War Series: Trump's Tariffs and How US Businesses Can Challenge Foreign Retaliatory Tariffs Under Bilateral Investment Treaties

April 23, 2025

In Light of the April 2, 2025, Executive Order on Reciprocal Tariffs

On April 2, 2025, President Trump signed the Executive Order titled "**Presidential Action: Regulating Imports with a Reciprocal Tariff to Rectify Trade Practices that Contribute to Large and Persistent Annual United States Goods Trade Deficits**." This order targets countries deemed to be engaging in unfair trade practices and imposes reciprocal tariffs to counterbalance the perceived disadvantage to American goods. In turn, several trading partners—claiming that the Executive Order undermines existing market access arrangements—have swiftly introduced **retaliatory tariffs** aimed at United States exports. These foreign duties potentially affect a wide swath of American industries, including manufacturing, technology, agriculture, and other key sectors.

Amid this new climate, **US manufacturers, industrial firms, farmers, and investors with international operations** may find themselves confronting sudden and detrimental market barriers. Unexpected surcharges on goods entering foreign countries or discriminatory policies targeting US-based enterprises can quickly erode profit margins and disrupt long-standing commercial relationships. Although these retaliatory tariffs

arise in part from a broader geopolitical and trade-policy standoff, they can directly harm the bottom lines of individual American businesses.

Critical to US businesses is that **Bilateral Investment Treaties (BITs)** or similar international agreements sometimes offer a legal avenue to challenge such foreign measures. This article explores how businesses—ranging from large-scale manufacturers to family-owned farming enterprises—can potentially invoke BIT protections and **pursue arbitration** when confronted with retaliatory tariffs that unfairly or discriminatorily harm US investments abroad.

1. **Background: Retaliatory Tariffs and Their Impact on US Industries**

Retaliatory tariffs are hardly new in global commerce. Still, the **2025 Executive Order** has generated considerable turbulence because it establishes reciprocal tariffs targeted at countries the administration views as contributing to persistent US goods trade deficits. Countries subject to these reciprocal measures are employing their own instruments to counter perceived US pressure. For instance, additional duties might be levied specifically on American agricultural products, advanced machinery, or technology components—often those with significant export volume or strategic political influence.

For **US manufacturers** that depend on selling products overseas, these newly imposed foreign tariffs can disrupt supply chains, inflate operational costs, and render American goods uncompetitive in key markets. Similarly, **farmers** who have cultivated relationships with foreign buyers—often built over decades—could see the demand for US-grown commodities plummet if foreign tariffs place local producers at an advantage. In the technology or industrial sectors, certain retaliatory measures may specifically target cutting-edge components, crippling the ability of some American firms to remain

profitable in international markets.

These actions are often politically motivated: foreign nations, frustrated by the US’s reciprocal tariff approach, design retaliatory tariffs to exert pressure on policymakers in Washington. However, the brunt of this pressure frequently falls on everyday American businesses—who may be singled out for punitive treatment to achieve diplomatic or economic goals.

2. **How BITs Can Offer a Path to Relief**

Bilateral Investment Treaties typically grant a private party—the investor—the right to **sue a host government** if that government’s actions cause harm to the investor’s business or property in the host’s territory. Traditionally, these claims arise from expropriation, unfair or inequitable treatment, denial of justice, or discriminatory measures. Retaliatory tariffs can, in certain circumstances, fit within these categories if they disproportionately burden US investors compared to local or third-country businesses.

The key question for many in the US business sphere is whether their foreign presence qualifies as a protected “investment.” BITs often define “investment” broadly, potentially encompassing **cross-border supply chains, distribution agreements, or minority stakes** in foreign companies—arrangements that might be significantly harmed by retaliatory duties. If the effect of a tariff is to undermine a US investor’s capacity to sell goods or to operate profitably, that investor may argue that the tariff contravenes BIT standards.

This legal reasoning has gained traction in international jurisprudence. One notable reference is the **Costello judgment** in Ireland’s Supreme Court, which, while addressing the constitutionality of the Canada-EU trade agreement, illustrates how investor-state tribunals wield authority to

rule on alleged breaches of treaty obligations—even when those breaches manifest as tariff disputes (Costello v The Government of Ireland, Ireland and the Attorney General (Approved) [2022] IESC 44_5). In paragraph 127 of the Costello judgment, the Court comments on how retaliatory tariffs—adopted in response to a finding that one party had violated trade rules—spurred lawsuits from private companies suffering trade restrictions:

"[127. As it happens, the CJEU has taken a similar view with regard to liability of the Union under Article 340 TFEU (ex. Article 288 EC). Thus, for example, in FIAMM and Fedon (Joined Cases C 120 and 121/06P, EU: C: 2008: 476) two Italian companies contended that they had suffered loss when a WTO Disputes Panel had authorised the US to impose retaliatory tariffs on certain products …]"

This observation underscores that **retaliatory tariffs** can become a focal point for investor claims, especially where a measure deliberately singles out goods from a particular country. If the duties disrupt an American company's ability to access a foreign market or fulfill contractual obligations, the possibility of a BIT-based challenge arises.

3. **Potential Grounds Under BITs: Fair Treatment and Non-Discrimination**

Many BITs contain provisions on **national treatment** (treating foreign investors no less favorably than domestic investors) and **most-favored-nation (MFN) treatment** (treating investors from one treaty partner no less favorably than investors from other countries). When a retaliatory tariff exclusively targets American goods or is intentionally calibrated to disadvantage US-produced items, it may violate one or both of these commitments.

For instance, the language in several US BITs is quite explicit. A typical article might state:

“Each Party shall accord treatment no less favorable than that it accords … to investments of its own nationals or companies (national treatment) or to investments of nationals or companies of a third country (most-favored-nation treatment).”

Should a government’s retaliatory tariff exclude local producers or third-country producers from comparable duties, US businesses could argue the measure amounts to **less favorable treatment** of American investments. When these measures carry signs of punitive or protectionist intent, the case for discrimination is further bolstered.

Additionally, many BITs oblige governments to respect **fair and equitable treatment** (FET). This standard protects investors from arbitrary, unreasonable, or unpredictable governmental conduct. A tariff that is indiscriminately aimed at harming US commercial interests—without a legitimate regulatory basis—could be cast as violating FET obligations. Although states do enjoy wide regulatory latitude, tribunals often look for objective justifications. Where purely political motives or open hostility toward American exporters are on display, an FET claim might succeed.

4. **Political Motivations and Potential Legal Vulnerabilities**

Unlike generalized tariffs that can be defended as responding to economic exigencies or trade imbalances, politically driven retaliatory tariffs often lack a clear neutral rationale. The US’s reciprocal tariff approach is justified by the President’s stated goal of **rectifying ongoing trade deficits**. By contrast, some foreign countermeasures appear more overtly aimed at harming American producers as a pressure tactic.

