required by law).[63] Egypt was also found liable for expropriation in the ***Ampal*** case (referred to above), in circumstances where the state terminated a contract with the investor at a time when strong public criticism of a project that supplied gas to Israel was voiced.[64] In ***Olin v. Libya***, a Cypriot investor's investment in a dairy and juice factory in Libya was the subject of a direct expropriation order, without prompt or effective compensation.[65]

Finally, war clauses contained in certain investment treaties expressly provide for compensation to be awarded to qualifying foreign investors for losses arising from civil unrest or armed conflict. A simple war clause creates an even playing field by providing that foreign investors are treated on a par with national investors in relation to state measures such as restitution and compensation. For instance, Article 7 of the Libya–Portugal BIT provides as follows:

> Each Party shall provide to investors of the other Party, whose investments suffer losses in the territory of the first Party owing to war or armed conflict, revolution, a state of national emergency, disobedience or disturbances or any other event considered as such, treatment that restitutes the conditions of these investments that existed before the damage had occurred, or compensation, or any other settlement that is no less favourable than that Party accords to the investments of its own investors, or of any third State, whichever is more favourable. Any payment made under this article shall be, without delay, freely transferable in convertible currency.

Extended war clauses can create additional substantive rights, in that they provide that losses suffered by an investor during a period of civil conflict through requisitioning or destruction of property shall be considered in the same light as losses arising from expropriation where the state's acts are not excused by the defence of necessity.[66]

Extended war clauses have been described as containing 'stringent'[67] requirements, and in neither ***AAPL***[68] nor ***AMT***[69] were the necessary conditions for an award under the

relevant extended war clause met. Nonetheless, they remain an important potential source of protection for investors in jurisdictions where armed conflict has affected their investment.

GOVERNMENT'S STANDING TO REPRESENT THE STATE

The third key question that arises in the context of civil unrest concerns the legitimacy of the regime purporting to bind the state and, therefore, a consideration of the standing of the respondent. This issue is particularly pertinent in situations where different regimes present competing claims to represent the state.

This issue was addressed head on in the case of ***Sabafon v. Yemen***, in which the tribunal was tasked with establishing which of two 'governments' had standing to represent Yemen in arbitration proceedings at the United Nations Commission for International Trade Law brought by an investor in the telecommunications sector under Yemen's investment law – the 'Sana'a' government associated with the Houthi movement and backed by Iran, or the Hadi government backed by Saudi Arabia, among others.[70]

Notwithstanding the Houthis' effective territorial control over the country, the tribunal concluded that the international community's recognition of the Hadi regime was determinative of the question as to which regime represented the state.

[T]here can be no question that the Houthis exercise effective control over the entire territory of Yemen. Accordingly, the Tribunal finds that the facts on the ground do not support the application of the effective control doctrine, or, in other terms, the facts on the ground are not sufficient to disregard the recognition by the international community of the Hadi Government. The Tribunal therefore concludes that the Hadi Government is the legitimate government both as a matter of Yemeni law and international law. The Tribunal is bound to take note of this state of affairs and to draw the necessary conclusions for the present case.[71]

The case (and a very similar decision by the tribunal in ***BUCG v. Yemen***) emphasises that ***de jure*** recognition trumps a competing administration's ***de facto*** control – a notion that is at odds with the practice of determining the attribution of acts to a state (where international recognition has not been a factor taken into consideration).[72] Professor Dumberry observes that there is a practical rationale to adopting this approach:

> Relying on effective control in this context may not be realistic and could create uncertainty given that the answers to the question as to who actually controls what part of the territory may change during the proceedings. In other words, there may be good reasons not to rely on effectiveness in this specific and unique context.[73]

In ***Solerec v. Libya***, a French construction company entered into a settlement agreement with the Tobruk-based government elected to power in 2014, only for Libya to subsequently argue that the agreement should have been entered into with the Tripoli-based government formed in 2015. The tribunal held that the investor was led to believe that it was dealing with the legitimate government but did not determine which was the legitimate government.[74]

Naturally, any investor bringing a claim against a state that is at war should carefully consider whether it is pursuing the government that is recognised by the international community, rather than any other 'government' that asserts its legitimacy on the international stage

by virtue of its effective control of a state or a part or parts thereof. Indeed, it might be worthwhile considering whether it is appropriate to bring a claim against more than one party purporting to represent the state, and allow the adjudicating tribunal to determine the correct state party as a preliminary matter in the proceedings (not least where the investor has had dealings with, for instance, different regulatory bodies or tax authorities).

