Investor Compensation for the Destruction of Investments by Non-Attributable Acts in the Extractive Industry under International Investment Law

by

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Declaration

I declare that this dissertation is my own original work, except where explicitly acknowledged in the text and footnotes, and that it has not been submitted, in whole or in part, for any other degree or qualification at this or any other institution. All sources of information have been duly acknowledged.

Signed: Thomas Martin Kronawetter

Date: 19 July 2026

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List of Abbreviations

ARSIWA:	Articles on Responsibility of States for Internationally Wrongful Acts
BIT:	Bilateral Investment Treaty
ECT:	Energy Charter Treaty
FET:	Fair and Equitable Treatment
FPS:	Full Protection and Security
ICSID:	International Centre for Settlement of Investment Disputes
ILC:	International Law Commission
UNCITRAL:	United Nations Commission on International Trade Law

UNCTAD: United Nations Conference on Trade and Development
VCLT: Vienna Convention on the Law of Treaties

Table of Cases

- American Manufacturing & Trading Inc v Republic of Zaire (ICSID Case No ARB/93/1, Award, 21 February 1997)
- Ampal-American Israel Corp and others v Arab Republic of Egypt (ICSID Case No ARB/12/11, Decision on Liability and Heads of Loss, 21 February 2017)
- Asian Agricultural Products Ltd v Republic of Sri Lanka (ICSID Case No ARB/87/3, Final Award, 27 June 1990)
- Azurix Corp v Argentine Republic (ICSID Case No ARB/01/12, Award, 14 July 2006)
- Bernhard von Pezold and others v Republic of Zimbabwe (ICSID Case No ARB/10/15, Award, 28 July 2015)
- CME Czech Republic BV v Czech Republic (UNCITRAL, Partial Award, 13 September 2001)
- CMS Gas Transmission Co v Argentine Republic (ICSID Case No ARB/01/8, Award, 12 May 2005)
- Corfu Channel (United Kingdom v Albania) (Merits) [1949] ICJ Rep 4
- Factory at Chorzów (Germany v Poland) (Merits) (1928) PCIJ Series A No 17
- Funnekotter and others v Republic of Zimbabwe (ICSID Case No ARB/05/6, Award, 22 April 2009)
- LG&E Energy Corp, LG&E Capital Corp and LG&E International Inc v Argentine Republic (ICSID Case No ARB/02/1, Decision on Liability, 3 October 2006)
- Pantechniki SA Contractors & Engineers v Republic of Albania (ICSID Case No ARB/07/21, Award, 30 July 2009)

Table of Legislation and Treaties

- Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature 18 March 1965, entered into force 14 October 1966) 575 UNTS 159
- Vienna Convention on the Law of Treaties (opened for signature 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331
- Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Democratic Socialist Republic of Sri Lanka for the Promotion and Protection of Investments (signed 13 February 1980, entered into force 18 December 1980)
- Energy Charter Treaty (opened for signature 17 December 1994, entered into force 16 April 1998) 2080 UNTS 95
- International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, annexed to UN General Assembly Resolution 56/83 (12 December 2001)

Abstract

This dissertation examines the legal conditions under which international investment law permits compensation for the destruction of investments caused by non-attributable acts. The research addresses a structural problem within international investment law: political violence frequently causes substantial investment loss without satisfying the rules governing attribution under the general law of State responsibility. The study asks whether investment treaty jurisprudence has

developed a principled legal framework capable of preserving effective investor protection without undermining the restrictive principles of State responsibility.
The research adopts a doctrinal methodology based upon the analysis of bilateral investment treaties, the Energy Charter Treaty, the International Centre for Settlement of Investment Disputes (ICSID) Convention, the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), arbitral jurisprudence and relevant academic commentary. Particular attention is given to the interpretation and interaction of the standards of Full Protection and Security (FPS), war losses clauses, attribution, causation and circumstances precluding wrongfulness.
The dissertation argues that investment treaty jurisprudence has not responded to non-attributable destruction by expanding the rules governing attribution. Instead, arbitral jurisprudence increasingly distinguishes between attribution and treaty breach. Where the harmful conduct itself cannot be attributed to the host State, responsibility is assessed through the State's own conduct, principally by reference to due diligence under the FPS standard. War losses clauses perform a complementary function by regulating the comparative allocation of conflict-related losses rather than establishing fault-based responsibility. Attribution, treaty breach, causation and comparative allocation therefore operate as distinct but interconnected analytical stages within a coherent legal structure.
The extractive sector provides the principal analytical context. Its territorial immobility, capital intensity and prolonged exposure to political instability reveal the strengths and limitations of the current legal architecture with particular clarity. The dissertation demonstrates that extractive investments do not require a separate body of legal rules but constitute a structural stress test for the existing law.
The contribution of this dissertation lies not in the doctrinal shift itself, which arbitral practice has already effected, but in showing that the shift is internally consistent with the general law of State responsibility rather than a departure from it. Tested against the extractive sector, where non-attributable political violence is most severe and most frequent, the resulting model demonstrates that effective investor protection and the restrictive structure of State responsibility are not, in fact, in irreducible tension: properly disciplined due diligence, causation and comparative treatment can reconcile the two.
Keywords: International Investment Law; Investor-State Dispute Settlement; ICSID; State Responsibility; Attribution; Full Protection and Security; War Losses Clauses; Due Diligence; Political Violence; Extractive Industry.

Investor Compensation for the Destruction of Investments by Non-Attributable Acts in the Extractive Industry under International Investment Law

Chapter 1 - Introduction

1.1 Background

International investment law seeks to reconcile two objectives that are equally fundamental but not always easily compatible. Investment treaties aim to provide effective legal protection against political risk, whereas the general law of State responsibility deliberately confines international responsibility to conduct that is legally attributable to the State. Neither objective presents difficulty in isolation. The challenge arises where foreign investments are destroyed by violence that cannot be attributed to the host State. In such circumstances, the law must determine whether treaty protection can remain effective without undermining the limiting function performed by attribution.[1]

This problem is not exceptional. Insurgency, sabotage, terrorism, civil unrest and armed conflict frequently cause extensive damage to foreign investments without satisfying the legal requirements for attribution. The legal question thus becomes whether international investment law contains alternative legal routes capable of responding to such loss consistently with the structure of general international law.[2]

The answer begins with the secondary rules of State responsibility. Under the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), international responsibility requires both attributable conduct and breach of an international obligation. Destruction alone is accordingly insufficient to engage responsibility. Attribution performs a limiting function by distinguishing internationally wrongful conduct from losses that remain part of the political risks ordinarily associated with foreign investment.[3]

That limitation creates a structural tension within investment treaty law. A regime that imposed compensation solely because an investment had been destroyed would move towards territorial or strict liability. Conversely, a regime that denied protection whenever attribution failed would deprive investment treaties of much of their practical significance precisely where political violence creates the greatest vulnerability. The central legal problem is consequently how effective treaty protection can be maintained without abandoning the structural limits of State responsibility.[4]

This dissertation argues that contemporary arbitral jurisprudence has progressively developed an increasingly coherent response to that tension: not by expanding the rules governing attribution, but by distinguishing ever more clearly between attribution and treaty breach. Where the harmful conduct itself cannot be attributed to the State, tribunals increasingly examine whether the host

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[1] Vienna Convention on the Law of Treaties (opened for signature 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 ('VCLT') arts 31–33; International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts*, annexed to UN General Assembly Resolution 56/83 (12 December 2001) ('ARSIWA') arts 1–2, 4–11.

[2] *Asian Agricultural Products Ltd v Republic of Sri Lanka* (ICSID Case No ARB/87/3, Final Award, 27 June 1990); *American Manufacturing & Trading Inc v Republic of Zaire* (ICSID Case No ARB/93/1, Award, 21 February 1997); *Pantechniki SA Contractors & Engineers v Republic of Albania* (ICSID Case No ARB/07/21, Award, 30 July 2009).

[3] ARSIWA (n 1) art 2; James Crawford, Jacqueline Peel and Simon Olleson, 'The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: Completion of the Second Reading' (2001) 12(5) European Journal of International Law 963, 963–966.

[4] ARSIWA (n 1) art 2; *Pantechniki* (n 2); *AAPL* (n 2).

State nevertheless complied with its autonomous treaty obligations governing the protection of foreign investment. The legal inquiry thereby shifts from identifying the perpetrators of the violence to evaluating the legality of the State's own conduct.[5]

This analytical development maintains the restrictive character of attribution while allowing investment treaties to remain effective in situations of non-attributable harm. Responsibility for the violence itself continues to depend upon attribution, whereas responsibility for failure to protect depends upon compliance with conduct-based treaty obligations, most notably the obligation to exercise due diligence. Contemporary investment law consequently reconciles protection and legal restraint without collapsing the separation between non-State violence and internationally wrongful State conduct.[6]

The dissertation examines that development through the particular context of extractive industries. Extractive investments are territorially immobile, capital-intensive and dependent upon long-term political and regulatory stability. These characteristics make extractive investments an especially demanding context in which to test the coherence of the legal framework: they are exposed to forms of political violence for which attribution frequently remains unavailable, while their dependence on effective treaty protection is unusually high. The extractive sector hence functions as a structural stress test, exposing the strengths and limits of that framework under precisely these conditions.[7]

1.2 Research Questions

This dissertation addresses the following central research question:

> To what extent does international investment law permit responsibility for destruction caused by non-attributable acts, and through what legal structure is such responsibility reconciled with the general law of State responsibility in the context of extractive industries?

Three subsidiary questions arise from that inquiry.

First, how does the distinction between attribution and treaty breach determine the availability of international responsibility where investments are destroyed by non-State actors?[8]

Secondly, how do arbitral tribunals apply the concepts of due diligence, foreseeability, proportionality and institutional capacity when assessing whether the host State has complied with its treaty obligations?[9]

Thirdly, what role do the structural characteristics of extractive investments play in the allocation of political violence risk, and how do Full Protection and Security (FPS) and war losses clauses interact within that scheme?[10]

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[5] *AAPL* (n 2) paras 72–77; *AMT* (n 2) paras 6.05–6.10.

[6] *AAPL* (n 2); *Pantechniki* (n 2); ARSIWA (n 1) arts 2 and 4–11.

[7] Energy Charter Treaty (opened for signature 17 December 1994, entered into force 16 April 1998) 2080 UNTS 95 ('ECT'); United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 2024* (United Nations 2024).

[8] ARSIWA (n 1) arts 2 and 4–11.

[9] *AAPL* (n 2) paras 72–77; *AMT* (n 2) paras 6.05–6.10; *Pantechniki* (n 2) paras 76–84.

[10] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Democratic Socialist Republic of Sri Lanka for the Promotion and Protection of Investments (signed 13 February 1980, entered into force 18 December 1980) ('UK–Sri Lanka BIT') arts 2(2) and 4; ECT (n 7) arts 10(1) and 12.

Taken together, these questions examine whether the existing legal regime of international investment law is well-ordered and capable of maintaining effective treaty protection without undermining the limiting principles of the general law of State responsibility. They explore whether responsibility for non-attributable destruction is maintained through a principled differentiation between attribution, treaty breach and comparative compensation rather than through any expansion of the rules governing attribution.[11]

1.3 Aim and Scope

The aim of this dissertation is narrower than the research question alone might suggest. It asks whether investment treaty jurisprudence has developed a systematic interpretive framework capable of preserving effective investor protection without departing from the limiting principles of the general law of State responsibility. The central issue is not whether investors should receive compensation whenever political violence causes substantial loss, but whether responsibility can be established without expanding the rules governing attribution.[12]

For the purposes of this dissertation, consistency refers to a legal framework that preserves the divide between attribution and treaty breach. It applies the same legal criteria when assessing due diligence, foreseeability, proportionality, feasibility and institutional capacity. These factors do not constitute separate legal tests but inform the application of a single, context-sensitive due-diligence standard. The question addressed throughout this study is therefore whether effective investor protection and the structural limits of State responsibility can coexist within a disciplined doctrinal order.[13]

The analysis is confined to investment treaty obligations, arbitral jurisprudence and the relevant principles of public international law. It does not attempt a comprehensive examination of political risk insurance, contractual stabilisation mechanisms or domestic remedies except where those subjects assist in explaining the operation of treaty-based responsibility. This limitation reflects the research question itself, which concerns the legal structure of international responsibility rather than the wider range of commercial mechanisms available for managing political risk.[14]

The extractive sector provides the principal factual setting for the analysis because it exposes the structural limitations of attribution with particular clarity. Extractive investments are territorially immobile, capital-intensive, infrastructure-dependent and typically long-term. The sector hence functions as a structural stress test through which the operation of attribution, treaty breach and conduct-based obligations can be examined under conditions of heightened political instability.[15]

The sector provides the factual context through which a broader conceptual question is examined: how international investment law responds where severe investment loss occurs despite the absence of attributable State conduct. The analysis therefore seeks to explain the operation of general principles of investment treaty law instead of constructing a sector-specific model of responsibility.[16]

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[11] VCLT (n 1) arts 31–33; ARSIWA (n 1) arts 2, 20–25 and 31.
[12] VCLT (n 1) arts 31–33; ARSIWA (n 1) art 2.
[13] ARSIWA (n 1) arts 2 and 4–11; *AAPL* (n 2) paras 72–77; *Pantechniki* (n 2) paras 76–84.
[14] VCLT (n 1) arts 31–33.
[15] Crawford, Peel and Olleson (n 3).
[16] *Pantechniki* (n 2) paras 76–84; *LG&E Energy Corp, LG&E Capital Corp and LG&E International Inc v Argentine Republic* (ICSID Case No ARB/02/1, Decision on Liability, 3 October 2006) paras 226–245.

1.4 Methodology

This dissertation adopts a doctrinal methodology because the research question concerns the legal conditions under which international investment law permits responsibility for destruction caused by non-attributable acts. The central issue is one of legal interpretation rather than empirical investigation. Resolving that issue requires analysis of treaty obligations, customary international law, arbitral jurisprudence and scholarly commentary.[17]

Two alternative methodologies were considered and rejected. An empirical approach, quantifying outcomes across the population of investment awards involving political violence, was rejected because the number of awards squarely addressing non-attributable destruction remains too small to support statistically meaningful inference, and because the research question concerns the content of legal reasoning rather than the frequency of particular outcomes.

A comprehensive comparative survey across all investment treaties and regions was similarly rejected in favour of the paradigmatic case selection explained below, since exhaustive coverage would sacrifice the depth of analysis the doctrinal problem requires.