Recent comments by public officials highlight this dynamic. For example, on March 27, 2025, Ontario Premier Doug Ford declared:

“…we’re going to make sure that we inflict as much pain as

possible … to the American people…"

Such statements suggest a motive less about fair trade policies and more about **punishment or leveraging political outcomes**. Although rhetorical flourishes are common in trade standoffs, they can serve as corroborating evidence that measures are discriminatory in nature.

This recalls the scenario in **LG&E v. Argentina**, where the tribunal considered whether the Argentine government, under the strain of economic crisis, used foreign-owned utility companies to bear a disproportionate burden (LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc .v. Argentine Republic, ICSID Case No. ARB/02/1). In that dispute, the claimants argued that the government singled out their sector for unfavorable treatment, effectively transferring wealth from foreign investors to local consumers. The tribunal recognized that such intent—coupled with tangible economic harm—could give rise to liability under the applicable treaty.

If a foreign state's retaliatory tariff policy is similarly **selective** or accompanied by aggressive rhetoric targeting American interests, a US business might argue that the measure constitutes unfair or inequitable treatment, discrimination, or even a form of indirect expropriation if it deprives the investor of substantially all economic benefit.

5. **Determining Damages: Insights from the Costello Judgment**

Returning to the **Costello** decision, the Irish Supreme Court notes that investor-state arbitration can impose significant damages on a host State if its regulations breach treaty standards. In paragraph 129, the Court points out that:

"[129. … at least at a theoretical level – CETA represents a potentially significant extension of the non-contractual liability of the State. … the State would be exposed to strict liability claims for damages arising from mere legislative non-compliance with CETA, even if the measures were not in

themselves unconstitutional … or even if the State had acted in perfect good faith … .]"

Substitute "CETA" with any relevant BIT or investment agreement, and the principle remains the same: if a state's measure, including a retaliatory tariff, **contravenes treaty commitments**, the state could face substantial compensation claims—even if it believed it was acting lawfully or in the national interest.

For US businesses, this underscores the viability of seeking monetary redress. Suppose a foreign government's retaliatory tariffs result in immediate and severe losses—by blocking key markets or imposing prohibitively high duties. In that case, an investor-state tribunal might award damages reflecting lost revenue or the diminution in the value of the investor's enterprise abroad. Consequently, these potential liabilities can act as a deterrent for host states contemplating retaliatory measures.

6. **Establishing Jurisdiction: Framing Exports as an Investment**

One common misconception among **US exporters, manufacturers, and agricultural producers** is that BIT protections only apply to large, capital-intensive projects, such as major infrastructure or significant equity stakes in a foreign subsidiary. While it is true that some BITs require a direct or indirect ownership interest in the host country, many treaties adopt **broad definitions** of "investment," potentially including long-term distribution agreements, supply chain contracts, or intangible rights crucial to a business's presence in the foreign market.

To access these protections, a US entity must demonstrate that it holds a protected investment under the treaty's definition. Even an export-oriented business might qualify if it has structured operations in the host country—such as local

partnerships, a distribution network, or commercial activities that go beyond one-off sales. Retaliatory tariffs that cripple these operations could be challenged as a violation of the treaty.

Typically, the procedural steps to initiate investor-state arbitration under a BIT involve:

1. **Notice of Dispute:** The US investor notifies the host State of the alleged treaty breach.
2. **Cooling-Off Period:** Many BITs mandate a waiting period (commonly 3–6 months) for parties to attempt amicable resolution.
3. **Arbitration Filing:** If no settlement is reached, the claimant can file its case under the agreed-upon rules (often ICSID or UNCITRAL).

This mechanism is reminiscent of the principle in **Banco Nacional de Cuba v. Sabbatino**, recognizing that extraterritorial judicial or arbitral review of governmental actions can occur if provided for by treaty. BIT arbitration stands out precisely because it bypasses local courts and places the dispute before an international forum empowered to render enforceable awards.

7. **The Political and Economic Stakes for Foreign States**

From a policy perspective, states that impose retaliatory tariffs in response to the **April 2, 2025, Executive Order** risk opening themselves to significant liability if they fail to calibrate these measures consistently with their BIT obligations. While officials may view “reciprocal” or retaliatory tariffs as a strategic tool to extract concessions from the US, they must consider the potential for major arbitral awards.

In recent years, tribunals have demonstrated a willingness to scrutinize **politically charged actions** that discriminate against foreign investors. If a tariff is accompanied by

public statements urging punitive action against Americans—rather than citing neutral economic considerations—it may be easier for investors to show the measure is arbitrary, lacking legitimate justification.

Indeed, the line between permissible countermeasures under international trade law and impermissible conduct under investment treaties can be fine. Even if a host state believes it is responding to the US's reciprocal tariff regime, it still has a duty not to violate the fair and equitable treatment or national treatment rights guaranteed to US companies. Put differently, states cannot simply invoke reciprocal trade retaliation as a shield if the measure in question breaches investor protections enshrined in a BIT.

8. **Practical Considerations for US Manufacturers, Farmers, and Investors**

For **US-based manufacturers**, the immediate concern is calculating the financial impact of retaliatory tariffs on existing foreign contracts. If a contract becomes unprofitable or impossible to fulfill due to extreme tariff hikes, businesses should examine their relevant BIT coverage. Where coverage exists, the next step is documenting the nature of the investment, the timeline of the tariff, any discriminatory language used by foreign officials, and the loss incurred.

Agricultural producers may likewise consider how their supply chain agreements and distribution networks abroad are structured. Even small or medium-sized farming operations, if integrated into a larger export system, might have enough of a "footprint" in a foreign country to assert BIT rights. Detailed record-keeping—especially regarding changes in market access, lost sales, and local competitor advantage—can bolster claims of discriminatory treatment.

Meanwhile, **foreign investors** from the US (for instance, those who have established local facilities or partnerships abroad)

should review their corporate structure. Some businesses maintain complex global footprints, with intermediate holding companies or subsidiaries in multiple jurisdictions. Determining which BIT is most advantageous—and whether the relevant entity qualifies as an "investor" under that treaty—can be crucial in selecting the optimal route for arbitration.

9. **Conclusion: Turning the Tables on Retaliatory Tariffs**

The **2025 Executive Order on Reciprocal Tariffs** has intensified tensions in global trade, spurring certain nations to respond with measures aimed squarely at US businesses. Although these moves are often framed as legitimate countermeasures, they may expose foreign governments to **significant legal and financial consequences** under the network of BITs that protect American investments.

For **US manufacturers, agricultural producers, technology exporters, and other industries** bearing the brunt of retaliatory duties, BIT arbitration represents a tangible opportunity to challenge measures that appear discriminatory or punitive. As the **Costello** judgment illustrates, tribunals can award substantial damages if they conclude that a host State has breached treaty obligations, particularly when the action was politically motivated.