CONCLUSION

This chapter has examined the vulnerability of the telecommunications sector to the complex consequences of investing in politically unstable regions, where war or civil strife may harm the investment, be it through the actions of the state or third parties. This vulnerability is, in part, the logical corollary of the depth and breadth of the sector's market penetration and a reflection of the sector's critical nature, both during and following periods of conflict. With geopolitical instability and telecommunications technology growing in parallel, we are bound to see many more disputes in this sector. Despite (or perhaps because of) the high returns available, investors would do well to carefully assess the implications of investing in unstable states prior to committing extensive resources. Naturally, political instability is not necessarily foreseeable; therefore, a sound awareness of the telecommunications investor's obligations, protections, risk exposure and risk mitigation options is all the more important.

ENDNOTES

[1] Michael Darowski is a partner and Romilly Holland is counsel at McDermott Will & Emery. The authors are grateful to David Pusztai for his assistance in preparing this chapter.

[2] See, e.g., Romilly Holland, 'Is Spectrum the New Oil? Trends in Investor-State Disputes in the Telecommunications Sector' (2018) ***Dispute Resolution International***-, Vol. 12, No. 2 131; Tiago Duarte-Silva and Milinda Muttiah, 'Mobile telecoms arbitrations: keeping pace with industry growth' (2019) ***Global Arbitration Review*** (-https://globalarbitrationreview.com/mobile-telecoms-arbitrations-keeping-pace-industry-growth (accessed 7 September 2023)); Herbert Smith Freehills, '2020 Survey of TMT Sector Investor-State Arbitration' (24 December 2020) (-https://hsfnotes.com/arbitration/2020/12/24/2020-survey -of-tmt-sector-investor-state-arbitration/ (accessed 7 September 2023)).

[3] GSMA Intelligence, 'The Mobile Economy 2019', 30–31 (-https://data.gsmaintelligence.com/api-web/v2/research-file-download?id=39256194&file=2712-250219-ME-Global.pdf (accessed 7 September 2023)); James Alleman, Carl Hunt, Donald Michaels and others, 'Telecommunications and Economic Development: Empirical Evidence from Southern Africa' (1994) International Telecommunications Society, 6. See also 'The Missing Link – Report of the Independent Commission for World-Wide Telecommunications Development' (1985) ***Telecommunication Journal*** 52 No. 2, 10.

[4] 'Global Telecom Services Market Analysis Report 2021-2028: Focus on Mobile Data Services, Machine-To-Machine Services – ResearchAndMarkets.com', ***Business Wire*** (14 September 2021) (-https://www.businesswire.com/news/home/20210914005664/en/Global-Telecom-Services-Market-Analysis-Report-2021-2028-Focus-on-Mobile-Data-Services-Machine-To-Machine-Services - ResearchAndMarkets.com (accessed 7 September 2023)).

[5] ibid.

[6] ibid. Investments in 5G network infrastructure are already giving rise to investment arbitration claims. See Sebastian Perry, 'Latvia warned of ICSID claim over 5G', ***Global Arbitration Review*** (23 January 2023) (https://globalarbitrationreview.com/article/latvia-warned-of-icsid-claim-over-5g (accessed 7 September 2023)).

[7] KPMG, 'Encouraging 5G Investment: Lessons learnt from around the world (December 2019) (-https://assets.kpmg/content/dam/kpmg/uk/pdf/2019/12/encouraging-5g-investment.pdf (accessed 7 September 2023)).

[8] id., 3.

[9] GSMA Intelligence, 'The Mobile Economy 2019', op. cit. note 3, 16.

[10] id., 20.