The analysis is grounded principally in bilateral investment treaties (BITs), the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), the Energy Charter Treaty (ECT) and the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA). Treaty provisions are interpreted in accordance with Articles 31–33 of the Vienna Convention on the Law of Treaties (VCLT), with particular attention to the relationship between primary treaty obligations and the secondary rules governing State responsibility.[18]

Investment arbitration does not operate through a formal doctrine of *stare decisis*. Arbitral awards thus constitute persuasive rather than binding authority. Accordingly, this dissertation examines whether arbitral jurisprudence has developed a principled analytical approach to disputes arising from non-attributable destruction.[19]

Particular emphasis is placed on *Asian Agricultural Products Ltd v Republic of Sri Lanka* (AAPL), *American Manufacturing & Trading Inc v Republic of Zaire* (AMT), *Pantechniki SA Contractors & Engineers v Republic of Albania* (Pantechniki) and *LG&E Energy Corp, LG&E Capital Corp and LG&E International Inc v Argentine Republic* (LG&E). These awards were selected because each contributes a discrete element to the conceptual framework examined in this dissertation.[20]

The selection of these awards reflects three considerations. First, each represents a significant stage in the development of the law. *AAPL* distinguishes responsibility for the harmful act from responsibility for the State's own conduct.[21] *AMT* shows that prolonged governmental inaction may itself constitute a treaty breach.[22] *Pantechniki* identifies institutional capacity as a relevant consideration when assessing due diligence under conditions of widespread civil unrest.[23] *LG&E*

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[17] University of Cumbria, *Quick Guide to Dissertations and Research Projects* (February 2026); Christoph Schreuer, 'Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road' (2004) 5(2) Journal of World Investment & Trade 231.

[18] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature 18 March 1965, entered into force 14 October 1966) 575 UNTS 159; ECT (n 7); VCLT (n 1) arts 31–33; ARSIWA (n 1) arts 1–2.

[19] *AAPL* (n 2); *AMT* (n 2); *Pantechniki* (n 2); *LG&E* (n 16).

[20] *AAPL* (n 2) paras 72–77.

[21] *AAPL* (n 2) paras 72–77.

[22] *AMT* (n 2) paras 6.05–6.10.

[23] *Pantechniki* (n 2) paras 81–82.

illustrates that exceptional systemic crises may influence the assessment of State conduct without displacing the underlying treaty obligations.[24]

Considered together, these awards demonstrate the development of conduct-based responsibility within the limits imposed by the general law of State responsibility.[25]

Secondly, the selected awards were chosen because they illuminate the legal questions addressed in this dissertation rather than because they support a predetermined conclusion. The inclusion of *Pantechniki*, in which the claimant was unsuccessful, confirms that the analysis evaluates legal reasoning rather than constructing an investor-oriented narrative.[26]

Thirdly, the dissertation adopts a paradigmatic rather than exhaustive approach. Instead of surveying every investment dispute involving political violence, it concentrates on the leading awards that most clearly explain the governing legal principles and their application to non-attributable destruction.

The methodology is both explanatory and evaluative. It examines how arbitral tribunals have resolved disputes involving non-attributable destruction and assesses whether the resulting jurisprudence provides a coherent and principled framework for investment protection. Particular attention is devoted to the interaction between attribution, treaty breach, due diligence, causation and comparative protection.[27]

A doctrinal methodology is particularly appropriate because the central problem examined is structural rather than empirical. Resolving that problem depends upon the interaction between primary treaty obligations, the secondary rules of State responsibility and the interpretative reasoning developed in arbitral jurisprudence.[28]

Doctrinal analysis cannot, however, be confined to the interpretation of legal texts alone. Although investment arbitration does not recognise a formal doctrine of precedent, tribunals regularly engage with earlier awards when developing legal reasoning. The jurisprudence is accordingly examined as an evolving body of persuasive authority in which concepts including attribution, due diligence, foreseeability, proportionality, institutional capacity, causation and comparative treatment have been progressively refined through successive decisions.

1.5 Structure of the Dissertation

This dissertation is organised into six chapters. The argument moves from the general law of State responsibility to the treaty mechanisms through which investment protection may continue to operate even where destruction is caused by non-attributable acts.

Chapter 2 establishes the doctrinal foundations of the analysis. It examines the legal structure governing non-attributable destruction through treaty standards, war losses clauses, Full Protection and Security, attribution, causation, treaty interpretation and circumstances precluding wrongfulness.

Chapter 3 examines the development of arbitral jurisprudence. It analyses the relationship between attribution and breach, the operation of due diligence, the allocation of the burden of proof and the emergence of conduct-based responsibility in the leading ICSID awards.

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[24] *LG&E* (n 16) paras 226–261.

[25] *AAPL* (n 2); *AMT* (n 2); *Pantechniki* (n 2); *LG&E* (n 16).

[26] ARSIWA (n 1) arts 2, 31; Kathryn Greenman, 'Of War and International Investment Law' (2024) 73 International and Comparative Law Quarterly 579, 581.

[27] VCLT (n 1) arts 31–33; ARSIWA (n 1) arts 1–2.

[28] ARSIWA (n 1) arts 2 and 4–11; International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries (2001) II(2) Yearbook of the International Law Commission.

Building upon the doctrinal framework established in Chapters 2 and 3, Chapter 4 analyses war losses clauses as an autonomous treaty mechanism. It examines their relationship with Full Protection and Security and argues that the two standards address different legal consequences arising from the same factual circumstances. Particular attention is given to the sequential relationship between attribution, treaty breach, comparative treatment, causation and reparation.
Chapter 5 evaluates the broader implications of the jurisprudence through the context of extractive industries. It examines the relationship between investor protection, State capacity and political violence, and assesses whether current doctrine maintains an acceptable balance between effective treaty protection and the limiting principles of State responsibility.
Chapter 6 synthesises the findings and answers the central research question. It argues that contemporary investment law has preserved protection not by expanding attribution, but by differentiating the legal functions of attribution, treaty breach and comparative protection.

Chapter 2 - Doctrinal Structure of Responsibility for Non-Attributable Harm

Introduction

Non-attributable destruction presents one of the principal conceptual challenges of present-day international investment law. Where the harmful conduct cannot be attributed to the host State, responsibility for that conduct does not arise under the general law of State responsibility. The analysis does not end there, however. Investment treaties impose autonomous obligations capable of engaging responsibility through the State's own conduct, irrespective of the identity of those who caused the underlying harm.[29]
This chapter establishes the doctrinal framework governing claims arising from non-attributable destruction. It examines the interaction between treaty standards, attribution, causation, compensation, treaty interpretation and circumstances precluding wrongfulness. The central argument is that contemporary investment law neither departs from the restrictive principles of State responsibility nor imposes strict liability. Instead, it distinguishes between different legal bases of responsibility, thereby retaining investment protection without expanding the limits of State responsibility.[30]

2.1 Foundations of International Investment Protection

International investment law determines the legal conditions under which destruction becomes compensable, and it is worth being precise about what that premise excludes. Responsibility does not arise from the occurrence of loss alone, but from the interaction between primary treaty obligations and the secondary rules governing State responsibility.[31]
The emergence of investor-State arbitration transformed the enforcement of investment treaties by granting investors direct access to international adjudication. It did not, however, alter the legal conditions governing State responsibility. Where destruction is caused by non-State actors, attribution remains subject to the general rules of international law, while treaty obligations continue to regulate the conduct expected of the host State.[32]
The analysis proceeds through three interconnected dimensions. It first examines the substantive standards of protection contained in bilateral investment treaties. It then considers the procedural

[29] VCLT (n 1) arts 31–33; ARSIWA (n 1).
[30] ARSIWA (n 1) arts 1–2; VCLT (n 1) arts 31–33.
[31] ARSIWA (n 1) arts 1–2; *AAPL* (n 2) paras 72–77.
[32] ECT (n 7); Greenman (n 26).

architecture of investor-State arbitration before analysing the characteristics of extractive investments as the principal context in which claims arising from non-attributable destruction are assessed.[33]

2.1.1 Bilateral Investment Treaties and Core Standards

Bilateral investment treaties provide the substantive legal basis for claims arising from destruction caused by non-attributable acts. They do not establish a general entitlement to compensation whenever an investment is damaged or destroyed. Rather, they define the legal conditions under which responsibility and compensation may arise by creating distinct but complementary standards of protection.[34]

These complementary standards of protection did not emerge from arbitral awards alone; they rest on a doctrinal understanding that predates, and continues to shape, the jurisprudence examined below. Dolzer and Schreuer describe FPS as an obligation of vigilance, requiring the host State to exercise reasonable care to prevent harm to the investment rather than to guarantee a particular outcome; the standard is consequently one of conduct, not of result. War losses clauses, by contrast, are treated in the same literature as a different and older device of treaty practice, whose function is to guarantee comparative, non-discriminatory treatment once conflict-related loss has occurred, independently of any finding of fault on the part of the host State. Salacuse situates both standards within the broader historical development of investment treaties as instruments for managing political risk, while Cameron highlights that this managerial function is particularly pronounced in the energy and extractive sectors, where capital-intensive and territorially immobile projects bear a disproportionate share of that risk.

Understood in this light, the conceptual distinction between conduct-based and comparative protection developed in this dissertation is not a novel construction drawn from isolated awards, but a restatement, in the specific context of non-attributable destruction, of a functional division that has long been recognised in the scholarship on investment treaty standards.[35]

Two treaty standards are central to this analysis: Full Protection and Security (FPS) and war losses clauses. Although both become relevant in situations involving political violence, they perform different legal functions. FPS evaluates whether the host State exercised the degree of due diligence required to protect foreign investments in light of foreseeable risks and the prevailing circumstances. War losses clauses perform a different function. Rather than evaluating the legality of State conduct, they regulate the distribution of conflict-related loss by requiring foreign investors to receive treatment no less favourable than that accorded to domestic investors or investors of third States in comparable situations. FPS is consequently conduct-based, whereas war losses clauses are comparative in character.[36]

The differentiation becomes particularly significant where the harmful conduct itself cannot be attributed to the host State. Attribution determines whether the violence engages direct State responsibility. FPS and war losses clauses address a different question: whether treaty protection nevertheless remains available through obligations that arise independently of attribution. They hence complement, and do not modify, the general law of State responsibility by addressing different dimensions of the same legal problem.[37]

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[33] UK–Sri Lanka BIT (n 10); ECT (n 7).
[34] UK–Sri Lanka BIT (n 10) art 2(2) (FPS) and art 4 (war losses); ECT (n 7) arts 10(1) and 12.
[35] ARSIWA (n 1) arts 2 and 4–11; *AAPL* (n 2) paras 72–77.
[36] *AAPL* (n 2) paras 54–56, 72–77.
[37] VCLT (n 1) arts 31–33; UK–Sri Lanka BIT (n 10) arts 2(2) and 4.

This functional differentiation reflects the architecture of modern investment treaties. FPS governs the standard of conduct expected of the host State before and during the occurrence of harm, whereas war losses clauses regulate entitlement to compensation after the loss has occurred through principles of non-discrimination and comparative equality. Their coexistence demonstrates that investment treaties distinguish between responsibility for wrongful State conduct and the allocation of conflict-related loss.[38]

Accordingly, bilateral investment treaties establish a sequential legal structure. Attribution determines whether the harmful conduct engages State responsibility. FPS assesses whether the host State complied with its autonomous obligation of protection. War losses clauses determine whether compensation is available through comparative treatment rather than proof of wrongful conduct. Together, these treaty standards provide the doctrinal foundation for the arbitral analysis developed in the following chapters.[39]

2.1.2 The Procedural Framework: The ICSID System

The International Centre for Settlement of Investment Disputes (ICSID) provides the procedural framework through which the doctrinal model developed in this dissertation is applied rather than altered. Under Article 42(1) of the ICSID Convention, tribunals apply the law chosen by the parties or, absent agreement, the relevant domestic law together with international law, so that attribution, treaty breach, causation and reparation are determined within a single procedure while remaining governed by their respective substantive rules.[40]

2.1.3 Sectoral Context: The Energy Charter Treaty and Extractive Investment

The Energy Charter Treaty (ECT) and the extractive sector provide the principal context for analysing responsibility arising from non-attributable harm. Their importance lies not in establishing a distinct legal regime, but in demonstrating how established principles of international investment law operate where political violence constitutes a persistent commercial risk.[41]

Extractive investments are characterised by territorial immobility, substantial sunk costs, long investment horizons and extensive dependence upon State infrastructure and public security. Unlike more mobile forms of investment, they cannot readily mitigate deteriorating political conditions through relocation or restructuring. Their exposure to insurgency, sabotage, civil unrest and institutional instability therefore places sustained pressure upon the legal regime governing investment protection.[42]

These characteristics make the extractive sector a particularly demanding context in which to assess the relationship between attribution and treaty obligations. In many disputes, the decisive legal issue is not the identity of those responsible for the physical destruction of the investment, but whether the host State complied with its autonomous obligation to exercise due diligence before, during and after foreseeable periods of instability. The focus thus shifts from the attribution of the underlying violence to the legality of the State's own conduct.[43]

The extractive sector thus functions as a structural stress test rather than as an exceptional category of investment. It exposes the interaction between attribution, due diligence and treaty

[38] UK–Sri Lanka BIT (n 10) arts 2(2) and 4; ECT (n 7) arts 10(1) and 12.
[39] ECT (n 7); UNCTAD, *World Investment Report 2024* (n 7).
[40] ICSID Convention (n 18) art 42(1).
[41] *AAPL* (n 2) paras 72–77; *AMT* (n 2) paras 6.05–6.10; *Pantechniki* (n 2) paras 76–84.
[42] ARSIWA (n 1) arts 2 and 4–11; ECT (n 7) art 10; *Pantechniki* (n 2).
[43] ECT (n 7) art 10(1); UK–Sri Lanka BIT (n 10) art 2(2).

protection under conditions in which the competing objectives of investor protection and sovereign limitation are most difficult to reconcile. If the existing legal order remains consistent under such conditions, its broader conceptual integrity is confirmed. If it does not, the difficulty lies not in the characteristics of extractive investment, but in the structure of the law itself.[44]

2.2 War Losses Clauses and Comparative Risk Allocation

War losses clauses address a question that the general law of State responsibility does not answer. Political violence may destroy investments without conduct that is legally attributable to the host State. In such circumstances, the legal issue extends beyond responsibility for the destruction itself to the allocation of the resulting economic loss.[45]

Unlike Full Protection and Security (FPS), war losses clauses do not evaluate the legality of State conduct. They operate through comparative treatment rather than fault-based responsibility. Instead of asking whether the host State exercised the degree of due diligence required by the treaty, they require foreign investors to receive treatment no less favourable than that accorded to nationals or investors of third States in comparable circumstances. The decisive inquiry is therefore one of equality of treatment rather than compliance with an autonomous obligation of protection.[46]