From a US business perspective, the **practical takeaway** is clear: While trade wars can be fought on the global stage through diplomacy and reciprocal measures, there is also an **individualized legal recourse** if retaliatory tariffs infringe on internationally guaranteed protections. By methodically documenting losses, verifying treaty coverage, and pursuing investor-state arbitration where applicable, American enterprises have a powerful tool to seek relief.

Thus, in a climate of escalating **reciprocal tariffs and retaliatory measures**, American businesses need not assume that

absorbing losses is the only path. BIT protections offer a channel for redress. While mounting such a claim requires careful analysis and legal support, successful arbitration can offset financial harm, reaffirm the value of treaty-based rights, and—ideally—encourage more balanced and equitable trade practices in the long run.

In sum, as the United States implements its April 2, 2025, Executive Order to address large and persistent trade deficits by regulating imports through reciprocal tariffs, foreign governments have launched retaliatory duties that could devastate certain segments of the US economy. However, those burdens need not be passively endured. Through the framework of BITs, US manufacturers, farmers, and other investors possess a significant legal mechanism to challenge unjust or discriminatory retaliatory tariffs. By understanding the scope of BIT protections, documenting the real-world impact, and considering prompt recourse to investor-state arbitration, American businesses can assert their rights in what has become a complex and high-stakes global trade landscape.

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War Series: Recent Submarine Cable Attacks, the 1923 Cuba Submarine Arbitration, and

Business Considerations

April 23, 2025

The global digital infrastructure relies heavily on a vast network of submarine cables, which carry approximately **95% of international data traffic**. These undersea cables are the lifelines of modern communications, finance, and commerce. However, escalating geopolitical tensions in regions such as the Red Sea, the Hormuz Strait, and the larger Indo-Pacific have exposed these critical infrastructures to increasing risks. Recent incidents have highlighted not only their vulnerability but also the complex legal challenges that private companies face when seeking remedies for disruptions.

Recent Incidents Underscoring Vulnerabilities

In March 2024, amid intensifying conflicts near Yemen, three submarine cables were damaged in the Red Sea. The causes—whether deliberate attacks or collateral damage from naval confrontations—remain unclear. The impact was immediate and significant. **HGC Global Communications reported a 25 percent reduction in data traffic across the Red Sea**, necessitating urgent rerouting to alternative networks. Major cables such as the **Europe India Gateway (EIG)** and the **Asia-Africa-Europe 1 (AAE-1)** network, which are crucial for connecting economies across continents, were affected.

Similar events have occurred elsewhere. In 2023, Taiwan faced the severing of two fiber-optic cables linking it to the Matsu islands, leaving thousands of residents with minimal internet access for months. In the Arctic, Norway discovered in 2021 that 4.2 km of submarine cables had vanished, disrupting essential oceanographic monitoring and satellite communications. Despite investigations, conclusive evidence of

intentional damage or attribution of responsibility remained elusive in both cases.

These incidents underscore the profound vulnerability of submarine cables to geopolitical conflicts and raise pressing questions about the legal remedies available to affected private entities.

Historical Legal Precedent: The Cuba Submarine Telegraph Company Case

To navigate the legal complexities surrounding undersea cable disruptions, it is instructive to examine historical precedents, notably the **Cuba Submarine Telegraph Company, Ltd. (Great Britain) v. United States** arbitration of 1923.

During the Spanish-American War of 1898, U.S. naval forces severed submarine telegraph cables operated by the Cuba Submarine Telegraph Company, a British entity. The action aimed to disrupt Spanish communications and was carried out within enemy territorial waters. The company sought compensation for the repair costs, arguing that their property had been unlawfully destroyed.

The tribunal disallowed the claim, offering reasoning that remains pertinent today. It recognized the United States' right to undertake necessary military measures, stating: *"In these circumstances the right of the United States to take measures of admittedly legitimate defense against these means of enemy communication was fully justified."* The company's operations were deeply intertwined with Spanish military interests. The concessions granted by Spain required the company to transmit official correspondence and prohibited any inspection of such communications. The tribunal observed: *"The transmission of the official correspondence of the Spanish Government was obligatory and gratuitous, the managers and directors being appointed by that Government."* Concluding that there were no equitable grounds for awarding compensation, the

tribunal emphasized: *“Not only is there no ground of equity upon which an award should be made against the United States, but equity appears to us to be on the side of the United States in their refusal to pay the damages claimed.”*

This case establishes a pivotal principle: during armed conflicts, actions taken by a state as legitimate acts of war may override private property rights without an obligation to compensate affected entities, especially when those entities are engaged in activities that support enemy military operations.

Navigating the Complex Liability Landscape

In the context of modern submarine cable operations, determining who owes obligations of compensation when cables are disrupted due to conflicts requires a nuanced understanding of international law and the various legal regimes governing the seas.

Submarine cables traverse multiple maritime zones, each with specific legal provisions under international law. The primary legal instruments include the **1884 Convention for the Protection of Submarine Telegraph Cables** and the **United Nations Convention on the Law of the Sea (UNCLOS)** of 1982. UNCLOS delineates the rights and responsibilities of states in maritime zones such as territorial seas, exclusive economic zones (EEZs), continental shelves, and the high seas.

In **territorial seas**, coastal states have sovereignty and extensive regulatory authority over activities, including submarine cable operations. Companies must comply with national laws, which may require permits and adherence to environmental regulations. In the **EEZ and continental shelf**, while coastal states have sovereign rights over natural resources, UNCLOS affirms that all states have the freedom to lay and maintain submarine cables, provided they respect the rights and duties of the coastal state.

However, when disruptions occur due to conflicts, especially in areas beyond national jurisdiction—the **high seas**—the question of liability becomes more intricate. The exclusive jurisdiction of flag states over their vessels on the high seas complicates enforcement measures against entities suspected of intentional damage to submarine cables. UNCLOS Article 97 restricts the arrest or detention of ships to the authorities of the flag state, particularly concerning incidents of navigation involving penal or disciplinary responsibility.

The **Enrica Lexie** arbitration provides valuable insight. The tribunal held that "incident of navigation" refers to events related to the movement or maneuvering of a ship causing serious damage or harm. Intentional acts causing damage, such as deliberately cutting undersea cables, may not be protected under the provisions limiting enforcement to flag states. This opens the possibility, albeit limited, for other states to take action against offending vessels, but practical challenges persist.

Practical Steps for Companies to Seek Recourse

Faced with these complexities, private companies need to explore all available avenues to protect their interests and seek remedies when undersea cables are disrupted due to conflicts.