[11] See, e.g., ***MTN (Dubai) Limited and MTN Yemen for Mobile Telephones v. Republic of Yemen***, ICSID Case No. ARB/09/7; ***Mobile-Telephony Saba fon v. Republic of Yemen-***, UNCITRAL; ***Orange SA v. Hashemite Kingdom of Jordan***, ICSID Case No. ARB/15/10; ***Public Joint Stock Company Mobile TeleSystems v. Turkmenistan (II)***, ICSID Case No. ARB(AF)/18/4.

[12] See, e.g., Transcript of the Speech of the Honourable Prime Minister of Belize, Dean Barrow, to the House of Representatives (24 August 2009), cited in ***Dunkeld International Investment Limited v. The Government of Belize (I)***, PCA Case No. 2010-13, Award, 28 June 2016, para. 137: 'Telecommunications uses the airwaves as its medium. But these airwaves constitute a God-given natural resource of Belize, just like our sun, our sea, our rivers, our forests. These things together help to make up the patrimony of the Belizean people, and the exploitation of that patrimony must always be consistent with the interests of Belizeans. When those that come to partner with us demonstrate beyond all doubt that they will upend equitability, upend reasonableness, that they will, infamy upon infamy, beat us about our heads with our own inheritance, the very blood coursing through our Belizean veins obliges us to act.'

[13] Holland, op. cit. note 2, 131, 138.

[14] ***Dunkeld International Investment Limited v. The Government of Belize (I)***, PCA Case No. 2010-13.

[15] ***E.T.I Euro Telecom International N.V. v. Plurinational State of Bolivia***, ICSID Case No. ARB/07/28.

[16] ***Brandes Investment Partners, LP v. The Bolivarian Republic of Venezuela***, ICSID Case No. ARB/08/3.

[17] ***Rumeli Telecom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan***, ICSID Case No. ARB/05/16.

[18] ***Global Telecom Holding S.A.E. v. Canada***, ICSID Case No. ARB/16/16.

[19] ***Orange SA v. Hashemite Kingdom of Jordan***, ICSID Case No. ARB/15/10.

[20] ***Neustar, Inc. v. Republic of Columbia***, ICSID Case No. ARB/20/7.

[21] *Millicom International Operations B.V. and Sentel GSM SA v. The Republic of Senegal*, ICSID Case No. ARB/08/20.

[22] *Vodafone International Holdings BV v. Government of India [I]*, PCA Case No. 2016-35.

[23] *Fouad Alghanim & Sons Co. for General Trading & Contracting, W.L.L. and Fouad Mohammed Thunyan Alghanim v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/13/38.

[24] *Mobile TeleSystems OJSC v. Turkmenistan (I)*, ICSID Case No. ARB(AF)/11/4.

[25] *Orascom Telecom Holding v. Algeria*, UNCITRAL.

[26] *Huawei Technologies Co., Ltd. v. Kingdom of Sweden*, ICSID Case No. ARB/22/2.

[27] *Itisaluna Iraq LLC and Others v. Republic of Iraq*, ICSID Case No. ARB/17/10).

[28] *Global Voice Group SA v. Republic of Guinea and Guinean Postal and Telecommunications Regulatory Authority*, ICC Case No. 22467/DDA.

[29] *Penwell Business Limited (by MegaCom) v. Kyrgyz Republic*, PCA Case No. 2017-31) Final Award, 8 October 2021. See also Sebastian Perry, 'Kyrgyzstan trounces telecoms claim' ***Global Arbitration Review*** (12 October 2021) (https://globalarbitrationreview.com/kyrgyzstan-trounces-telecoms-claim (accessed 7 September 2023)).

[30] See, in this regard, The Chartered Institute of Arbitrators' guidelines on 'Party Non-Participation' (https://ciarb.org/media/4204/guideline-9-party-non-participation-2015.pdf (accessed 7 September 2023)).

[31] Claudia T Salomon and Florian Loibl, 'How to Respond to Respondents' Non-Participation in International Arbitration' (2020) ***New York Law Journal***, Vol. 264 No. 28.

[32] Samantha Lord Hill, 'Arbitration of Disputes Arising in Conflict and Post Conflict Zones: Managing the Risks' in Jean Kalicki and Mohamed Abdel Raouf, ***Evolution and Adaptation: The Future of International Arbitration*** (Kluwer Law International, 2020).