This distinction performs an important structural function within investment treaty law. Although FPS and war losses clauses may arise from the same factual circumstances, they regulate different legal questions. FPS evaluates whether the host State complied with its duty of protection, whereas war losses clauses regulate the distribution of conflict-related loss through principles of non-discrimination and comparative equality. Their relationship is consequently complementary, not overlapping.[47]

War losses clauses consequently occupy an intermediate position within the treaty regime. They neither transform investment treaties into systems of conflict insurance nor leave conflict-related loss entirely outside treaty protection where attribution is unavailable. Instead, they provide a limited mechanism for allocating the economic consequences of political violence while preserving the restrictive structure of the general law of State responsibility.[48]

2.3 Full Protection and Security as a Due Diligence Obligation

Full Protection and Security (FPS) is the principal treaty standard through which tribunals assess destruction caused by non-attributable acts. Its significance lies in transforming harm caused by non-State actors into a question of the host State's own conduct. Treaty protection is maintained not by attributing the underlying violence to the State, but by examining whether the State exercised the degree of diligence required to protect the investment against foreseeable risks.[49]

Contemporary arbitral jurisprudence consistently characterises FPS as an obligation of due diligence rather than one of result. In *Asian Agricultural Products Ltd v Republic of Sri Lanka* (AAPL), the tribunal examined whether the military operation had been planned and executed with due regard for the protection of the claimant's investment instead of treating the destruction itself as determinative of responsibility. *Pantechniki SA Contractors & Engineers v Republic of Albania* (Pantechniki) likewise confirms that the obligation requires reasonable protective

[44] UK–Sri Lanka BIT (n 10) arts 2(2) and 4; ECT (n 7) arts 10(1) and 12.
[45] *AAPL* (n 2) paras 54–56, 72–77.
[46] ECT (n 7) art 12; ARSIWA (n 1) arts 2 and 4–11.
[47] UK–Sri Lanka BIT (n 10) art 2(2); *AAPL* (n 2) paras 72–77.
[48] *AAPL* (n 2) paras 54–56, 72–77; *Pantechniki* (n 2) paras 76–84.
[49] ARSIWA (n 1) art 2; *AAPL* (n 2) paras 72–77; *Pantechniki* (n 2) paras 76–84.

measures in light of foreseeable risks, available resources and the prevailing circumstances rather than the prevention of every instance of harm. FPS consequently evaluates the adequacy of the State's conduct, not the occurrence of the loss itself.[50]

FPS accordingly provides the principal conduct-based mechanism through which treaty protection remains effective where political violence originates from non-State actors. By linking responsibility to the adequacy of State conduct instead of the occurrence of harm, it retains the separation between due diligence and strict liability while ensuring that investment treaties remain effective where attribution alone would provide no meaningful protection.[51]

2.3.1 The Relationship between Full Protection and Security and Fair and Equitable Treatment

Fair and Equitable Treatment (FET) and Full Protection and Security (FPS) regulate different dimensions of investment protection, although both are concerned with the conduct of the host State. Tribunals occasionally interpret the two standards together, but they pursue separate legal objectives and should not be treated as interchangeable.[52] FET governs the legal relationship between the investor and the host State. It is concerned with the legality, consistency and fairness of governmental conduct, not with the physical security of the investment. FPS, by contrast, addresses the State's obligation to exercise reasonable diligence in protecting investments against foreseeable physical harm. Its focus is hence not the fairness of governmental regulation, but the adequacy of protective measures adopted in response to risks such as political violence, insurgency, terrorism, sabotage and civil unrest.[53]

Maintaining this distinction is essential to the conceptual structure developed in this dissertation. Where destruction results from non-attributable acts, the central legal issue is not whether the investor was treated fairly in a regulatory sense, but whether the host State exercised the degree of protection required under the applicable treaty. Expanding FPS into a general guarantee of legal or regulatory stability would blur the boundaries between separate treaty standards and weaken the coherence of investment treaty law.[54]

FET and FPS should accordingly be understood as complementary, not hierarchical, standards. Each protects a different legal interest through a distinct legal test. Their separate operation preserves the internal logic of investment treaty law by ensuring that regulatory fairness and physical protection remain analytically discrete.[55]

2.3.2 Scope of the Obligation: Physical Security or Legal Stability?

The scope of Full Protection and Security (FPS) remains one of the most debated issues in investment treaty jurisprudence. The central question is whether the standard is confined to protection against physical harm or extends to legal and regulatory stability. The answer is significant because it determines the function that FPS performs within the overall architecture of investment treaty protection.[56]

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[50] ECT (n 7) art 10(1); UK–Sri Lanka BIT (n 10) art 2.
[51] *AAPL* (n 2) paras 72–77; *Pantechniki* (n 2) paras 76–84.
[52] *AAPL* (n 2) paras 72–77; ARSIWA (n 1) arts 2 and 4–11.
[53] ECT (n 7) art 10(1); UK–Sri Lanka BIT (n 10) art 2(2); *AAPL* (n 2) paras 72–77.
[54] ECT (n 7) art 10(1); UK–Sri Lanka BIT (n 10) art 2.
[55] *AAPL* (n 2) paras 72–77; Crawford, Peel and Olleson (n 3); *CME Czech Republic BV v Czech Republic* (UNCITRAL, Partial Award, 13 September 2001) para 613; *Azurix Corp v Argentine Republic* (ICSID Case No ARB/01/12, Award, 14 July 2006) paras 406–408.
[56] *AAPL* (n 2) paras 72–77; *Pantechniki* (n 2) paras 76–84.

Tribunals in *CME v Czech Republic* and *Azurix v Argentina* adopted a broad interpretation, extending FPS to legal and regulatory security; this risks collapsing FPS into Fair and Equitable Treatment (FET). Once FPS is understood as a general guarantee of legal or regulatory stability, the divide between the two standards becomes increasingly difficult to sustain. The consequence is not merely conceptual. It weakens the internal coherence of investment treaty law by reducing analytically distinct treaty obligations to overlapping standards of review.[57]

The narrower interpretation is preferable here: extending FPS to legal and regulatory stability would collapse it into FET and erase the distinction the two standards are meant to preserve, for the reasons given above. Under that approach, FPS is concerned with protection against foreseeable physical harm and is implemented through the obligation of due diligence. It does not guarantee legal or regulatory stability. Its purpose is to assess whether the host State exercised the degree of care reasonably required to protect the investment in the circumstances.[58]

That interpretation is also the more persuasive in cases involving destruction caused by non-State actors. Where attribution of the harmful conduct is unavailable, FPS provides the principal conduct-based mechanism through which treaty responsibility may nevertheless arise. Extending the standard beyond physical protection would weaken that doctrinal function by blurring the distinction between obligations concerned with physical security and those governing regulatory fairness.[59]

This does not suggest that FPS can never extend beyond physical protection in other treaty contexts. It means only that, for claims arising from non-attributable destruction, the narrower interpretation provides the more analytically structured framework. It upholds the integrity of due diligence, maintains the differentiation between FPS and FET, and allows each standard to perform its own function within the architecture of investment treaty protection.[60]

2.4 Attribution and State Responsibility

The International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) establish the secondary rules governing attribution and the legal consequences of internationally wrongful conduct. Their function is not to allocate economic loss but to identify the circumstances in which conduct may be treated as the conduct of the State for the purposes of international responsibility.[61]

ARSIWA's authority does not derive from ratification as a treaty, and Article 55 of the Articles themselves recognises that the general rules of State responsibility yield to a *lex specialis* where a specialised regime governs the same subject matter. Because international investment law is frequently described as such a specialised regime, its reliance on ARSIWA requires justification rather than assumption. Under those Articles, conduct is attributable principally where it is that of a State organ, where it is carried out under the State's instructions, direction or control, or where the State acknowledges and adopts it as its own.[62]

Two considerations support that reliance. First, the core attribution rules relied upon in this dissertation, including the requirement in Article 2 that responsibility depends upon both conduct and breach, are widely regarded as codifying customary international law rather than creating obligations peculiar to ARSIWA itself; their application hence does not depend on the

[57] *CME* (n 55) para 613; *Azurix* (n 55) paras 406–408; cf *Pantechniki* (n 2) paras 76–84.
[58] UK–Sri Lanka BIT (n 10) art 2(2); ECT (n 7) art 10(1); *AAPL* (n 2).
[59] ARSIWA (n 1) arts 1, 2 and 4–11; Crawford, Peel and Olleson (n 3) 963–966.
[60] ARSIWA (n 1) art 2.
[61] *AAPL* (n 2) paras 72–77; *AMT* (n 2) paras 6.05–6.10.
[62] *Pantechniki* (n 2) paras 76–84; ARSIWA (n 1) arts 2 and 4–11.

instrument's own status as a treaty. Secondly, investment treaties rarely displace the general law of attribution: they define primary obligations, such as Full Protection and Security and war losses clauses, but do not typically supply their own rules for determining when conduct is attributable to the State. Article 55 displaces the general law only where a specialised regime addresses the same question with different rules; since investment treaties are silent on attribution as such, the customary rules captured in ARSIWA continue to apply by default. On this basis, the shift from attribution to breach traced throughout this dissertation is best understood as a development internal to the general law of State responsibility as it operates within investment arbitration, rather than as evidence that investment law has displaced that general law altogether.[63]

Article 2 requires both attributable conduct and the breach of an international obligation before international responsibility arises. Harm occurring within the territory of a State is therefore insufficient, without more, to engage responsibility. This preserves the distinction between political risk and internationally wrongful conduct and prevents investment treaties from operating as a regime of territorial or strict liability.[64]

Attribution accordingly performs a threshold function rather than constituting an independent source of investor protection. That distinction matters more than it might first appear. Where the harmful conduct falls outside the rules of attribution, responsibility for that conduct cannot arise. The legal inquiry nevertheless continues because the host State's own response remains attributable and may independently amount to a breach of its treaty obligations.[65]

The importance of present-day investment jurisprudence lies in maintaining that analytical separation. Rather than extending the rules governing attribution to encompass non-State violence, tribunals examine whether the host State complied with its autonomous treaty obligations once the harmful conduct itself falls outside the scope of State responsibility. Treaty responsibility thus rests, where appropriate, upon the legality of the State's own conduct rather than upon attribution of the underlying violence.[66]

2.5 Causation, Compensation, and the Structure of Reparation

Establishing a treaty breach does not, by itself, entitle an investor to compensation. The present analysis treats that separation as doing real analytical work, not as a formality. A separate inquiry into causation is required to establish whether, and to what extent, the claimant's loss is legally connected to the breach. This distinction is particularly important in cases involving political violence, where damage frequently results from a combination of non-attributable violence and omissions attributable to the host State.[67]

The applicable standard of reparation, once a breach has been established, derives from the classical authority of *Factory at Chorzów*. The Permanent Court of International Justice held that reparation must, so far as possible, wipe out the consequences of the illegal act and re-establish the situation that would, in all probability, have existed had the act not occurred. This formulation continues to guide the assessment of compensation in investment arbitration.[68]

The limits of that principle are as important as its scope. The *Chorzów* formulation presupposes that an internationally wrongful act has already been established; it governs the measure of reparation once

[63] ARSIWA (n 1) art 31; Crawford, Peel and Olleson (n 3) 980–983.
[64] ARSIWA (n 1) arts 2 and 31.
[65] *AAPL* (n 2) paras 72–77.
[66] ARSIWA (n 1) art 2; *AAPL* (n 2) paras 72–77.
[67] ARSIWA (n 1) arts 2 and 31.
[68] *Factory at Chorzów (Germany v Poland)* (Merits) (1928) PCIJ Series A No 17, 47; ARSIWA (n 1) art 31.

responsibility exists, not the conditions under which responsibility arises. It therefore cannot substitute for the prior findings of attribution, treaty breach and causation examined earlier in this chapter. Where destruction results from non-attributable acts, the principle of full reparation attaches only to the loss legally connected to the host State's own wrongful conduct, typically a failure of due diligence, rather than to the totality of the physical destruction suffered by the investor. Applied without this qualification, the *Chorzów* standard would risk erasing the divide between the extent of harm and the extent of legal responsibility that this dissertation identifies as the organising principle of its conceptual framework.[69]

Causation performs an autonomous function within the structure of State responsibility. Attribution identifies the conduct capable of engaging responsibility, while treaty breach establishes whether an international obligation has been violated. Causation, by contrast, limits recovery to losses that are sufficiently connected with the established breach. Compensation consequently follows from the wrongful conduct of the State rather than from the occurrence of the underlying harm alone.[70]

This distinction is illustrated by *Asian Agricultural Products Ltd v Republic of Sri Lanka* (AAPL). The tribunal did not treat the destruction of the investment as sufficient to justify compensation; it examined instead whether the claimant had established a causal connection between the loss suffered and the respondent's failure to comply with the applicable treaty standard of protection. Reparation consequently flowed from the breach of the treaty obligation rather than from the destruction itself.[71]

Maintaining a different inquiry into causation maintains the discipline of conduct-based responsibility. If every failure to exercise due diligence automatically generated compensation for all consequential loss, investment treaty protection would approach a system of de facto insurance. By requiring a sufficient causal connection between breach and loss, international investment law preserves effective protection while confining recovery to the consequences of the State's own internationally wrongful conduct.[72]

Causation hence completes the analytical sequence developed in this chapter. Attribution establishes the threshold of responsibility, treaty breach determines whether the State has complied with its obligations, and causation limits recovery to losses legally connected with the established breach. Together, these elements ensure that compensation reflects legal responsibility rather than the mere occurrence of political violence.[73]

2.6 Treaty Interpretation and Doctrinal Coherence

The interpretive scheme developed in this chapter ultimately depends upon treaty interpretation, and it is worth saying so explicitly before turning to the detail. The scope of investment protection is shaped not only by the content of individual treaty standards but also by the manner in which those standards are interpreted within the broader system of public international law. Treaty interpretation accordingly provides the mechanism through which the different components of investment treaty protection are integrated into a well-ordered legal system.[74]

In accordance with Articles 31–33 of the Vienna Convention on the Law of Treaties (VCLT), investment treaties must be interpreted in good faith, in their context and in light of their object

[69] *Chorzów* (n 68), 47; ARSIWA (n 1) arts 2 and 31.
[70] VCLT (n 1) arts 31–33; ARSIWA (n 1) art 2.
[71] ARSIWA (n 1) arts 2, 20–25 and 31.
[72] ARSIWA (n 1) arts 2, 4–11 and 31–39; VCLT (n 1) arts 31–33.
[73] *AAPL* (n 2) paras 72–77; *AMT* (n 2) paras 6.05–6.10.
[74] ARSIWA (n 1) arts 2 and 4–11; *AAPL* (n 2) paras 72–77; *AMT* (n 2) paras 6.05–6.10.

and purpose. Within the present analysis, this requires the primary obligations contained in investment treaties to be interpreted consistently with the secondary rules governing State responsibility while upholding the distinct legal role of each treaty standard.[75]
The central interpretative task is hence neither to expand nor to restrict investment protection in the abstract. It is to preserve the functional relationship between the different components of treaty responsibility. Attribution, Full Protection and Security (FPS), war losses clauses, causation and circumstances precluding wrongfulness each regulate a separate stage of the legal analysis. The doctrinal order of the regime depends upon maintaining that analytical separation while allowing each element to contribute to an integrated system of investment protection.[76]

The practical stakes of this interpretative discipline are illustrated by *AAPL*. The applicable treaty contained both a general standard of Full Protection and Security and a specific, comparative provision addressing losses arising from civil disturbance. A strictly hierarchical reading, treating the specific provision as *lex specialis* exhausting the host State's liability for conflict-related loss, would have excluded any independent inquiry into the adequacy of the State's own conduct once the comparative threshold was not met.
The tribunal did not adopt that reading. It treated the general due diligence standard as capable of operating alongside the comparative provision, and examined separately whether the State's own conduct satisfied the requirements of due diligence.[77] Had the tribunal instead accepted the strict *lex specialis* reading, an investor unable to satisfy the comparative threshold would have had no further recourse, regardless of any independent failure of protection by the State. The choice between these two interpretative approaches therefore does not merely affect the reasoning; it determines whether conduct-based responsibility remains available at all once a claim under a comparative provision fails. This confirms that interpretative discipline under Articles 31–33 is not a formal requirement external to the substantive analysis, but the mechanism through which the distinct legal functions of attribution, breach, due diligence and comparative treatment are kept apart in application.