One critical approach is to **review international investment treaties**. These treaties often contain provisions that protect investments against expropriation and unfair treatment, and they provide mechanisms for dispute resolution between investors and states. Companies should assess whether their investments in submarine cables qualify for protection under such treaties and whether the treaties cover the territories where disruptions have occurred.

In assessing the applicability of investment treaty

protections, companies must determine whether the treaty applies to the maritime zones where the damage occurred. Some treaties explicitly include protections in EEZs and continental shelves. It is essential to confirm that submarine cable assets are considered investments under the treaty's definitions. Moreover, companies should evaluate if the state's actions or omissions can be attributed to it under international law, potentially giving rise to a claim.

Another vital step is to **leverage insurance protections**. Companies should thoroughly review their insurance policies to ensure coverage of damages resulting from conflicts. This includes policies that specifically cover losses due to acts of war or terrorism, known as war risk coverage. Business interruption insurance can also provide coverage for financial losses resulting from operational disruptions. Scrutinizing policy terms, exclusions, and conditions is essential to ascertain the extent of coverage and any obligations required to maintain it.

Companies should also **strengthen contractual protections** with partners, suppliers, and customers to mitigate risks associated with undersea cable disruptions. This involves examining and enhancing contractual provisions such as force majeure clauses, which clearly define events that constitute force majeure and the consequences for contractual obligations. Establishing indemnification agreements can set terms where parties agree to compensate each other for specific losses or damages. Additionally, setting caps on liabilities and outlining procedures for dispute resolution can help manage potential disputes and financial exposures arising from disruptions. By proactively addressing these issues in contracts, companies can better safeguard their interests.

Takeaway

The disruption of undersea cables in conflict zones presents

complex legal challenges for private companies. Historical precedents like the **Cuba Submarine Telegraph Company** case highlight the difficulties in seeking compensation when state actions during armed conflicts are deemed legitimate military measures. The intricate web of international law governing maritime zones adds further complexity, especially concerning enforcement in areas beyond national jurisdiction.

However, companies are not without recourse. By thoroughly reviewing investment treaties, ensuring comprehensive insurance coverage, and strengthening contractual agreements, they can identify potential avenues for compensation and risk mitigation. Proactive engagement with international legal mechanisms and collaborative advocacy can also contribute to enhancing protections for these critical infrastructures.

Understanding the legal landscape and taking strategic actions are essential for companies seeking to navigate the uncertainties associated with undersea cable disruptions. While challenges persist, informed and proactive approaches can help safeguard interests and support the resilience of the global digital infrastructure.

By integrating these considerations into their strategic planning, companies can better position themselves to respond effectively to undersea cable disruptions and contribute to the stability and security of global communications networks.

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War Series: Investment Protection Treaties in War for Investors in the Middle East (GÜRİŞ v. Syria)

April 23, 2025

The recent arbitration award in the case of **GÜRİŞ and others v. Syria** (ICC, Final Award, 31 August 2020) offers a timely reminder of the complexities businesses face when operating in conflict zones. As tensions rise in parts of the Middle East, understanding the obligations of host states under investment treaties becomes ever more crucial.

In this case, Turkish investors found themselves embroiled in a dispute after their investments in Syria suffered losses due to the ongoing conflict. The investors turned to the **Syria-Turkey Bilateral Investment Treaty (BIT) of 2004**, seeking compensation for their losses.

Key Takeaways from the Arbitration

One of the central issues was whether the Syrian government had breached its obligations under the BIT, particularly concerning the **“full protection at all times”** standard and the provisions related to losses due to war or civil disturbances.

The tribunal highlighted that the existence of an armed conflict does not automatically suspend a state’s obligations under international treaties. Referring to the **2011 International Law Commission (ILC) Articles on the Effect of Armed Conflict on Treaties**, the tribunal noted that treaties continue to operate unless specific provisions state

otherwise.

The War-Losses Clause and Its Implications

A significant point of contention was **Article IV(3) of the Syria-Turkey BIT**, known as the “war-losses” clause. This provision ensures that investors are accorded treatment no less favorable than that given to the host state’s own investors or those of any third country concerning measures adopted in relation to losses suffered due to war or similar events.

The tribunal determined that this clause did not exclude the application of other protections under the BIT. Instead, it provided an additional layer of security for investors during times of conflict. This interpretation aligns with previous arbitral decisions, reinforcing that **war-losses clauses are additive, not exclusionary**.

Most-Favored-Nation Treatment Extends Protections

The investors also invoked the **Most-Favored-Nation (MFN) clause** in the BIT, seeking to benefit from more favorable provisions in Syria’s investment treaty with Italy. The tribunal agreed that the MFN clause allowed the investors to access these enhanced protections, particularly the obligation to offer adequate compensation for losses, as stipulated in the **Syria-Italy BIT**.

This decision underscores the importance of MFN clauses in investment treaties, enabling investors to benefit from the best available standards of protection, even during armed conflicts.

Force Majeure and Necessity Defenses Rejected

Syria attempted to defend its position by invoking **force majeure** and **necessity**, arguing that the conflict excused any breaches of its treaty obligations. However, the tribunal

rejected these defenses, emphasizing that such exceptions are not applicable when the obligation in question is to provide compensation for losses already incurred.

The tribunal noted that the obligation to offer compensation is a financial one and that war or armed conflict does not make it materially impossible to fulfill this duty. By undertaking to compensate for losses due to war or similar events, the state cannot later claim that the very occurrence of these events absolves it of its obligations.

Implications for Middle Eastern Businesses

For businesses operating in the Middle East, the GÜRİŞ v. Syria award serves as a crucial precedent. It highlights that:

- **Investment treaties remain in force during conflicts**, and host states are still bound by their obligations.
- **War-losses clauses provide additional protections** but do not negate other treaty rights.
- **MFN clauses can be powerful tools** for investors to access the most favorable treatment available.
- **States cannot easily evade their compensation obligations** by citing conflict-related defenses.

As regional tensions escalate, companies must be vigilant in understanding their rights under international law. Investment treaties can offer significant protections, but navigating them requires expertise.

Moving Forward: Strategic Considerations

Businesses should:

- **Review existing investment treaties** relevant to their operations to understand the full spectrum of protections available.
- **Consider the inclusion of robust dispute resolution mechanisms** in contracts, ensuring access to

international arbitration if disputes arise.
- **Stay informed about geopolitical developments** that may impact their investments and adjust strategies accordingly.

Conclusion

The GÜRİŞ v. Syria case reinforces the notion that even in the face of war, investment protections endure. Host states have clear obligations, and investors have avenues to seek redress when those obligations are not met.

In these uncertain times, it's more important than ever for businesses to be proactive in safeguarding their interests. Understanding the nuances of investment treaties and the protections they offer can make all the difference.