[33] See Tiago Duarte-Silva and Milinda Muttiah, 'Mobile telecoms arbitrations: keeping pace with industry growth', ***Global Arbitration Review*** (27 November 2019) (-https://globalarbitrationreview.com/mobile-telecoms-arbitrations-keeping-pace-industry-growth (accessed 7 September 2023)).

[34] Javier Echeverri, 'Parties Agree to Discontinue First Arbitration Against Sudan at ICSID', ***IA Reporter*** (3 August 2020).

[35] See Christoph H Schreuer, 'The Protection of Investments in Armed Conflict' (2012) 3 ***Transatlantic Dispute Management Journal***; Freya Baetens, 'When International Rules Interact: International Investment Law and the Law of Armed Conflict' (2011), 3(1) ***Invest Treaty News*** 1, 11; Meriam Al-Rashid, Ulyana Bardyn and Levon Golendukhin, 'Investment Claims Amid Civil Unrest: Questions of Attribution and Responsibility' (2016) ***International Arbitration Review*** 3 No. 2 181, 197. See also Gleider I Hernández, 'The Interaction Between Investment Law and the Law of Armed Conflict in the Interpretation of Full Protection and Security Clauses' in Freya Baetens (ed.), ***Investment Law Within International Law: Integrationist Perspectives*** (CUP 2013), 21; Ofilio Mayorga, 'Arbitrating War: Military Necessity as a Defense to the Breach of Investment Treaty Obligations', Harvard University Program on Humanitarian Policy and Conflict, Policy Brief (August 2013).

[36] See, e.g., Josef Ostřanský, 'The Termination and Suspension of Bilateral Investment Treaties due to an Armed Conflict' (2015) ***Journal of International Dispute Settlement***, Vol. 6 Issue 1 136.

[37] 'Draft articles on the effects of armed conflicts on treaties, with commentaries' (2011), in ***Yearbook of the International Law Commission***, 2011, Vol. II, Part Two (-https://legal.un.org/ilc/texts/instruments/english/commentaries/1_10_2011.pdf (accessed 7 September 2023)).

[38] Ostřanský, op. cit. note 36, 136.

[39] Reza Mohtashami, 'Protecting the Legitimacy of the Arbitral Process: Jurisdictional and Procedural Challenges in Public-Private Disputes' in Jean Kalicki and Mohamed Abdel Raouf, ***Evolution and Adaptation: The Future of International Arbitration*** (Kluwer Law International, 2020).

[40] 'Responsibility of States for Internationally Wrongful Acts' (2001), in ***Yearbook of the International Law Commission*** (2001), Vol. II (Part Two) (-https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf (accessed 7 September 2023)).

[41] Meriam Al-Rashid, Ulyana Bardyn and Levon Golendukhin, 'Investment Claims Amid Civil Unrest: Questions of Attribution and Responsibility' (2016) ***International Arbitration Review***, 3 No. 2 181, 184.

[42] In ***Luther v. Sagor***, the Court of Appeal of England and Wales held that Wheaton's citation of Montague Bernard correctly encapsulates the distinction between a ***de jure*** and a ***de facto*** government as follows: 'A de jure government is one which . . . ought to possess the powers of sovereignty, though at the time may be deprived of them. A de facto government is one which is really in possession of them, although the possession may be wrongful or precarious' – ***Aksionairnoye Obschestvo Dlia Mechaniches-Koyi Obrabotky Diereva A.M. Luther (Company for Mechanical Woodworking A.M. Luther) v. James Sagor and Company*** [1921] 3 KB 532, [544].

[43] Although the issue is not addressed within the confines of this chapter, we note that Article 9 of the ILC Articles may well also be relevant in assessing how attributable the conduct of insurrectional movements is. Article 9 provides: 'The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.' Insofar as insurrectional movements ***de facto*** 'substitute' the regular state authorities in the absence of the latter, Article 9 may allow the attribution of breaches of investment treaty standards committed by insurrectional movements to the state.

[44] Patrick Dumberry, ***Rebellions and Civil Wars: State Responsibility for the Conduct of Insurgents*** (CUP 2022).

[45] id., 30–31.

46 id., 31.

[47] ibid.

48 id., 32.