2.7 Circumstances Precluding Wrongfulness

Circumstances precluding wrongfulness — necessity, *force majeure* and distress — do not determine whether a treaty obligation has been breached; they determine whether otherwise wrongful conduct is exceptionally excused. Their relevance lies in confirming that protective obligations operate within the realities of armed conflict and systemic crisis, a premise this dissertation develops further in chapter 5's treatment of institutional capacity. They complement, but do not displace, attribution, treaty breach and causation as the constituent elements of responsibility.[78]

Conclusion

The analysis in this chapter demonstrates that responsibility for non-attributable destruction cannot be explained through attribution alone. Contemporary investment law instead operates through a differentiated conceptual scheme in which each legal concept performs a discrete function. Attribution defines the threshold of responsibility. Full Protection and Security (FPS)

[75] *AAPL* (n 2) paras 72–77; *Pantechniki* (n 2) paras 81–82.
[76] *AAPL* (n 2) paras 72–77; *AMT* (n 2) paras 6.05–6.10; *Pantechniki* (n 2) paras 81–82.
[77] ARSIWA (n 1) arts 2 and 4–11; *AAPL* (n 2) paras 72–77; *AMT* (n 2) paras 6.05–6.10; *Pantechniki* (n 2) paras 81–82.
[78] ARSIWA (n 1) arts 23–25; *LG&E* (n 16) paras 226–261.

evaluates the adequacy of State conduct. War losses clauses regulate the comparative allocation of conflict-related loss. Causation determines the extent of recoverable damage, while treaty interpretation and circumstances precluding wrongfulness maintain the unity of the overall legal framework.[79]

This arrangement enables investment treaties to provide meaningful protection without departing from the limiting principles of the general law of State responsibility. Responsibility is not expanded by relaxing the rules of attribution, but by examining whether the host State complied with its own treaty obligations once the harmful conduct falls outside the attribution scheme. The following chapter examines how arbitral tribunals have applied this interpretive approach in practice and how the jurisprudence has refined the relationship between attribution, treaty breach and due diligence in cases involving non-attributable destruction.

Chapter 3 - Attribution, Breach, and Evidentiary Allocation in Arbitral Reasoning

Introduction

The conceptual model established in the previous chapter provides the legal structure through which claims arising from non-attributable destruction are assessed. This chapter turns from doctrinal analysis to arbitral application. Its focus is therefore not on what international investment law permits in the abstract, but on how arbitral tribunals have translated general legal principles into practical standards for resolving disputes arising from political violence.[80]

The jurisprudence demonstrates a consistent analytical approach. Rather than relaxing the rules of attribution, tribunals have concentrated on the conduct of the host State by examining whether it complied with the treaty obligations owed to the investor in the circumstances of the case.[81] The central question is consequently not who caused the physical destruction, but whether the host State exercised the degree of protection required under the applicable treaty standard.[82]

The chapter proceeds in three stages. It first examines the relationship between attribution and treaty breach. It then considers the allocation of evidentiary burdens in claims based upon due diligence. Finally, it compares the principal arbitral awards to identify the recurring legal reasoning underlying decisions that reached different outcomes.[83] The chapter argues that present-day investment jurisprudence has developed a coherent analytical model that retains the restrictive principles of attribution while refining the assessment of State conduct through a context-sensitive application of treaty obligations.[84]

3.1 Attribution and Breach

Arbitral jurisprudence consistently distinguishes between attribution and breach. They are not treated as alternative bases of responsibility, but as successive stages of analysis. Attribution determines whether the harmful conduct itself engages State responsibility. Breach addresses a different question: whether the host State complied with its independent treaty obligations once attribution of the underlying violence is unavailable.[85]

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[79] ARSIWA (n 1) arts 4–11.
[80] *AAPL* (n 2) paras 72–77; *AMT* (n 2) paras 6.05–6.10.
[81] *AAPL* (n 2) paras 72–77; *Pantechniki* (n 2) paras 81–82.
[82] ARSIWA (n 1) arts 2 and 4–11; *AAPL* (n 2) paras 72–77; *AMT* (n 2) paras 6.05–6.10.
[83] ARSIWA (n 1) arts 2 and 4–11; *AAPL* (n 2); *AMT* (n 2); *Pantechniki* (n 2).
[84] ARSIWA (n 1) arts 2 and 4–11.
[85] *AAPL* (n 2) paras 72–77; *AMT* (n 2) paras 6.05–6.10; *Pantechniki* (n 2) paras 76–84.

That differentiation is particularly important in disputes arising from political violence. Insurgency, terrorism, sabotage, looting and civil unrest will often fall outside the attribution rules reflected in the International Law Commission's *Articles on Responsibility of States for Internationally Wrongful Acts* (ARSIWA).[86] Rather than extending those rules, tribunals have concentrated on the conduct of the host State by examining whether it exercised the protection required under the applicable treaty.[87]

The jurisprudence accordingly follows a recognisable sequence. Tribunals first ask whether the harmful conduct is attributable to the State. If attribution is not established, the inquiry shifts to the State's own conduct, especially its compliance with obligations of Full Protection and Security (FPS).[88] The focus thus moves from the identity of the perpetrators to the adequacy of the State's response before, during and after the events giving rise to the claim.[89]

This approach preserves the restrictive structure of State responsibility while allowing treaty protection to remain effective in situations involving non-State actors. Responsibility is not generated by expanding attribution beyond its accepted limits, but by evaluating whether the host State fulfilled its own obligations under the applicable investment treaty.[90]

3.1.1 Legal Treatment of Non-Attributable Acts

The legal treatment of non-attributable acts reflects the distinction between responsibility for the harmful act and responsibility arising from the host State's own conduct. Violence committed by private actors, insurgent groups or other non-State entities will not ordinarily satisfy the rules of attribution under international law. The absence of attribution does not, however, conclude the analysis. Once responsibility for the harmful act is excluded, tribunals examine whether the host State nevertheless complied with its treaty obligations in responding to the risks or consequences of that violence.[91]

The jurisprudence does not attempt to reclassify non-State violence as attributable State conduct. Instead, it considers whether foreseeable risks required protective measures that were not adopted, whether governmental inaction amounted to a failure to exercise due diligence, or whether the response of the host State was inadequate in the circumstances. Where responsibility is established, it arises from the breach of the State's treaty obligations rather than from the underlying violence itself.[92]

This separation underpins current arbitral practice. It upholds the restrictive principles governing attribution while ensuring that treaty protection remains effective where political violence is committed by non-State actors. The significance of non-attributable violence consequently lies not in expanding the rules of attribution, but in identifying the point at which the conduct of the host State becomes subject to legal scrutiny.[93]

3.1.2 The Structural Premise: Attribution under the Law of State Responsibility

The restrictive character of attribution is a defining feature of the general law of State responsibility rather than a deficiency in investment protection. The Articles on Responsibility of

[86] ARSIWA (n 1) arts 2 and 4–11; *Pantechniki* (n 2) paras 76–84.
[87] ARSIWA (n 1) arts 2 and 4–11.
[88] ARSIWA (n 1) arts 4–11.
[89] *AAPL* (n 2) paras 72–77; *AMT* (n 2) paras 6.05–6.10; *Pantechniki* (n 2) paras 76–84.
[90] *AAPL* (n 2) paras 72–77; ARSIWA (n 1) arts 2 and 4–11.
[91] *AMT* (n 2) paras 6.05–6.10.
[92] *Pantechniki* (n 2) paras 76–84.
[93] *Pantechniki* (n 2) paras 76–84.

States for Internationally Wrongful Acts (ARSIWA) require a recognised legal connection between the impugned conduct and the State before international responsibility can arise. Harm occurring within the territory of a State is hence insufficient, without more, to engage State responsibility.[94]

That arrangement inevitably creates tension in cases involving political violence. The most significant losses are frequently caused by insurgents, terrorist organisations or other non-State actors whose conduct remains legally external to the State. This does not expose a weakness in the rules governing attribution. Rather, it reflects the distinction maintained by international law between territorial sovereignty and internationally wrongful conduct.[95]

International investment law responds to that structural limitation without modifying the rules of attribution. Once the harmful conduct falls outside those rules, the legal inquiry turns to the host State's own obligations under the applicable investment treaty. Attribution accordingly performs a dual function. It defines the boundary of direct State responsibility while also marking the point at which the analysis shifts from the conduct of the perpetrators to the legality of the State's own response.[96]

3.1.3 The Conduct-Based Route to Breach

Arbitral jurisprudence demonstrates that treaty responsibility does not depend exclusively upon attribution of the harmful conduct. Where attribution is unavailable, tribunals examine whether the host State nevertheless complied with its autonomous treaty obligations by exercising the degree of diligence required in the circumstances. The inquiry hence shifts from the identity of the perpetrators to the legality of the State's own conduct.[97]

American Manufacturing & Trading Inc v Republic of Zaire (AMT) illustrates this approach under conditions of widespread looting and institutional collapse. Rather than attributing the conduct of the looters to the State, the tribunal examined whether the prolonged absence of effective protection constituted a breach of the respondent's treaty obligations. Responsibility therefore arose from the State's own omission in failing to provide the level of protection required under the applicable treaty.[98]

A comparable interpretive pattern appears in *Asian Agricultural Products Ltd v Republic of Sri Lanka* (AAPL). Although the investment was destroyed during military operations, the tribunal did not regard the occurrence of the damage as determinative. What mattered was whether the planning and execution of the operation complied with the applicable treaty standard of protection. The decisive issue was thus the adequacy of the State's conduct rather than the destruction itself.[99]

The limiting dimension of the same framework is illustrated by *Pantechniki SA Contractors & Engineers v Republic of Albania* (Pantechniki). While accepting that inadequate protection may engage treaty responsibility, the tribunal concluded that Albania's institutional capacity, the scale of the civil unrest and the practical constraints on governmental action were decisive in determining whether reasonable due diligence had been exercised. The award shows that the

[94] *AAPL* (n 2) paras 72–77; *AMT* (n 2) paras 6.05–6.10; *Pantechniki* (n 2) paras 76–84.
[95] *AMT* (n 2) paras 6.05–6.10.
[96] *Pantechniki* (n 2) paras 76–84.
[97] ARSIWA (n 1) art 2; *AMT* (n 2) paras 6.13–6.14.
[98] *AAPL* (n 2) paras 72–77; *AMT* (n 2) paras 6.05–6.14; *Pantechniki* (n 2) paras 76–84; *LG&E* (n 16) paras 226–245.
[99] *AAPL* (n 2) paras 72–77.

applicable legal standard remains constant, but its application is calibrated according to the factual circumstances confronting the host State.[100]

Taken together, these awards confirm that contemporary investment jurisprudence preserves restrictive attribution while adapting the assessment of treaty breach to the factual context of each dispute. Attribution remains the threshold inquiry, whereas responsibility ultimately depends upon whether the host State complied with its own treaty obligations through the exercise of reasonable due diligence. The consistency of the jurisprudence therefore lies in the consistent application of that analytical sequence rather than in uniform factual outcomes.[101]

3.1.4 Jurisprudential Illustration: Calibrating the Breach Route

The leading awards demonstrate a common analytical approach while differing in the intensity with which the conduct of the host State is reviewed. None relaxes the rules of attribution. Instead, each calibrates the assessment of treaty breach according to the factual circumstances confronting the State.[102]

Asian Agricultural Products Ltd v Sri Lanka (AAPL) repays closer scrutiny than a case merely illustrating a rule, because it anchors the model developed throughout this dissertation. The tribunal did not face a single question but a sequence of them, and its choice between the paths available illustrates why due diligence, rather than the alternatives argued before it, became the framework's foundation.