For those seeking guidance on navigating these complex legal landscapes, expertise in international arbitration and investment law is invaluable. As the Middle East continues to evolve, staying ahead of the curve is not just advantageous—it's essential.

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War Series: Sports (Basketball) Contracts and

War as Force Majeure in Arbitration

April 23, 2025

The case **Jarrell Isaiah Brantley v. Basketball Club Unics (BAT 1813/22)** was an **international sports arbitration** introduced on **April 19, 2022** and has since been **concluded**. The dispute was adjudicated under the **Basketball Arbitral Tribunal (BAT)**, using the **BAT Arbitration Rules 2022**, with the **seat of arbitration** in **Geneva**. The claimant, **Jarrell Isaiah Brantley**, a professional basketball player from the **United States**, brought the case against **Basketball Club Unics**, based in **Russia**, following a contractual disagreement arising during the 2021-2022 season amid the geopolitical tensions caused by Russia's invasion of Ukraine. The arbitration proceedings examined issues related to the player's departure from the team and whether the war constituted a **force majeure** event excusing his performance under the contract.

In **Jarrell Isaiah Brantley v. BC Unics**, we confront a fascinating convergence of sports arbitration and the broader impact of **war on the sporting industry**. This case revolves around Brantley, an American professional basketball player, and the Russian club BC Unics. The crux of the dispute lies in whether Brantley was justified in terminating his contract due to Russia's invasion of Ukraine, and if such a **force majeure** event can relieve athletes of their contractual obligations.

Brantley, contracted to BC Unics for the 2021-2022 season, found himself in an escalating geopolitical crisis. The Russian invasion of Ukraine on **February 24, 2022**, led to a swift series of sanctions, airspace closures, and public advisories urging U.S. citizens to leave Russia. Against this

backdrop, Brantley, concerned for his safety and that of his family, left Russia, despite Unics' insistence that the situation was "normal."

One of the **key legal issues** here is the interpretation of the **force majeure clause** in the player contract. Typically, a **force majeure** clause excuses non-performance when unforeseen and uncontrollable events render contract fulfillment impossible. The contract in question defined force majeure to include events such as war or hostilities. Given the nature of the Russian military actions, Brantley's departure appears justified on its face. After all, no one could predict how the conflict would evolve.

However, the club argued that since the conflict was not on Russian soil and Brantley's personal safety was not immediately jeopardized, he breached the contract by leaving. They claimed that his real reason for leaving was dissatisfaction with his playing time—an old grievance that predated the war. This sets up a classic clash between **contractual obligations** and the broader context of **human safety and ethics**.

The **Basketball Arbitral Tribunal (BAT)** ultimately sided with Brantley. It ruled that the **war constituted a force majeure** event, excusing him from fulfilling the remainder of his contractual duties. This decision underscores the significant effects that global conflicts can have on **professional sports**, a sector often seen as detached from such worldly concerns.

One of the **broader implications** of this ruling is the message it sends to international athletes: in times of war or global crisis, personal safety supersedes contractual commitments. This case establishes a **precedent** where athletes can lawfully exit contracts if they are directly affected by large-scale events like war. With more **international sports leagues** becoming hubs for global talent, especially in geopolitically tense regions, this decision will undoubtedly echo far and

wide.

From a sports management perspective, it’s clear that **force majeure clauses** in contracts need careful drafting. What constitutes a **force majeure** event must be explicitly defined. Can a player claim force majeure if their home country issues a travel advisory? What if sanctions disrupt payment systems, effectively cutting off their income? Clubs must now grapple with these questions as geopolitical risks are no longer abstract concerns but real threats to business continuity.

The **economic impact** of war on sports is another layer of this case. By suspending Russian teams from the **EuroLeague**, the ripple effect cascaded down to individual players like Brantley, who found themselves in untenable situations. The decision to pause EuroLeague games involving Russian clubs not only denied these athletes the opportunity to compete on a European stage, but it also raised questions about whether clubs should be held accountable for compensating players in such crises. If you’re a player, does your **salary freeze** the moment the games stop? Or are you still entitled to your full pay?

For BC Unics, the ruling was a bitter pill. The club argued that Brantley breached his contract by leaving without permission, but the BAT recognized that **Brantley acted reasonably** under the circumstances. **War is unpredictable**, and it is unreasonable to expect an athlete to prioritize a game over the safety of their family.

This judgment also shines a light on the **business of sports during war**. For Russian clubs, this war has not only led to the loss of top-tier players like Brantley but has also placed them in a precarious financial position. Sponsorship deals, ticket sales, and broadcast revenues are all likely to take a hit when **foreign talent** opts to leave, and **international tournaments** pull the plug on Russian participation.

In conclusion, **Jarrell Isaiah Brantley v. BC Unics** demonstrates the profound impact that geopolitical events can have on the sports industry. Beyond the field, pitch, or court, athletes must weigh their obligations against the safety of themselves and their families. In the end, **force majeure clauses** may offer some respite, but the evolving world of **international sports arbitration** will need to continue addressing the balance between athletic contracts and **global instability**. War is not just a tragedy for nations—it disrupts everything, including the games we play.

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War Series: Defining 'War' in Arbitration Awards and NATO Operations (Kosovo)

April 23, 2025

The arbitration award referenced in the UK Court of Appeal judgment [2002] EWCA 1878 delves deeply into the meaning of 'war' as interpreted by arbitration tribunals and its implications for contractual obligations. This award, rendered by a distinguished panel of arbitrators, underscores the nuanced approach that arbitration tribunals take in defining what constitutes a 'war' under commercial contracts, particularly in the context of **NATO operations**.

The arbitration at the heart of this judgment concerned the **New York Produce Exchange (NYPE) form of charter**, specifically the invocation of a **War Cancellation Clause** by charterers. The clause allowed for the cancellation of the charter in the event of the outbreak of war involving the nation under whose flag the vessel sailed. The dispute arose when Germany, as a member of NATO, participated in military operations in Kosovo and Yugoslavia in 1999. The charterers sought to cancel their obligations under the charter, claiming that Germany's involvement in the conflict constituted 'war' as envisaged by the clause.

The core issue before the arbitration tribunal was whether the military operations in Kosovo, involving NATO and Germany, could be considered a 'war' within the meaning of the War Cancellation Clause. The tribunal's majority found that the operations in Kosovo did not constitute 'war' as contemplated by the contract. This decision was based on a common-sense interpretation of the term 'war,' which the majority arbitrators held should be understood as a conflict between nation-states, not merely military activities or hostilities that fall short of war. The tribunal majority reasoned that while the conflict in Kosovo was indeed intense and involved significant military engagement, it did not rise to the level of 'war' as defined by the contract.