[49] Meriam Al-Rashid, Ulyana Bardyn and Levon Golendukhin, 'Investment Claims Amid Civil Unrest: Questions of Attribution and Responsibility' (2016) ***International Arbitration Review***, 3 No. 2 181, 187. Note that the conceptual issue of whether the rules of attribution under the law of state responsibility may properly be relied on to assess whether the conduct of non-state entities (such as insurrectional movements) made the state party to obligations is a matter of some controversy. See, e.g., Martina Magnarelli and Andreas R Ziegler, 'Irreconcilable perspectives like in an Escher's drawing? Extension of an arbitration agreement to a non-signatory state and attribution of state entities' conduct: privity of contract in Swiss and investment arbitral tribunals' case law' (2020) ***Arbitration International***, 36, Issue 4, 509.

[50] See, e.g., ***Strabag SE v. Libya***, ICSID Case No. ARB(AF)/15/1, Award, 29 June 2020; ***Cengiz Inşaat Sanayi ve Ticaret A.S. v. Libya***, ICC Case No. 21537/ZF/AYZ, Final Award, 7 November 2018.

[51] See, e.g., Patrick Dumberry, 'State Responsibility for the Conduct of Rebels in Situations of Unsuccessful Civil Wars: A Critical Analysis of the Cengiz v Libya Case' (2022) ***Journal of International Dispute Settlement***, 13, 153.

[52] Al-Rashid, Bardyn and Golendukhin, op. cit. note 49, 198.

[53] See ***Italy v. Venezuela*** (1903) 10 R.I.A.A, and ***Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)***.

[54] ***Asian Agricultural Products Ltd. v. Republic of Sri Lanka***, ICSID Case No. ARB/87/3.

[55] ***American Manufacturing & Trading Inc. v. Republic of Zaire***, ICSID Case No. ARB/93/1, Award, 21 February 1997.

[56] ibid.

[57] ***Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania***, ICSID Case No. ARB/07/21.

[58] ***Ampal-American Israel Corporation and Others v. Arab Republic of Egypt***, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss, 21 February 2017, paras. 284–85.

[59] ***Ampal-American Israel Corporation and Others v. Arab Republic of Egypt***, op. cit. note 58.

[60] ***Strabag SE v. Libya***, ICSID Case No. ARB(AF)/15/1, Award, 29 June 2020, para. 234.

[61] id., para. 236.

[62] ***Cengiz Inşaat Sanayi ve Ticaret A.S. v. Libya***, ICC Case No. 21537/ZF/AYZ, Final Award, 7 November 2018.

[63] ***Wena Hotels Ltd. v. Arab Republic of Egypt***, ICSID Case No. ARB/98/4) Award, 8 December 2000.

[64] ***Ampal-American Israel Corporation and Others v. Arab Republic of Egypt***, op. cit. note 58.

[65] ***Olin Holdings Limited v. State of Libya***, ICC Case No. 20355/MCP.

[66] An examination of defences available to states (including the defence of necessity) under treaties or international customary law that preclude liability for otherwise wrongful acts exceeds the scope of this chapter.

[67] Schreuer, op. cit. note 35, 14.

[68] *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1990, paras. 54–60.

[69] *American Manufacturing & Trading Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award, 21 February 1997, paras. 7.08–7.09.

[70] *Yemen Company for Mobile Telephony-Sabafon v. The Government of the Republic of Yemen*, UNCITRAL, PCA Case No. 2010-03.

[71] *Yemen Company for Mobile Telephony-Sabafon v. The Government of the Republic of Yemen*, PCA Case No. 2010-03, Procedural Order No. 11, 2 May 2018, para. 80; cited in Mohtashami, op. cit. note 39, 627; see also ***Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen***, ICSID Case No. ARB/14/30.

[72] Mohtashami, op. cit. note 39, 627.

[73] Dumberry, op. cit. note 45, 107.

[74] The dispute was subject to International Chamber of Commerce proceedings, but the tribunals' awards were subsequently set aside on the grounds that the underlying settlement agreement was fraudulent.

Michael Darowski mdarowski@mwe.com
Romilly Holland raholland@mwe.com

110 Bishopsgate, London, EC2N 4AY, United Kingdom

Tel: +44 20 7577 6935

https://www.mwe.com/