The claimant's primary submission was that Article 2(2) of the treaty imposed strict or absolute liability: Full Protection and Security, on this reading, guaranteed an outcome, so destruction alone sufficed to establish responsibility. Both the majority and, notably, the dissenting arbitrator Asante rejected this reading as incompatible with the ordinary meaning of the treaty text, with the parallel guarantee of fair and equitable treatment in the same provision, and with established authority on the standard of care owed to aliens.[103]

The claimant's fallback argument invoked the treaty's war losses clause, which entitled it to compensation only if Sri Lanka failed to prove the destruction resulted from combat action required by military necessity; the tribunal found that Sri Lanka had discharged that burden, so the claim failed on its own terms.[104] At this point the tribunal faced its genuine fork. Arbitrator Asante, in dissent, argued that the war losses clause was *lex specialis*: because it addressed losses from civil disturbance specifically, it exhausted Sri Lanka's liability for conflict-related destruction, and the claimant's failure under that provision should have concluded the case. The majority took the opposite path, treating Full Protection and Security as an independent standard that survived the claimant's failure under the war losses clause, and assessing separately whether Sri Lanka had exercised due diligence in planning and executing the operation.[105]

That choice was not the only point of disagreement. Rather than measuring Sri Lanka's conduct against what a State confronting a comparable security crisis could reasonably be expected to do, the majority applied an objective standard largely detached from the government's actual operational capacity during an internal armed conflict. Asante argued for the contrary, contextual

[100] ARSIWA (n 1) arts 2 and 4–11; *Pantechniki* (n 2) paras 76–84.
[101] ARSIWA (n 1) arts 2 and 31; *AAPL* (n 2) paras 72–77; *AMT* (n 2) paras 6.05–6.10.
[102] *AMT* (n 2) paras 6.05–6.10.
[103] *AAPL* (n 2) paras 72–77.
[104] *AAPL* (n 2) paras 72–77.
[105] *AAPL* (n 2) paras 72–77.

view: a State fighting for its institutional survival should be presumed to have complied with due diligence absent clear evidence to the contrary.[106]

The better view is that the majority's institutional choice was the doctrinally superior one, for the structural reasons developed in section 4.2.2: a *lex specialis* reading would make conduct-based protection least available precisely where political violence is most severe, an outcome this dissertation treats as unacceptable. The majority's application of that standard is harder to defend on its own terms. An objective test detached from the respondent's actual capacity sits uneasily with the capacity-sensitive due diligence *Pantechniki* applied nearly two decades later, and which this dissertation treats as characteristic of the jurisprudence as a whole. Had the *AAPL* majority retained Full Protection and Security as an independent, concurrent basis for liability while adopting Asante's contextual standard, the result would likely have resembled *Pantechniki's* later reasoning more closely than *AAPL's* own. Understood this way, *AAPL* is not simply the paradigm case for the framework defended in this dissertation; it is also the case in which the tension between an objective and a capacity-sensitive due-diligence standard first surfaces unresolved, a tension only substantially settled by the arbitral practice, including *Pantechniki*, that followed it.[107]

American Manufacturing & Trading Inc v Zaire (AMT) adopted the same methodology in circumstances of widespread looting and institutional collapse. The tribunal considered whether the prolonged absence of effective protection constituted a breach of the State's treaty obligations. The decisive issue was whether the authorities had provided the level of protection required under the treaty, not whether the looters themselves could be treated as organs of the State.[108]

Pantechniki SA Contractors & Engineers v Albania (Pantechniki) demonstrates the limits of that analysis. Although the tribunal accepted that treaty obligations continued to apply during severe civil unrest, it attached considerable weight to Albania's institutional capacity, the scale of the disorder and the practical limits on governmental action. The applicable standard of due diligence remained unchanged, but its application reflected the operational realities confronting the State.[109]

LG&E Energy Corp v Argentine Republic (LG&E) demonstrates a comparable process in the context of systemic crisis. Rather than displacing treaty obligations, the tribunal recognised that exceptional circumstances may influence the assessment of what constitutes reasonable governmental conduct without excluding responsibility as a matter of principle.[110]

A similar test faced *LG&E* and *CMS Gas Transmission Co v Argentina*, two ICSID tribunals ruling on materially the same Argentine crisis within a year of each other. Both States pleaded necessity under Article XI of their BITs. *CMS* rejected the defence, holding that Argentina had contributed to the crisis and that the measures taken were not the only means available. *LG&E* reached the opposite conclusion, accepting a state of necessity from December 2001 to April 2003 and excusing Argentina from liability for that period alone. The divergence is not doctrinal disagreement: *LG&E* kept the treaty and customary-law necessity standards analytically distinct,

[106] Dissenting Opinion of Samuel K B Asante in *Asian Agricultural Products Ltd v Republic of Sri Lanka* (ICSID Case No ARB/87/3, Final Award, 27 June 1990), also reported (1991) 30 ILM 628.
[107] *AAPL* (n 2) paras 72–77; *AMT* (n 2) paras 6.05–6.10; *Pantechniki* (n 2) paras 81–82.
[108] *Pantechniki* (n 2) paras 81–82.
[109] *AAPL* (n 2) paras 72–77.
[110] *Pantechniki* (n 2) paras 81–82.

whereas the 2007 Annulment Committee in *CMS* found that the tribunal had committed a manifest error of law by conflating the two.[111]

Viewed together, these awards demonstrate that prevailing arbitral practice does not apply due diligence through a rigid or mechanical formula. Instead, tribunals adjust the intensity of review to the factual context while preserving the same analytical sequence: restrictive attribution, assessment of treaty breach and evaluation of the State's response. The coherence of the jurisprudence consequently lies not in identical outcomes, but in the consistency of its legal reasoning.[112]

This claim of coherence should not be overstated. In *Ampal-American Israel Corp and others v Arab Republic of Egypt*, a tribunal found Egypt liable for breach of FPS following repeated attacks on a pipeline during the Sinai insurgency, without conducting the capacity-sensitive proportionality assessment central to *Pantechniki*.[113] Commentators have argued that this reasoning effectively converts a duty of conduct into a duty to achieve a result, precisely the collapse between attribution-based and outcome-based liability that this dissertation treats as structurally secured.[114] The better view is that *Ampal* does not disprove the coherence of the framework but exposes its unresolved edge: the due-diligence standard supplies a stable interpretive base without yet supplying a stable metric for its application, leaving individual tribunals considerable interpretive discretion at the margins. That indeterminacy is a genuine limitation of the model defended in this dissertation, not evidence that the framework itself has collapsed into strict liability.

3.1.5 Structural Implications

The divide between attribution and treaty breach reshapes the operation of investment treaty responsibility without altering the underlying principles of the general law of State responsibility. Once attribution is excluded, the analysis shifts from the authorship of the harmful act to the legality of the host State's response. Responsibility consequently depends less upon identifying those who caused the damage than upon determining whether the State complied with its treaty obligations in the circumstances.[115]

This changes the nature of the legal analysis. Attribution continues to be governed by relatively stable secondary rules, whereas treaty breach requires an evaluative assessment based upon due diligence, foreseeability, proportionality, feasibility and institutional capacity. The outcome hence depends not only upon legal classification but also upon the reasonableness of the State's response in the particular circumstances.[116]

The resulting framework represents a deliberate legal balance. Restrictive attribution keeps its threshold role within the general law of State responsibility, while conduct-based treaty obligations ensure that investment protection remains effective where the harmful act itself cannot be attributed to the State. Due diligence is accordingly not an exception to that structure

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[111] *LG&E* (n 16) paras 226–261; *CMS Gas Transmission Co v Argentine Republic* (ICSID Case No ARB/01/8, Award, 12 May 2005) paras 315–332; *CMS Gas Transmission Co v Argentine Republic* (Decision on Annulment, ICSID Case No ARB/01/8, 25 September 2007) paras 130–136.

[112] *Pantechniki* (n 2) paras 76–84.

[113] *Ampal-American Israel Corp and others v Arab Republic of Egypt* (ICSID Case No ARB/12/11, Decision on Liability and Heads of Loss, 21 February 2017).

[114] Eric De Brabandere, 'Host States' Due Diligence Obligations in International Investment Law' (2015) 42(2) Syracuse Journal of International Law and Commerce 319, 328–330.

[115] *Pantechniki* (n 2) paras 81–82.

[116] *AAPL* (n 2); *AMT* (n 2); *Pantechniki* (n 2); *LG&E* (n 16).

but the mechanism through which legal restraint and effective investment protection are reconciled.[117]

3.2 Evidentiary Allocation in Due-Diligence Claims

Once attribution is excluded, the operation of conduct-based responsibility depends upon the allocation of evidence. The decisive question is no longer whether the claimant can establish that the State committed the harmful act, but whether the available evidence demonstrates that the host State failed to exercise the degree of diligence required under the applicable treaty.[118]

This creates an inherent evidential asymmetry. Investors can ordinarily establish the occurrence of destruction and the resulting loss. Evidence concerning governmental knowledge, available resources, operational decision-making and protective measures will frequently remain within the control of the respondent State. The assessment hence extends beyond what occurred to what the State knew, or ought reasonably to have known, what measures were realistically available and whether its response was proportionate to the foreseeable risk.[119]

For that reason, due diligence rarely depends upon direct evidence alone. Arbitral tribunals frequently rely upon contextual inferences drawn from the surrounding circumstances, including the duration and visibility of the threat, prior warning signs, the proximity of public authorities, the resources available and the adequacy of the protective response. Evidential assessment is therefore inseparable from the substantive evaluation of treaty breach.[120]

The allocation of evidence has direct substantive consequences. A tribunal that requires highly specific proof of every omitted precaution narrows the practical scope of treaty protection. By contrast, a tribunal prepared to infer breach from prolonged instability, persistent inaction or a manifestly inadequate response enlarges the practical operation of due diligence. The intensity of evidential review thus influences the threshold at which responsibility arises.[121]

That flexibility remains subject to principled limits. Destruction alone cannot justify an inference of breach without eroding the distinction between due diligence and strict liability. Evidential assessment must accordingly balance two objectives: preventing informational asymmetry from rendering treaty protection ineffective while maintaining the requirement that responsibility be established through proof of legal failure rather than from the occurrence of harm itself.[122]

The jurisprudence accordingly indicates that evidential allocation is not merely procedural. It forms part of the architecture of conduct-based responsibility by determining how general standards of due diligence are translated into findings of treaty breach.[123]

3.2.1 Foreseeability and Prior Risk

Foreseeability is the principal criterion through which external violence becomes legally relevant in assessing the conduct of the host State. Due diligence cannot require States to prevent risks that were neither known nor reasonably foreseeable. Where political violence is visible, prolonged or predictable, however, foreseeability strengthens the conclusion that the State was under an obligation to adopt reasonable protective measures.[124]

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[117] *AAPL* (n 2) paras 72–77.
[118] *Pantechniki* (n 2) paras 76–84.
[119] *AMT* (n 2) paras 6.05–6.10; *LG&E* (n 16) paras 226–245.
[120] ICSID Convention (n 18) art 42(1); *AAPL* (n 2) paras 72–77.
[121] *AAPL* (n 2) paras 72–77; *Pantechniki* (n 2) paras 76–84.
[122] *AAPL* (n 2) paras 54–56, 72–77.
[123] *AAPL* (n 2) paras 72–77; *Pantechniki* (n 2) paras 76–84.
[124] ARSIWA (n 1) arts 2 and 4–11.

Tribunals assess foreseeability by reference to the circumstances preceding the loss. Prior incidents, escalating instability, known threats to foreign-owned facilities, intelligence available to the authorities and a deteriorating security environment may each indicate that the relevant risk should reasonably have been anticipated. It consequently provides the factual basis upon which the obligation to act is evaluated.[125]

Its importance extends beyond the allocation of evidence. It marks the point at which external violence ceases to be an unforeseeable event and becomes a circumstance requiring an appropriate governmental response. The stronger the evidence that the relevant risk could reasonably have been anticipated, the stronger the basis for concluding that the host State failed to exercise the required standard of due diligence.[126]

3.2.2 Capacity and Operational Constraint

Institutional capacity qualifies the application of due diligence by recognising that the required standard of protection cannot be separated from the practical ability of the host State to respond. The relevant question is consequently not simply what the State failed to do, but what could reasonably have been expected in the prevailing circumstances.[127]

Pantechniki SA Contractors & Engineers v Albania (Pantechniki) illustrates this principle. The tribunal accepted that widespread civil unrest had caused substantial loss but held that the occurrence of harm alone could not establish a treaty breach. Instead, it evaluated Albania's operational capacity by considering the scale of the disorder, the functioning of public institutions, the resources available to restore order and the absence of evidence that protection had been selectively withheld from the claimant. On that basis, it concluded that Albania had exercised the degree of diligence reasonably required in the circumstances.[128]

The claimant had urged an objective standard — the same standard the *AAPL* majority applied — under which Albania's capacity would have been irrelevant to whether protection was adequate. The sole arbitrator, Paulsson, confronted the strongest objection to the alternative he ultimately adopted: a capacity-sensitive standard risks penalising States that improve their institutions, since a State investing more in public order would thereby graduate into a more exacting category of scrutiny, and relativism of this kind could leave international law without any incentive-compatible content.[129]

Despite that objection, the tribunal preferred the contextual standard, reasoning that holding a fragile State fighting civil collapse to the benchmark of a well-resourced one would convert due diligence into liability for the mere existence of disorder.[130] This is the reverse choice from the one made in *AAPL*, and it is *Pantechniki*, not *AAPL*, that this dissertation treats as the more defensible resolution of the tension both tribunals confronted: an objective legal standard, applied through a capacity-sensitive factual inquiry, serves the structural balance between investor protection and sovereign limitation better than a standard that ignores context altogether.

Institutional capacity hence operates as both a substantive and an evidential criterion. It informs the standard against which governmental action is evaluated while also influencing whether the available evidence is sufficient to establish a treaty breach. The greater the practical constraints

[125] *AAPL* (n 2) paras 54–56.
[126] ibid.
[127] *AAPL* (n 2) paras 54–56 and 72–77.
[128] *AAPL* (n 2) paras 54–56.
[129] *Pantechniki* (n 2) paras 76–84.
[130] ARSIWA (n 1) arts 2 and 4–11; *AAPL* (n 2) paras 72–77.

upon the authorities, the more cautiously tribunals will infer that inadequate protection constitutes a violation of the applicable treaty standard.[131]

3.2.3 Inference, Context, and Judicial Calibration

Because due-diligence claims frequently arise where direct evidence of governmental decision-making is unavailable, arbitral tribunals often rely upon inference drawn from the surrounding circumstances. A finding of treaty breach therefore depends not only upon direct proof but also upon conclusions reasonably drawn from the available evidence. The duration of disorder, the foreseeability of the risk, the visibility of the threat and the adequacy of the governmental response provide the factual basis for determining whether the State complied with its treaty obligations.[132]

This explains why the awards display consistency in principle despite differing outcomes. The applicable legal standard remains constant, but its application depends upon the tribunal's evaluation of the evidence and the circumstances of the particular dispute. Judicial calibration is hence an inherent feature of due diligence rather than an exception to it. Through this evaluative process, tribunals apply a common legal standard to the factual diversity of disputes arising from political violence.[133]

3.3 Comparative Patterns Across the Principal Awards

The principal awards examined individually in section 3.1 display a common interpretive method rather than a uniform outcome: attribution is assessed first, and where it fails, the inquiry turns to whether the host State complied with its own autonomous treaty obligations. *AAPL*, *AMT* and *Pantechniki* apply that method to reach different results depending on institutional capacity and foreseeability, while *LG&E* confirms the relevance of exceptional circumstances to State responsibility more generally. The variation across these awards therefore lies in the contextual evaluation of treaty breach, not in the governing principles themselves.[134]

Conclusion

Arbitral jurisprudence concerning non-attributable destruction follows a clear logical sequence. Restrictive attribution remains the boundary of direct State responsibility, but the absence of attribution does not conclude the analysis. Instead, attention shifts to treaty breach by examining whether the host State fulfilled its obligations of protection, response and security.[135]

The resulting model preserves the limits of the general law of State responsibility while ensuring that investment treaties continue to provide meaningful protection in situations involving non-State violence. Its operation nevertheless depends upon evaluative judgment, evidential inference and the assessment of the particular circumstances of each dispute.[136]

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[131] *Pantechniki* (n 2) paras 76–84; *AMT* (n 2) paras 6.05–6.10.
[132] *AAPL* (n 2) paras 72–77; *Pantechniki* (n 2) paras 76–84.
[133] *AAPL* (n 2) paras 54–56.
[134] *AAPL* (n 2) paras 72–77; *AMT* (n 2) paras 6.05–6.10; *Pantechniki* (n 2) paras 76–84; *LG&E* (n 16) paras 226–245.
[135] *AAPL* (n 2) paras 54–56, 72–77; for the same result reached against a claim that a compensation-for-losses clause displaces FPS as lex specialis, see *Funnekotter and others v Republic of Zimbabwe* (ICSID Case No ARB/05/6, Award, 22 April 2009) para 104; *von Pezold and others v Republic of Zimbabwe* (ICSID Case No ARB/10/15, Award, 28 July 2015) paras 588–599; Christoph Schreuer, 'Investment Protection in Times of Armed Conflict' (2022) 23(5–6) Journal of World Investment & Trade 701, 705–706.
[136] *AAPL* (n 2) paras 72–77; *Pantechniki* (n 2) paras 76–84.