This interpretation aligns with the approach taken by the courts in earlier cases, such as **KKKK v Belships Co (1939)**, where Branson J emphasized that the term 'war' must be construed based on the reasonable expectations of businesspersons, taking into account the nature of the conflict and the specific contractual context. The majority's view was further supported by the distinction between 'war' and 'warlike activities or hostilities short of war' as explicitly drawn in the NYPE charter form.

The dissenting view by Sir Christopher Staughton, however, highlights the inherent ambiguity in the term 'war' and the

potential for differing interpretations. Sir Christopher argued that a reasonable businessman would have considered the Kosovo conflict to be a ‘war,’ given the scale and intensity of the operations and Germany’s involvement. This dissent raises critical questions about the flexibility and adaptability of contractual terms in light of evolving international conflict scenarios.

The relationship between the judgment and the arbitration award is significant in that the Court of Appeal ultimately upheld the arbitration tribunal’s decision, despite recognizing the serious legal questions it raised. The court acknowledged that the arbitrators had applied a common-sense approach to the interpretation of the War Cancellation Clause, consistent with established legal principles. However, the court also noted the practical implications of the decision, particularly the emphasis on the timing of the cancellation notice, which played a crucial role in the outcome.

The broader implications of this award for **NATO operations today** are profound. The tribunal’s decision reflects a conservative approach to defining ‘war’ in the context of contractual obligations, one that emphasizes the traditional understanding of war as a conflict between nation-states. This interpretation has significant consequences for parties to contracts involving NATO member states, as it suggests that not all military engagements, even those involving substantial force and participation by multiple nations, will be considered ‘war’ for the purposes of war cancellation clauses.

In the current geopolitical climate, where NATO operations are increasingly characterized by coalition-based engagements and multilateral military actions that may not involve formal declarations of war, the need for clarity in contractual language has never been more pressing. Parties drafting contracts that include war cancellation clauses must carefully consider the scope and definition of ‘war,’ ensuring that the terms are explicit and aligned with the parties’ intentions.

The tribunal's decision in this case also underscores the importance of **timeliness in exercising cancellation rights**. The charterers' failure to provide timely notice of cancellation was ultimately fatal to their claim, highlighting the need for parties to act swiftly and decisively when invoking such clauses.

In conclusion, the arbitration award referenced in [2002] EWCA 1878 offers valuable insights into the interpretation of 'war' in commercial contracts, particularly in the context of NATO operations. The decision reflects a cautious approach, favoring a traditional understanding of war that may not always align with the realities of modern military engagements. For parties involved in contracts with NATO member states, the key takeaway is the importance of clear, precise language and the need for prompt action when invoking war-related contractual provisions. This award serves as a reminder that while the nature of conflict may evolve, the principles of contract interpretation remain rooted in the reasonable expectations of the parties and the common-sense application of contractual terms.

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War Series: Civil War and Force Majeure in Global

Construction

April 23, 2025

The arbitration between Ermir İnşaat Sanayi ve Ticaret A.Ş. and Biwater Construction Ltd., adjudicated by a sole arbitrator under the ICC Arbitration Rules, offers several critical lessons for construction companies operating in regions vulnerable to civil unrest. This case, which revolved around a construction project in Libya that was interrupted by the First Libyan Civil War, underscores the complexities and risks associated with working in conflict zones.

Lesson 1: Force Majeure in the Context of Civil War

One of the key lessons from this arbitration is the interpretation of force majeure clauses when civil war interrupts a construction project. The sole arbitrator, Tobias H. Zuberbühler, meticulously examined whether the Respondent, Biwater Construction Ltd., could have reasonably been expected to resume the project after the cessation of the First Libyan Civil War. The arbitrator determined that the **“ongoing force majeure situation”** justified the Respondent’s decision not to resume the project, highlighting that **“Libya was and has been a dangerous country since 2011”** (para. 155).

This case illustrates that civil war, as a force majeure event, can extend beyond the immediate conflict period. The arbitrator accepted that the dangers in Libya persisted long after active hostilities ceased, making it unreasonable to expect project resumption. The lesson here is clear: construction companies must recognize that the effects of civil wars are prolonged and can render contract performance impossible for extended periods.

Lesson 2: The Interplay Between Security and Financial Risks

Another significant takeaway from this arbitration is the intricate relationship between security risks and financial considerations in post-conflict environments. The sole arbitrator acknowledged that Biwater's decision not to resume the project was influenced by both **"substantial security concerns"** and the financial risks associated with non-payment by the Libyan client, HIB (para. 154). This dual consideration emphasizes that in conflict zones, security and financial stability are deeply intertwined.

Companies must therefore conduct thorough risk assessments that consider both factors equally. This lesson is particularly relevant for projects in regions where the local government or clients may be financially unstable or unable to fulfill payment obligations, as seen in Libya during the post-war period.

Lesson 3: The Limits of Claims for Lost Profits

The denial of Ermir İnşaat's claim for lost profits is another crucial lesson from this case. The Claimant sought compensation under Clause 3.7 of the Agreement and Article 378 of the Swiss Code of Obligations (CO), arguing that Biwater's failure to resume the project led to lost profits. The arbitrator, however, rejected this claim, stating that the **"ongoing force majeure situation"** made it impossible for the Respondent to resume the project and that Biwater was not at fault (para. 280).

This lesson underscores the difficulty of substantiating claims for lost profits in situations where force majeure is involved. When a civil war or similar event disrupts a project, proving that one party is at fault for non-

performance becomes challenging. Construction companies must be cautious when drafting contracts to ensure that lost profit claims are clearly defined and that force majeure events are appropriately addressed.

Lesson 4: The Importance of Clear Settlement Agreements

The arbitration also highlights the importance of drafting clear and comprehensive settlement agreements in the aftermath of a conflict. The December 2015 Agreement between the parties was intended to resolve certain outstanding issues, but the arbitration revealed that ambiguities in the agreement led to further disputes. For instance, the arbitration had to interpret various clauses of the December 2015 Agreement, particularly those related to payments and legal disputes in Turkey (para. 88-90).

This lesson teaches that settlement agreements must be carefully negotiated and drafted to prevent future litigation. Ambiguities can lead to prolonged disputes and additional arbitration, as seen in this case.

Lesson 5: Documentation and Evidence in Conflict Zones

Finally, this arbitration underscores the challenges of gathering documentation and evidence in conflict zones. The arbitrator acknowledged that the Claimant faced difficulties in providing documentation for its site clearance costs due to the chaotic circumstances of evacuating personnel from Libya. The arbitrator allowed for a relaxation of the substantiation requirements, recognizing that **“under these circumstances, the requirement of substantiation can be alleviated”** (para. 263).

This lesson is particularly important for companies operating in similar environments today. It emphasizes the need for

flexible evidentiary standards in arbitration when the usual documentation is not available due to war or other emergencies. Companies should ensure that their contracts allow for such flexibility, anticipating the possibility that certain records may be lost or unobtainable in the event of a conflict.