This balance characterises contemporary investment jurisprudence. The governing legal principles remain stable, but their application depends upon the tribunal's assessment of foreseeability, institutional capacity and the adequacy of the governmental response. The following chapter examines war losses clauses and the comparative allocation of losses arising from political violence.[137]

Chapter 4 - War Losses Clauses and the Architecture of Risk Allocation

Introduction

Chapter 3 demonstrated how arbitral jurisprudence retains investment protection through treaty breach once the harmful act itself cannot be attributed to the host State. This chapter examines a related question: how international investment law addresses conflict-related loss where fault-based responsibility cannot readily be established. Its principal focus is the operation of war losses clauses.[138]

War losses clauses occupy a separate function within the treaty scheme. Unlike Full Protection and Security (FPS), which evaluates the adequacy of State protection through due diligence, war losses clauses determine whether investors affected by armed conflict, civil unrest, insurrection, revolution or comparable instability receive treatment no less favourable than that accorded to nationals or investors of third States in comparable circumstances. Their operation is therefore comparative, not conduct-based.[139]

This chapter argues that war losses clauses contribute to the overall internal logic of investment protection. They neither guarantee compensation for conflict-related destruction nor leave investors entirely dependent upon the discretion of the host State. Instead, they provide a limited treaty mechanism through which the economic consequences of political violence become legally relevant.[140]

4.1 The Legal Function of War Losses Clauses

The legal significance of war losses clauses lies in separating compensability from wrongfulness. Unlike Full Protection and Security (FPS), they do not examine whether the host State breached an obligation of protection. Their function is to determine whether foreign investors received treatment no less favourable than that accorded to nationals or investors of third States following conflict-related loss.[141]

This differentiation is important because fault-based responsibility cannot resolve every legal consequence of political violence. Armed conflict, insurgency, riots, sabotage, terrorism and civil unrest may destroy investments without generating conduct attributable to the State. In such circumstances, a State may compensate domestic investors for conflict-related losses while denying equivalent relief to foreign investors yet incur no responsibility for the destruction itself because attribution is absent and no independent treaty breach can be established.[142]

War losses clauses address this gap by requiring equality in the distribution of compensation or other relief. Their application is triggered not by the occurrence of conflict-related harm itself,

[137] VCLT (n 1) art 31; ECT (n 7) art 12.
[138] *AAPL* (n 2) paras 54–56, 72–77.
[139] ibid.
[140] ECT (n 7) art 12; Greenman (n 26) 587 (noting that war losses clauses could be regarded as *lex specialis* provisions displacing more general standards in times of war).
[141] UK–Sri Lanka BIT (n 10) art 4; ECT (n 7) art 12.
[142] ECT (n 7) art 12; *AAPL* (n 2) paras 54–56.

but by discriminatory treatment in its aftermath. The inquiry thus focuses upon comparative treatment rather than fault, asking whether the foreign investor received less favourable treatment than similarly situated nationals or investors of third States.[143]
This function differs fundamentally from conduct-based liability. War losses clauses do not examine whether the State caused the loss, failed to prevent it or acted negligently. Their concern is whether any relief that the State chooses to provide is distributed without discrimination.[144]
The point emerges clearly from *Asian Agricultural Products Ltd v Sri Lanka* (AAPL). The tribunal did not assimilate the war losses clause into FPS or treat the two standards as interchangeable. FPS governed the adequacy of State protection during the military operation, whereas the war losses clause governed comparative entitlement to compensation following the destruction. Each accordingly performed a separate legal function.[145]
War losses clauses consequently establish neither fault-based responsibility nor automatic compensation. They create a limited entitlement to equal treatment in the allocation of conflict-related relief. Their significance lies in ensuring that investment treaties remain relevant where the general law of State responsibility cannot, by itself, determine the distribution of post-conflict losses.[146]

4.2 The Relationship Between War Losses Clauses and Full Protection and Security

The central issue is whether war losses clauses and Full Protection and Security (FPS) operate as complementary treaty standards or whether war losses clauses displace FPS as *lex specialis* in situations involving armed conflict, insurgency, civil unrest or comparable instability.[147] The answer is structurally significant because it determines whether conduct-based treaty responsibility remains available where the risk of non-attributable destruction is greatest.[148]

4.2.1 The Argument for Hierarchical Displacement

A strict *lex specialis* approach would treat war losses clauses as the exclusive treaty mechanism whenever destruction occurs in the context of armed conflict, insurrection, revolution or civil disturbance. Once the relevant facts fall within the scope of the clause, the investor's entitlement to relief would be confined to the comparative protection it provides. Full Protection and Security (FPS) would no longer constitute an independent basis for recovery.[149]
This interpretation draws support from the principle that specific treaty provisions prevail over more general ones. War losses clauses are drafted specifically for situations of political violence, whereas FPS applies generally to the protection of investments. On this view, treaty drafters intended the inclusion of a war losses clause to regulate, and thereby limit, recovery in those exceptional circumstances.[150]
The argument also reflects concern about over-protection. If both standards operate concurrently, investors may pursue whichever avenue is more favourable, thereby circumventing the comparative limitations inherent in war losses clauses. A *lex specialis* interpretation seeks to

[143] *AAPL* (n 2) paras 54–56 and 72–77.
[144] ARSIWA (n 1) arts 2 and 31; ECT (n 7) art 12.
[145] *AAPL* (n 2) paras 54–56, 72–77.
[146] *AAPL* (n 2) paras 54–56.
[147] ECT (n 7) art 12; *AAPL* (n 2) paras 54–56.
[148] ARSIWA (n 1) arts 2, 4–11 and 31.
[149] Dissenting Opinion of Asante (n 106); cf *AAPL* (n 2) paras 72–77.
[150] ECT (n 7) art 12; *AAPL* (n 2) paras 54–56.

avoid that outcome by confining claims arising from political violence to the treaty mechanism specifically designed for those situations.[151]

4.2.2 The Argument for Concurrent Operation

That outcome is difficult to justify because the two standards address different legal questions. Full Protection and Security (FPS) evaluates whether the host State complied with its obligation of protection. War losses clauses determine whether post-conflict relief was distributed on equal terms. One concerns wrongful conduct; the other concerns the comparative allocation of loss.[152]

The preferable interpretation is concurrent operation combined with a strict separation of function. This approach is most consistent with *Asian Agricultural Products Ltd v Sri Lanka* (AAPL). The tribunal did not treat the war losses clause as excluding FPS merely because the destruction occurred during military operations. Instead, each provision performed its own function: FPS assessed the adequacy of the State's protective measures, whereas the war losses clause governed comparative entitlement to compensation.[153]

The justification for concurrent operation is not merely textual but structural. The two standards address different legal risks. FPS concerns the possibility that the authorities failed to adopt reasonable protective measures in the face of foreseeable violence. War losses clauses address the possibility that, once violence has occurred, relief is distributed unequally. Because these risks are analytically distinct, there is no principled basis for treating one provision as displacing the other.[154]

The principle of specificity supports displacement only where two treaty provisions regulate the same legal question. That is not the case here. A clause governing comparative entitlement to compensation does not determine whether the authorities exercised due diligence before or during the relevant events. Equally, a conduct-based standard does not determine whether post-conflict relief was distributed without discrimination.[155]

A strictly hierarchical approach would also produce an undesirable practical consequence. The more severe the instability, the narrower conduct-based treaty protection would become. Investors would benefit from judicial scrutiny of governmental conduct during isolated incidents but lose that protection in situations of armed conflict or widespread civil unrest. Treaty protection would consequently diminish precisely where the risk of non-attributable destruction is greatest.[156]

The preferable conclusion is that war losses clauses and FPS operate concurrently, but without overlapping functions: one asks whether the State's own conduct was adequate, the other asks whether the resulting relief was distributed without discrimination. Their coexistence preserves both doctrinal coherence and effective investment protection.[157]

4.3 Structural Consequences for the Architecture of Responsibility

The significance of war losses clauses extends beyond their immediate operation. Their chief significance lies in the way they reorganise the structure of treaty responsibility.[158]

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[151] ARSIWA (n 1) arts 2, 4–11 and 31; *AAPL* (n 2) paras 54–56, 72–77; *Pantechniki* (n 2) paras 76–84.
[152] ECT (n 7) art 12; *AAPL* (n 2) paras 54–56, 72–77.
[153] *AAPL* (n 2) paras 54–56, 72–77; VCLT (n 1) art 31.
[154] ECT (n 7) arts 10(1) and 12; *AAPL* (n 2) paras 54–56, 72–77.
[155] ARSIWA (n 1) arts 2 and 4–11; *AAPL* (n 2) paras 54–56, 72–77; *AMT* (n 2) paras 6.05–6.10.
[156] VCLT (n 1) art 31; ECT (n 7) art 12.
[157] ARSIWA (n 1) arts 2, 20–25 and 31; *Pantechniki* (n 2) paras 76–84.
[158] ARSIWA (n 1) arts 2, 4–11 and 31.

Classical State responsibility proceeds through a relatively linear sequence. Attribution identifies conduct legally connected to the State, breach determines whether that conduct violates an international obligation, and reparation follows responsibility. Although coherent, that model leaves limited scope for addressing conflict-related loss where neither attribution nor an independent treaty breach can be established.[159]

War losses clauses introduce an additional route. They neither modify the rules of attribution nor replace the requirement of breach. Instead, they establish a comparative mechanism through which conflict-related destruction may become legally relevant even where the destruction itself involves no internationally wrongful act by the State.[160]

The significance of this differentiated structure lies in recognising that conflict-related disputes raise different legal questions. Attribution determines responsibility for the harmful act. Treaty breach evaluates whether the host State complied with its obligations of protection. War losses clauses address a separate issue by examining whether conflict-related relief was distributed without discrimination. These functions are complementary, not competing, allowing investment treaties to respond to different legal consequences arising from the same factual events.[161]

This differentiation also strengthens the legitimacy of the investment treaty regime. Conflict-related destruction may raise several distinct forms of legal responsibility: wrongful conduct by the State, failure to exercise due diligence or discriminatory distribution of post-conflict relief. A regime that reduced every dispute to attribution alone would be too narrow, whereas one that transformed every loss into a claim for compensation would extend treaty protection beyond its proper limits. The differentiated structure avoids both outcomes.[162]

The resulting framework operates through four connected stages:

- Attribution determines whether the harmful conduct is legally attributable to the State.
- Treaty breach examines whether the State violated an obligation of protection, including through omission.
- Comparative allocation asks whether conflict-related relief was distributed without discrimination.
- Causation limits recovery to losses sufficiently connected with the treaty breach or the discriminatory treatment.[163]

This differentiated framework also requires careful doctrinal discipline. If compensation for treaty breach and compensation for unequal treatment are allowed to merge, war losses clauses risk becoming indirect substitutes for fault-based responsibility. Their legitimacy hence depends upon preserving their limited comparative function.[164]

Properly understood, war losses clauses occupy a narrow but important position within the system of investment protection. They provide an intermediate mechanism between fault-based responsibility and complete non-liability while retaining the integrity of both.[165]

4.4 The Sequential Analytical Structure of Responsibility

[159] *Pantechniki* (n 2) paras 76–84.
[160] *AAPL* (n 2) paras 72–77; *AMT* (n 2) paras 6.05–6.10.
[161] *Pantechniki* (n 2) paras 76–84.
[162] *Pantechniki* (n 2) paras 76–84; *LG&E* (n 16) paras 226–245.
[163] *AAPL* (n 2) paras 72–77.
[164] ARSIWA (n 1) arts 2 and 4–11; *Pantechniki* (n 2) paras 76–84.
[165] *AAPL* (n 2) paras 72–77; *AMT* (n 2) paras 6.05–6.10; *Pantechniki* (n 2) paras 76–84.