Conclusion

The Ermir İnşaat Sanayi ve Ticaret A.Ş. v. Biwater Construction Ltd. arbitration provides essential lessons for construction companies and arbitrators alike. It highlights the extended impact of civil wars on construction projects, the intertwined nature of security and financial risks, the challenges of substantiating claims for lost profits, the importance of clear settlement agreements, and the need for flexible evidentiary standards in conflict zones.

These lessons are particularly relevant in today's global construction industry, where projects frequently intersect with geopolitical instability. As this case demonstrates, the aftermath of civil wars continues to shape the legal landscape, requiring companies and arbitrators to navigate these challenges with foresight and adaptability.

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War Series: Arbitration and

the Tax on War Profits

April 23, 2025

On 15 June 1922, Gustave Ador rendered a significant arbitration award regarding the applicability of a tax on war profits, a decision that resonates through the corridors of international arbitration to this day. This case, arbitrated between the French and Spanish governments, addressed whether Spanish nationals residing in France were subject to the French law of 1 July 1916 on exceptional war profits or exempted by virtue of the Franco-Spanish convention of 7 January 1862. This award exemplifies the intricate interplay between **domestic tax laws** and **bilateral treaties**, a theme recurrent in modern-day international arbitration.

The Compromis Arbitral: Foundations of the Dispute

The arbitration agreement, or **compromis arbitral**, between France and Spain tasked the sole arbitrator, Ador, with resolving a critical issue: the applicability of the 1916 French tax law on Spanish nationals in France, against the backdrop of the 1862 treaty. The agreement underscored that Ador's decision would be final and binding, highlighting the **binding nature** of arbitral awards in international disputes.

Context and Historical Background

The 1862 treaty between France and Spain was a diplomatic effort to establish **mutual tax exemptions** for their nationals residing in each other's territories. This treaty aimed to shield foreign nationals from extraordinary taxes imposed during exceptional circumstances, such as war. Ador meticulously examined the treaty's intent and the historical context, which played a pivotal role in his decision.

Treaty Interpretation and Legal Principles

Ador's analysis revolved around the interpretation of Article 4 of the 1862 treaty, which sought to balance the **principle of domicile** with **nationality-based exemptions**. The treaty exempted foreign nationals from extraordinary contributions tied to their nationality, while subjecting them to ordinary taxes based on domicile. This distinction was crucial in determining the applicability of the 1916 tax law.

The arbitrator dismissed the restrictive interpretation that the exemption was solely for civil war scenarios. He argued that the **broad language** of the treaty did not confine the exemption to such a narrow scope, instead covering any extraordinary contributions arising from exceptional circumstances, such as the global conflict of World War I.

Nature of the 1916 Tax Law

The French law of 1 July 1916 was enacted to address the extraordinary economic gains made during wartime, imposing a tax on **exceptional war profits**. Ador emphasized that this tax was not a standard commercial levy but a response to the extraordinary economic conditions created by the war. He underscored the law's exceptional nature, aligning it with the treaty's provisions exempting foreigners from such extraordinary taxes.

Ador highlighted the **transitory and exceptional character** of the tax, noting that it targeted only the excess profits generated due to the war, distinguishing it from regular commercial taxes. This differentiation was pivotal in concluding that the tax law fell within the treaty's exemption clause.

Equity and Fairness Considerations

The award also touched upon the **equity arguments** presented by France, which contended that it was unfair for Spanish

nationals to benefit from the war without contributing to the extraordinary fiscal burdens. Ador acknowledged these concerns but emphasized that any perceived inequity should have been addressed by renegotiating or denouncing the 1862 treaty, a step France had not taken.

He pointed out that the legislative debates in France, particularly the statements by French officials, reinforced the view that the extraordinary tax was linked to national solidarity and patriotism. This further bolstered the argument that the tax was inherently tied to French nationals, not foreign residents.

Implications and Contemporary Relevance

Ador's award is a landmark in the realm of **international arbitration**, illustrating the delicate balance arbitrators must maintain between **state sovereignty**, **treaty obligations**, and **equitable considerations**. The principles elucidated in this award continue to influence contemporary arbitration, particularly in disputes involving **taxation and international treaties**.

The award underscores the importance of **clear treaty drafting** and the need for states to periodically review and update their international agreements to reflect evolving circumstances. It also highlights the role of arbitrators in navigating the **intersection of domestic laws and international obligations**, ensuring that justice is served while respecting the sovereign rights of nations.

In modern contexts, this case resonates in debates over **taxation of multinational corporations**, where treaties and domestic laws often collide. The principles of **fairness, equity, and the intent of treaties** remain central to resolving such disputes, making Ador's reasoning as relevant today as it was a century ago.

Conclusion

Gustave Ador's arbitration award on the tax on war profits is a testament to the enduring relevance of principled arbitration. It demonstrates the critical role of historical context, treaty interpretation, and equitable considerations in resolving complex international disputes. As we navigate contemporary challenges in international arbitration, the wisdom embedded in this award provides valuable guidance for balancing the interests of states and the principles of justice.

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War Series: When Geopolitics Meets Arbitration in the UTI vs. Iran Case

April 23, 2025

In the arbitration case **United Technologies International, Inc. v. Islamic Republic of Iran**, the Tribunal faced a complex dispute arising from the Iranian Revolution and subsequent geopolitical upheavals. At the heart of the matter were **helicopter components** that Iran Helicopter Support and Renewal Company (IHSRC) had shipped to United Technologies International, Inc. (UTI) for repairs. The core issue was the proper return and payment for these components, with UTI seeking compensation for services rendered and storage costs,

while IHSRC demanded the return of all components or their value.

UTI's Position and Claim

UTI, represented by its unincorporated division Sikorsky, argued that they fulfilled their contractual obligations by repairing and overhauling the components at their Connecticut facility. These repairs were conducted under terms specifying **delivery "F.o.b. Factory"**. However, post-revolution, IHSRC's request to alter the delivery terms to "C and F, Tehran" was declined by UTI, leading to a stalemate exacerbated by U.S. government orders that froze Iranian assets and prohibited the shipment of the components, classified under the **U.S. Munitions List**.

UTI thus found itself in possession of 22 fully repaired and 11 partially repaired components, for which payment was not received. They sought **$183,886.05** for these services, plus storage charges and interest. UTI asserted that due to the changing geopolitical landscape, including the U.S. embargo, they were rightfully retaining the components and sought Tribunal authorization to auction them or receive directions for continued storage and cost reimbursement.