The architecture of treaty responsibility in cases involving political violence and the destruction of investments is best understood as sequential rather than unitary. The first inquiry is whether the harmful conduct is attributable to the host State under the applicable rules of international law. Where attribution is established, the claim proceeds through the classical model of State responsibility: attribution is followed by breach of an international obligation, causation and reparation, subject to any applicable circumstances precluding wrongfulness.[166]

Where attribution is absent, however, the analysis does not end. Instead, it shifts to whether the host State nevertheless complied with its independent treaty obligations. Full Protection and Security (FPS) performs the principal conduct-based function at this stage by examining whether the State exercised due diligence in protecting the investment in light of foreseeable risks, proportionality, available resources and institutional capacity.[167]

Where a breach of FPS is established, the analysis proceeds to causation. Where no such breach is found, the tribunal may nevertheless be required to consider any applicable war losses clause.[168]

War losses clauses perform a different legal function. Rather than assessing wrongfulness, they determine whether conflict-related relief was distributed on terms no less favourable than those accorded to nationals or investors of third States. Where discriminatory treatment is established, the inquiry again proceeds to causation; where it is not, no entitlement arises under the clause. The tribunal must then determine whether the investor's loss is sufficiently connected to the established treaty breach or to the less favourable treatment. That assessment remains subject to any applicable circumstances precluding wrongfulness, including necessity, *force majeure* and distress. Only after these questions have been resolved does the issue of reparation arise, namely the appropriate form and quantum of compensation under international law and the applicable treaty. This sequential framework demonstrates that attribution, conduct-based responsibility, comparative allocation, causation and reparation are not competing explanations of the same problem, but successive analytical inquiries through which international investment law reconciles effective investment protection with the limiting principles of the general law of State responsibility.[169]

Conclusion

War losses clauses occupy a separate function within international investment law. They regulate conflict-related loss through comparative allocation rather than fault-based responsibility. Their role accordingly differs fundamentally from that of Full Protection and Security (FPS): FPS evaluates whether the host State complied with its obligation of protection, whereas war losses clauses determine whether conflict-related relief was distributed on terms no less favourable than those accorded to nationals or investors of third States.[170]

The analysis developed in this chapter supports the conclusion that war losses clauses operate concurrently with FPS instead of hierarchically. Armed conflict does not remove the relevance of conduct-based treaty obligations, just as conduct-based obligations do not displace the requirement of equal treatment in the allocation of conflict-related relief. Each standard addresses

[166] *AAPL* (n 2) paras 72–77; *AMT* (n 2) paras 6.05–6.10; *Pantechniki* (n 2) paras 76–84.
[167] *AAPL* (n 2) paras 72–77.
[168] ICSID Convention (n 18) art 48(3).
[169] ARSIWA (n 1) arts 2, 4–11, 23–25 and 31.
[170] ARSIWA (n 1) arts 2 and 31; *Pantechniki* (n 2) paras 76–84.

a separate legal dimension of the same factual circumstances and performs a different doctrinal function within the treaty structure.[171]

Properly understood, war losses clauses supplement conduct-based responsibility through a limited comparative mechanism operating independently of fault. Their significance lies not in replacing attribution or treaty breach, but in ensuring that conflict-related relief, where granted, is distributed without discrimination. They preserve the integrity of treaty responsibility by addressing the comparative allocation of conflict-related loss without altering the principles governing attribution or conduct-based responsibility.[172]

Chapter 5 - Systemic Implications and the Allocation of Political Violence Risk

Introduction

The preceding chapters have demonstrated that non-attributable destruction does not leave international investment law without a legal response. Contemporary investment law remains anchored in the classical requirements of attribution and breach, yet continues to protect investors through distinct treaty mechanisms that assess State conduct and, where applicable, the comparative allocation of conflict-related loss.[173]

The significance of that development extends beyond the interpretation of individual treaty provisions or arbitral awards. It raises broader questions concerning the conceptual order, legitimacy and predictability of the investment treaty regime, as well as the allocation of political violence risk between host States and foreign investors.[174]

This chapter moves from doctrinal analysis to normative evaluation. It argues that the existing regime neither departs from the general principles of State responsibility nor transforms investment treaties into systems of conflict insurance. Rather, it reflects a conditional model of investment protection in which responsibility survives the absence of attribution through a disciplined assessment of treaty obligations, while remaining constrained by the limiting principles of the general law of State responsibility.[175]

5.1 Consistency, Flexibility, and Structural Tension in Arbitral Practice

The central tension within the jurisprudence does not concern the existence of a common structure of responsibility. At that level, arbitral practice is notably consistent. Attribution remains the threshold inquiry. Where the harmful act cannot be legally imputed to the State, the analysis turns to the host State's conduct under the applicable treaty obligations. If breach is established, compensation depends on causation and the relevant treaty regime.[176]

The difficulty arises at the level of application. Attribution operates through comparatively determinate legal thresholds, whereas due diligence depends upon evaluative standards. This asymmetry explains both the coherence and the instability of arbitral practice.[177]

This consistency should not be understated: tribunals do not expand attribution beyond recognised limits, and the same analytical sequence recurs across the leading authorities.[178] Yet

[171] ARSIWA (n 1) arts 2 and 4–11.
[172] ARSIWA (n 1) art 2; *Pantechniki* (n 2) paras 76–84.
[173] *AAPL* (n 2) paras 72–77; *Pantechniki* (n 2) paras 76–84.
[174] *Pantechniki* (n 2) paras 76–84.
[175] *AAPL* (n 2) paras 72–77; *AMT* (n 2) paras 6.05–6.10.
[176] *Pantechniki* (n 2) paras 76–84; *LG&E* (n 16) paras 226–245.
[177] ECT (n 7) preamble, arts 10 and 12; *Pantechniki* (n 2) paras 76–84.
[178] ECT (n 7) art 10.

structural consistency does not produce uniform outcomes, since due diligence depends on foreseeability, proportionality, operational feasibility, institutional capacity and evidentiary availability – variables no mechanical formula can resolve.[179]

That flexibility is necessary and risky in equal measure. It is necessary because political violence occurs under radically different conditions, from isolated unrest to systemic collapse, requiring tribunals to calibrate accordingly.[180] It is risky because the more responsibility depends on evaluative standards, the harder it becomes to predict the threshold of breach; severe loss may tempt tribunals to assess reasonableness retrospectively through the harm suffered. The danger is not doctrinal incoherence, but outcome-driven reasoning presented as conduct assessment.[181]

The resulting instability is best understood as controlled indeterminacy. The structure remains stable, but its application varies with the circumstances of the dispute. That is not evidence of doctrinal failure. It is the cost of preserving meaningful protection without abandoning restrictive attribution or collapsing responsibility into territorial liability.[182]

The leading authorities illustrate this dynamic. *AAPL* and *AMT* demonstrate a willingness to scrutinise serious failures of protection despite the absence of attributable violence. *Pantechniki* demonstrates greater deference to institutional limitation. These decisions do not reveal disagreement over the structure of responsibility. They reveal divergence over the intensity with which due diligence is applied once attribution no longer determines the outcome.[183]

Arbitral practice is therefore consistent but not uniform. Its consistency lies in method; its variability lies in calibration.[184]

5.1.1 Sources of Controlled Indeterminacy

The indeterminacy inherent in conduct-based responsibility is constrained by several institutional and procedural safeguards. First, the burden of proof operates as a structural limitation. Claimants must establish not only that loss has occurred, but also that the host State failed to comply with the applicable treaty standard. Responsibility cannot thus be inferred from the occurrence of harm alone.[185]

Secondly, tribunals are under a duty to provide reasoned decisions explaining why the State's conduct did or did not satisfy the applicable standard, disciplining judicial discretion and building a systematic body of arbitral reasoning.[186] Thirdly, the ICSID Convention provides a limited supervisory mechanism through annulment proceedings under Article 52; although not an appeal on the merits, annulment reinforces the requirement that tribunals act within their jurisdiction, give adequate reasons and observe fundamental rules of procedure.[187]

These safeguards do not eliminate the indeterminacy inherent in conduct-based responsibility, but they contain it. The framework remains well-ordered because attribution continues to define the limits of direct responsibility, while the assessment of treaty breach remains responsive to the factual circumstances of each dispute. The resulting reduction in predictability is the necessary

[179] ARSIWA (n 1) arts 2 and 4–11; *AAPL* (n 2) paras 72–77.
[180] *Pantechniki* (n 2) paras 76–84.
[181] ibid.
[182] ECT (n 7) arts 10 and 12.
[183] *Pantechniki* (n 2) paras 76–84; *AAPL* (n 2) paras 72–77; VCLT (n 1) art 31.
[184] ECT (n 7) preamble, arts 10 and 12; *Pantechniki* (n 2) paras 76–84.
[185] ARSIWA (n 1) arts 2 and 31; *AAPL* (n 2) paras 72–77; *Pantechniki* (n 2) paras 76–84.
[186] ICSID Convention (n 18) art 48(3).
[187] ICSID Convention (n 18) art 52.

consequence of upholding effective investment protection without abandoning the limiting principles of the general law of State responsibility.[188]

5.2 Investor Protection, Sovereignty, and Institutional Limitation

The most difficult normative problem exposed by non-attributable destruction concerns the relationship between investor protection and the limits of sovereign responsibility. Once attribution is unavailable, responsibility depends increasingly upon what the host State could reasonably have done in the circumstances. The central issue is therefore not whether protection was provided, but what the applicable standard of protection should require.[189]

The difficulty is inherent in the design of investment treaty law. A legal regime requiring States to prevent every instance of politically motivated harm would transform responsibility into a system of outcome-based liability incompatible with the general law of State responsibility. Equally, excessive judicial deference to institutional weakness would render treaty protection least effective in precisely those situations where investors are most exposed to instability and most dependent upon public protection. The task is consequently not to choose between investor protection and sovereignty, but to define a standard through which each limits the other.[190]

Due diligence occupies that intermediate position. It neither guarantees successful protection nor excuses inadequate performance. The question it poses is whether the State acted reasonably in the particular circumstances. The flexibility inherent in that standard is both its principal strength and its principal weakness. The weight attached to institutional capacity and investor vulnerability directly influences the practical content of the obligation.[191]

Institutional capacity is consequently an indispensable element of the analysis. Due diligence cannot plausibly require identical responses from highly stable and institutionally fragile States. A standard detached from operational reality would soon lose normative legitimacy. Capacity cannot, however, become an autonomous defence insulating governmental conduct from legal scrutiny. It may influence what constitutes reasonable protection, but it cannot remove the obligation to justify the measures adopted in response to foreseeable risks. A State experiencing severe institutional constraints must still demonstrate what risks were foreseeable, what protective measures were realistically available, what action was taken and why that response satisfied the applicable treaty standard.[192]

The opposite approach would undermine the credibility of conduct-based responsibility. If institutional fragility automatically excused inadequate protection, treaty rights would remain formally intact while becoming practically ineffective in the environments where they matter most. Equally, tribunals must avoid treating severe loss as evidence of breach. Once the occurrence of harm becomes a substitute for evaluating governmental conduct, due diligence ceases to function as a standard of conduct and becomes an indirect mechanism of compensation. Conduct-based responsibility remains viable only because it occupies the narrow space between these two extremes: absolute protection and complete non-liability.[193]

This tension ultimately reflects the dual function of sovereignty within international investment law. Sovereignty provides the legal foundation for holding the State accountable for the exercise of public authority within its territory. At the same time, it defines the practical limits of what

[188] *AAPL* (n 2) paras 72–77; *Pantechniki* (n 2) paras 76–84.
[189] *AAPL* (n 2) paras 72–77; *Pantechniki* (n 2) paras 76–84.
[190] ARSIWA (n 1) arts 2 and 31.
[191] *Pantechniki* (n 2) paras 76–84.
[192] VCLT (n 1) art 31; ARSIWA (n 1) arts 2 and 31.
[193] *AAPL* (n 2) paras 72–77; *AMT* (n 2) paras 6.05–6.10.

international law can reasonably require from public institutions operating under conditions of armed conflict, civil unrest or institutional collapse. The same principle that justifies scrutiny hence also justifies restraint. A credible doctrine of due diligence must preserve both dimensions. It must require States to justify their conduct while recognising that international responsibility cannot be assessed as though every political community possessed the same institutional capacity under all circumstances.[194]

5.3 Extractive Industries as a Structural Stress Test

The extractive sector exposes the operation of this legal regime with particular clarity. It provides a structural stress test because it combines territorial immobility, dependence upon critical infrastructure, strategic economic significance and prolonged exposure to political instability.[195]

Mines, pipelines, refineries, energy corridors and extraction facilities cannot simply be relocated when political conditions deteriorate. Their economic value is inseparable from the territory in which they operate. Unlike more mobile forms of investment, extractive projects cannot substantially reduce risk through relocation, divestment or rapid restructuring.[196]

This creates a distinctive relationship between investor vulnerability and State responsibility. Investors remain highly exposed to political violence while exercising only limited control over the conditions that produce it. At the same time, the violence affecting extractive investments will frequently fall outside the rules governing attribution under international law. The legal analysis accordingly shifts from responsibility for the harmful act itself to the adequacy of the host State's response under the applicable treaty obligations.[197]

5.3.1 Normative Implications for the Due-Diligence Standard

The question is whether the due-diligence standard should be calibrated differently for extractive investments. Two competing approaches may be identified.[198]

The first regards due diligence as a unitary legal standard applied in a context-sensitive manner. The nature of the investment influences the factual assessment by shaping the foreseeability of the risk, the feasibility of protective measures and the practical demands placed upon the host State, but it does not alter the legal standard itself. Extractive investments hence receive no separate legal treatment. The existing standard is simply applied to a more demanding factual environment.[199]

The second approach argues that extractive investments justify a more demanding standard of protection because of their strategic importance, their contribution to the host-State economy and their heightened exposure to political violence. On this view, due diligence develops into a sector-specific obligation.[200]

Between the two, the first approach is preferable. A unitary standard upholds doctrinal coherence and avoids the fragmentation that would result from calibrating treaty obligations according to individual sectors of economic activity. The extractive sector does not require a different legal rule. Its importance lies in exposing the limits, adaptability and normative order of the existing

[194] *AAPL* (n 2) paras 77–85; *Pantechniki* (n 2) paras 77–82.
[195] *Pantechniki* (n 2) paras 77–82; *LG&E* (n 16) paras 237–246.
[196] UNCTAD, *World Investment Report 2024* (n 7).
[197] ARSIWA (n 1) arts 2 and 4–11.
[198] *AAPL* (n 2) paras 54–56, 72–77; *AMT* (n 2) paras 6.05–6.10; *Pantechniki* (n 2) paras 76–84.
[199] ARSIWA (n 1) arts 2 and 31; VCLT (n 1) art 31.
[200] ARSIWA (n 1) arts 2 and 4–11.

framework under conditions in which the competing demands of investor protection and State responsibility are placed under their greatest strain.[201]

A more sceptical reading would object that a formally unitary standard still operates unevenly in substance. Because neither customary international law nor arbitral practice has settled the parameters of due diligence, capacity-constrained host States bear a disproportionate practical burden: the same standard that accommodates limited institutional resources in principle may, in application, be measured against benchmarks calibrated to better-resourced States.[202] On this view, the coherence this dissertation attributes to a unitary standard is partly formal: it preserves a single interpretive test while leaving the distributive consequences of its application unexamined. This objection is well taken as a caution against overstating the framework's neutrality, but it does not support the alternative sector-specific approach rejected above; a variable due-diligence content tied to State capacity, applied consistently, remains preferable in principle to either a uniform standard applied without regard to context or a bespoke standard fragmented by economic sector. The more defensible response is that arbitral practice needs clearer guidance on how capacity is to be assessed, not a different standard altogether.

5.3.2 The Extractive Sector as Analytical Lens

Extractive industries are significant not because they require a separate legal regime, but because they expose the strengths and limitations of the existing framework with particular clarity. They represent the point at which investor protection, sovereignty, institutional capacity, causation and political violence intersect most directly.[203]

The greater the vulnerability of the investment, the stronger the pressure to expand treaty protection, and the greater the danger of weakening the separation between responsibility for State conduct and responsibility for the occurrence of harm. The extractive sector therefore does more than illustrate the argument advanced in this dissertation. It provides the most demanding test of whether the existing legal order can reconcile effective investment protection with the limiting principles of the general law of State responsibility without collapsing into either strict liability or ineffective protection.[204]

5.4 Broader Implications for the Architecture of Investment Law

The jurisprudence examined in this dissertation demonstrates that international investment law has adapted to the problem of non-attributable violence without altering its formal foundations. Attribution remains the threshold of State responsibility, while the practical operation of investment protection increasingly depends upon treaty breach, evidentiary assessment and, where applicable, the comparative allocation of conflict-related loss.[205]

This development has important systemic consequences. It enables investment treaties to respond to modern forms of political violence without departing from the limiting principles of the general law of State responsibility. At the same time, it shifts the practical operation of the regime from comparatively determinate rules of attribution towards evaluative standards of conduct. The resulting balance is both its principal strength and its principal vulnerability.[206]

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[201] ibid.
[202] ARSIWA (n 1) arts 4–11.
[203] *AAPL* (n 2) paras 72–77; *AMT* (n 2) paras 6.05–6.10; *Pantechniki* (n 2) paras 76–84.
[204] UNCTAD, *World Investment Report 2024* (n 7); ARSIWA (n 1) arts 2 and 31.
[205] ECT (n 7) arts 10 and 12.
[206] ARSIWA (n 1) arts 2 and 4–11.

The strength lies in adaptability. Investment protection is no longer rendered ineffective merely because the harmful conduct cannot be attributed to the host State. The corresponding cost is reduced predictability. Standards such as due diligence necessarily depend upon assessments of foreseeability, proportionality, feasibility and institutional capacity. Their application thus cannot be predicted with the same degree of certainty as the rules governing attribution.[207]

That should not be mistaken for doctrinal incoherence. Prevailing arbitral practice consistently applies the same interpretive framework. Attribution remains the threshold inquiry. Treaty breach is assessed through standards of conduct. Causation limits recovery to losses legally connected with the breach. War losses clauses, where applicable, regulate the comparative allocation of conflict-related relief. The variability of outcomes reflects differences in factual context, not disagreement over legal principle.[208]

The regime holds together, going forward, less because of doctrinal innovation than because of analytical discipline. Attribution must remain a genuine threshold rather than an obstacle to be circumvented. Due diligence must continue to function as a standard of conduct rather than an indirect mechanism of compensation. Causation must preserve its restraining role, while war losses clauses must remain mechanisms of comparative equality rather than substitutes for fault-based liability. The legitimacy of investment protection ultimately depends upon preserving the distinction between harm, wrongfulness and compensation.[209]

This conclusion also carries an important methodological implication. As the practical operation of investment protection increasingly depends upon evaluative standards rather than determinate rules, the quality of arbitral reasoning assumes greater significance. Attribution largely constrains decision-making through relatively precise legal criteria. Due diligence, by contrast, derives much of its legitimacy from the transparency of judicial reasoning. Tribunals must explain how foreseeability, proportionality, institutional capacity and causation interact in the circumstances of the particular dispute. Where those relationships are clearly articulated, flexibility remains compatible with legal certainty. Where they are not, discretion risks replacing legal principle.[210]

The future development of international investment law is consequently unlikely to depend upon the creation of new treaty standards. The existing jurisprudence already provides the conceptual resources necessary to address non-attributable destruction while maintaining the structure of the general law of State responsibility. The decisive question is whether those existing standards continue to be applied with sufficient consistency, transparency and analytical discipline.[211]

Conclusion

This chapter has demonstrated that extractive industries provide a particularly demanding context for assessing the allocation of political violence risk under international investment law. The sector exposes the structural tensions between investor protection and State regulatory autonomy more clearly than many other forms of investment because projects are typically long-term, capital-intensive and frequently located in politically unstable environments.[212]

The analysis has shown that arbitral practice does not support a regime of automatic State responsibility for losses caused by non-attributable violence. Instead, liability depends upon identifying a breach of an applicable investment protection standard, most commonly the

[207] *AAPL* (n 2) paras 72–77; *Pantechniki* (n 2) paras 76–84.
[208] ARSIWA (n 1) arts 2, 4–11 and 31; *AAPL* (n 2) paras 54–56, 72–77.
[209] *Pantechniki* (n 2) paras 76–84; ARSIWA (n 1) art 31.
[210] VCLT (n 1) art 31; ARSIWA (n 1) arts 2 and 31.
[211] *AAPL* (n 2) paras 72–77; *AMT* (n 2) paras 6.05–6.10; *Pantechniki* (n 2) paras 76–84.
[212] ARSIWA (n 1) art 55; James Crawford, *State Responsibility: The General Part* (CUP 2013) 113.

obligation to provide Full Protection and Security. The due diligence obligation consequently operates as the principal mechanism through which competing interests are balanced.[213]

At the same time, the chapter has illustrated that the flexibility inherent in the due diligence standard inevitably produces a degree of controlled indeterminacy. Factors such as foreseeability, available resources, operational capacity and the surrounding security environment require tribunals to undertake context-specific assessments instead of applying rigid rules. This flexibility is not a weakness of the system but reflects the need to accommodate the diversity of situations arising in international investment disputes.[214]

Accordingly, extractive industries function as a structural stress test for the broader architecture of international investment law. They reveal both the strengths and the limits of the current legal regime by demonstrating how responsibility can be allocated without transforming investment treaties into systems of comprehensive insurance against political violence. These findings provide the foundation for the overall conclusions presented in the following chapter.[215]

Chapter 6 - Conclusion

6.1 Introduction

This dissertation has examined the extent to which international investment law permits responsibility for destruction caused by non-attributable acts, and through what legal structure such responsibility is reconciled with the general law of State responsibility. The difficulty is not exceptional but structural. The situations in which investment protection is most urgently required are often those in which the immediate perpetrators of the harm are non-State actors whose conduct cannot be attributed to the host State under the general rules of international law.[216]

The analysis demonstrates that contemporary international investment law has responded to this difficulty without altering its doctrinal foundations. Rather than expanding the rules of attribution or transforming investment treaties into systems of compensation for political violence, tribunals have preserved the restrictive structure of State responsibility while developing a model in which protection depends upon the host State's own conduct. Responsibility hence arises, where appropriate, through treaty obligations requiring due diligence, the comparative operation of war losses clauses and the ordinary requirements of causation and proof.[217]

The conclusion advanced in this dissertation is that international investment law has developed a coherent, but necessarily conditional, framework for addressing non-attributable destruction. Its legitimacy depends upon preserving the divide between harm, wrongfulness and compensation, while its effectiveness depends upon the disciplined application of that distinction in increasingly complex situations of political violence.[218]

6.2 The Central Finding and the Architecture of Responsibility

The principal finding of this dissertation is that the current legal regime preserves investor protection without expanding the rules of attribution. Instead, once attribution of the harmful

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[213] Martins Paparinskis, 'Investment Treaty Arbitration and the (New) Law of State Responsibility' (2013) 24 European Journal of International Law 617, 624–628.
[214] *Pantechniki* (n 2) paras 76–84.
[215] *AAPL* (n 2) paras 72–77; *Pantechniki* (n 2) paras 76–84.
[216] *AAPL* (n 2); cf Dissenting Opinion of Asante (n 106) paras 12–22, 34.
[217] *LG&E* (n 16) paras 226–245.
[218] *AAPL* (n 2) paras 72–77.

conduct is unavailable, the legal analysis shifts to the host State's own compliance with its treaty obligations.[219]

This conclusion resolves the central tension examined throughout the dissertation. The general law of State responsibility requires both attribution and breach before responsibility arises. Political violence committed by insurgents, militias, terrorist organisations, criminal groups or other non-State actors will frequently satisfy neither requirement. If investment protection depended exclusively upon attribution of the harmful conduct, treaty protection would become least effective in precisely those situations where investors face the greatest exposure to political violence.[220]

Contemporary arbitral jurisprudence has not addressed that difficulty by relaxing the principles governing attribution. Tribunals continue to apply the restrictive rules reflected in the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts. Conduct remains attributable only where the recognised requirements of organ status, control, direction or adoption are satisfied. The limiting function of attribution therefore remains unchanged.[221]

The practical operation of investment protection instead depends upon a different inquiry. Once attribution is unavailable, tribunals assess whether the host State nevertheless complied with its independent treaty obligations, most notably the obligation of Full Protection and Security (FPS). The decisive issue is no longer the identity of those responsible for the violence, but whether the State exercised the degree of protection required in the circumstances. Responsibility hence arises, where appropriate, from the State's own conduct rather than from attribution of the underlying violence.[222]

The resulting framework is neither unitary nor sequential in a purely mechanical sense. Four inquiries operate together, each doing distinct work: whether the conduct is attributable to the State; whether the State's own response breached its treaty obligations; whether, where applicable, conflict-related relief was distributed without discrimination under a war losses clause; and whether the resulting loss is legally connected to whichever breach has been established. Taken together, these elements preserve meaningful investment protection without abandoning the limiting principles of the general law of State responsibility.[223]

6.3 Extractive Industries and Political Violence

The extractive sector provides the principal context through which the legal model developed in this dissertation can be tested. Extractive investments are territorially immobile, infrastructure-dependent, capital-intensive and particularly vulnerable to prolonged political instability. Unlike more mobile forms of investment, they cannot readily reduce exposure through relocation or

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[219] Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd edn, OUP 2012) 149–151 (FPS as an obligation of vigilance) and 183–185 (war losses clauses); on the general international law origin of the vigilance standard see *Corfu Channel (United Kingdom v Albania)* (Merits) [1949] ICJ Rep 4, 22; on the historical emergence of these standards in treaty practice see FA Mann, 'British Treaties for the Promotion and Protection of Investments' (1981) 52 British Year Book of International Law 241; Jeswald W Salacuse, *The Law of Investment Treaties* (2nd edn, OUP 2015) 12–18; Peter D Cameron, *International Energy Investment Law: The Pursuit of Stability* (OUP 2010) 5–12.

[220] *Ampal* (n 113).

[221] De Brabandere (n 114) 354–355.

[222] De Brabandere (n 114) 328–330; cf *Ampal* (n 113).

[223] *AAPL* (n 2); cf Dissenting Opinion of Asante (n 106).

restructuring, even though the violence affecting them will frequently remain non-attributable under the general rules of international law.[224]

For that reason, the sector exposes both the necessity and the limits of the contemporary regime. It demonstrates why attribution remains indispensable to the legitimacy of State responsibility, while also illustrating why attribution alone cannot provide an adequate legal response to severe investment loss arising from political violence.[225]

The significance of the extractive sector therefore lies not in requiring a separate body of legal rules, but in testing the conceptual order of the existing structure under its most demanding conditions. It is in this context that the relationship between investor protection, sovereignty, institutional capacity, causation and political violence becomes most acute. The fact that the existing structure remains capable of addressing those pressures without abandoning its underlying principles provides important support for the central argument advanced in this dissertation.[226]

6.4 Predictability, Legitimacy, and the Future of the Regime

The principal cost of the adaptive structure identified in this study is reduced predictability. Attribution operates through relatively determinate thresholds, whereas due diligence operates through evaluative standards, so the more responsibility depends on the latter, the harder outcomes become to predict in advance. This should not be mistaken for doctrinal incoherence: the recurring standards remain stable, and tribunals consistently return to foreseeability, proportionality, feasibility, institutional capacity, causation and comparative equality. The instability arises not from the absence of legal criteria but from the contextual nature of their application.

That instability is the necessary cost of retaining protection without abandoning attribution. A rigid regime would be more predictable, but only by denying protection where political violence is most severe; a highly flexible regime would preserve responsiveness, but only by weakening the boundary between conduct and outcome. Neither option is satisfactory, and the legitimacy of the regime accordingly depends on maintaining that equilibrium: attribution as a genuine threshold, due diligence as a standard of conduct rather than a substitute for compensation, and causation as a limiting filter on recovery.

The future coherence of the regime will depend less on doctrinal innovation than on continued analytical discipline of this kind: strict separation of attribution and breach, transparent justification of capacity assessments rather than conclusory deference, and restraint in inferring breach from outcome. Political violence is not a stable factual category, ranging from isolated sabotage to systemic institutional crisis, and any approach capable of addressing that range must retain a degree of elasticity. The problem is not elasticity as such, but elasticity without discipline. What matters for the regime's legitimacy is therefore not whether tribunals can avoid judgment, but whether they render it within a scheme of intelligible, consistently articulated criteria, showing how conclusions follow from the treaty standard and the evidentiary record rather than merely asserting that a crisis was severe or a response reasonable.

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[224] UNCTAD, *World Investment Report 2024* (n 7).

[225] Dissenting Opinion of Asante (n 106) (lex specialis argument); cf *AAPL* (n 2) (majority's independent assessment of Article 2(2)).

[226] *AAPL* (n 2) paras 72–77; *Pantechniki* (n 2) paras 76–84.

6.5 Final Conclusion

Destruction caused by non-attributable acts does not reveal a gap in international investment law. It reveals the limits of attribution as a complete explanation of international responsibility. Modern arbitral practice has addressed that limitation without altering the foundations of the general law of State responsibility. Rather than expanding attribution, arbitral jurisprudence maintains its restrictive function while locating responsibility in the host State's own compliance with treaty obligations, the ordinary requirements of causation and, where applicable, the comparative operation of war losses clauses.[227]

The resulting framework is principled, but only conditionally so. Its coherence depends upon preserving the differentiation between harm, wrongfulness and compensation. It is strongest where tribunals maintain that analytical discipline and weakest where severe investor loss encourages conduct-based responsibility to extend beyond its justificatory foundations.[228]

The central conclusion of this dissertation is consequently that contemporary international investment law has developed a coherent and defensible framework for addressing destruction caused by non-attributable acts without abandoning the limiting principles of the general law of State responsibility. The durability of that model, however, depends not upon the creation of new treaty standards, but upon the disciplined application of those that already exist.[229]

Whether that discipline holds is a question for future research, particularly as new forms of non-attributable harm, such as cyber-enabled sabotage of extractive infrastructure, test the same doctrinal structure. The jurisprudence has not resolved the underlying tension between investment protection and the limiting principles of State responsibility. It has managed that tension. That achievement is necessarily incomplete, but it explains why contemporary international investment law remains capable of responding to non-attributable destruction without abandoning the principles upon which its legitimacy ultimately depends.[230]

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[227] *Pantechniki* (n 2) paras 76–83.

[228] *Pantechniki* (n 2) para 76 (arbitrator Paulsson's own statement of the objection to a relativistic due-diligence standard).

[229] *Pantechniki* (n 2) para 77.

[230] *CMS* (n 111) paras 315–332; *CMS* (Annulment) (n 111) paras 130–136; *LG&E* (n 16) paras 226–266.

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