IHSRC's Defense and Counterclaim

IHSRC countered with a multifaceted defense, asserting that UTI was obligated to return the components under IHSRC's terms, which specified "C and F Tehran, Iran". They disputed the claim, arguing that UTI failed to deliver the components as agreed and contended that UTI's non-performance couldn't be excused by U.S. government actions. IHSRC's counterclaim demanded either the return of all components sent for repair, valued at **$5,500,000**, plus **$15,000,000** in damages for non-delivery and **$68,410,713** in incidental damages.

Request for Interim Measures

UTI’s request for interim measures centered on auctioning the components or obtaining explicit instructions for their continued storage, highlighting the financial burden of storage costs and the risk of component obsolescence. They emphasized their **artisan’s lien** under Connecticut law, securing payment for their repair and storage services. UTI argued that the interim measures were essential to prevent further economic loss and asset deterioration.

Tribunal’s Analysis and Decision

The Tribunal’s decision hinged on several critical points. Firstly, under Article 26 of the Tribunal Rules, interim measures can be granted to prevent **irreparable harm** to the parties’ rights or property pending the final decision. This principle aligns with the International Court of Justice’s practice of preserving the rights under dispute.

However, the Tribunal identified several obstacles:

1. **Ownership and Control**: Although IHSRC owned the components, they were stored in UTI’s warehouses. The Tribunal noted that granting UTI’s request could preempt a final decision on the restitution of these goods to IHSRC, thus complicating any future awards.
2. **Specificity and Jurisdiction**: There was ambiguity regarding the specific components held by UTI and those listed in IHSRC’s counterclaim. Furthermore, the issue of storage costs beyond January 19, 1981, and whether these were within the Tribunal’s jurisdiction, posed additional complications.
3. **Export Licensing**: UTI did not address the responsibility for obtaining export licenses, which was crucial given the components’ classification under the U.S. Munitions List.

Given these factors, the Tribunal concluded that granting the interim measures would effectively constitute a provisional

judgment on UTI’s claims, which was inappropriate. Moreover, the Tribunal highlighted that the payment of storage costs, should it be warranted, was secured by the General Declaration’s Security Account, thus negating the need for immediate interim relief.

Implications and Considerations

This decision underscores the delicate balance tribunals must maintain between providing interim relief and preserving the integrity of the final judgment. The ruling demonstrates the importance of clear contractual terms, especially in international transactions affected by geopolitical events. It also highlights the complexities of enforcing contractual rights amid governmental restrictions and the importance of addressing jurisdictional scope clearly in arbitration proceedings.

Key Takeaways

1. **Contractual Clarity**: Parties must ensure contracts are explicit about terms, especially regarding delivery and liability in the event of geopolitical changes.
2. **Interim Measures**: Tribunals have the authority to grant interim measures, but such requests must be compelling, clearly within jurisdiction, and not prejudicial to the final award.
3. **Geopolitical Impact**: Businesses operating internationally must consider the implications of political instability and government regulations on their contractual obligations.

This case serves as a poignant reminder of the intricacies involved in international arbitration and the critical role of clear legal frameworks and strategic foresight in managing cross-border disputes.

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War Series: The 1923 Arbitration on War-Risk Premiums

April 23, 2025

The case of **War-Risk Insurance Premium Claims** presented a unique challenge for the **United States-Germany Mixed Commission**. At its core, it revolved around whether premiums paid by American companies for war-risk insurance during World War I could be recovered from Germany. These premiums were for protection against potential war hazards that, ultimately, did not materialize into actual losses. The Commission's analysis, delivered by Parker, Umpire, and concurred by both American and German Commissioners, hinges on the fundamental principles of **proximate cause and liability** in international law.

Historical Context and Challenges

At the outbreak of World War I, the **United States was neutral**, facing myriad uncertainties in maritime commerce. American nationals, whose businesses were entrenched in international shipping, had to navigate through a web of risks including contraband, blockades, mines, and belligerent activities. The war had disrupted normal trading routes, and the shifting sands of international law on contraband and blockades added

layers of complexity.

In response, the U.S. sought agreement from belligerent nations to adhere to the **Declaration of London (1909)**, a set of laws governing naval warfare. Germany and her allies acquiesced, but the British and her allies only partially adopted these rules, introducing significant modifications. This led to a precarious situation for American shippers who found themselves vulnerable to seizures and detentions of their cargoes by the British, and to German declarations of war zones that endangered even neutral ships.

Insurance as a Protective Measure

Amidst these hazards, **American companies turned to war-risk insurance** to safeguard their shipments. Initially, American insurers struggled to provide coverage due to the unprecedented nature of the risks. However, the **U.S. Congress quickly established the Bureau of War Risk Insurance** within the Treasury Department, which began writing policies at more reasonable rates compared to private insurers.

Despite this protection, the question arose: should these premiums be reimbursed by Germany as part of war reparations? The **Commission's role** was to determine if these insurance costs constituted a loss directly attributable to German acts under the **Treaty of Berlin**.

Examination of Claims

The Commission examined three representative claims:

1. **United States Steel Products Company**
2. **Costa Rica Union Mining Company**
3. **South Porto Rico Sugar Company**

Each company had paid war-risk premiums to protect their shipments or facilities against potential war-related hazards. Notably, none of these companies experienced actual losses

from the insured risks; the shipments arrived safely, and the facilities were unmolested.

The Principle of Proximate Cause

The central legal question was whether the **premiums paid for war-risk insurance** could be considered a loss proximately caused by German actions. The **Treaty of Berlin** required Germany to compensate for losses directly caused by its acts or those of its agents. However, the premiums in question were for potential risks that did not result in actual damage or loss of property.

The Commission concluded that these premiums did not meet the criteria for compensation under the Treaty. They were **precautionary expenses** against hypothetical risks, not losses caused by specific acts of Germany. The concept of **proximate cause** necessitates a direct causal link between an act and the resultant loss, which was absent in these cases.

The Broader Implications

This decision underscores a critical aspect of **international arbitration**: the distinction between **direct losses** and **indirect or consequential damages**. War inherently introduces uncertainties and risks that cannot always be clearly traced to the actions of a single belligerent party. The **Treaty of Berlin** does not extend to cover every conceivable financial impact of the war on neutral parties.

Conclusion

In denying the claims for reimbursement of war-risk insurance premiums, the Commission reinforced the principle that **liability under international law** requires a demonstrable, direct causal connection between the act of a belligerent and the loss suffered by the claimant. This decision not only clarified the limits of **war reparations** but also provided a precedent for interpreting similar claims in future conflicts.

The **War-Risk Insurance Premium Claims case** serves as a reminder of the complexities inherent in international disputes and the importance of adhering to established principles of **proximate cause and direct liability**. It highlights the necessity for nations and their nationals to navigate the legal and commercial uncertainties of war with prudence, recognizing that not all war-related costs are compensable under international treaties.

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War Series: Exhaustion of Remedies in Lessons from the Finnish Shipowners' War-Time Arbitration

April 23, 2025

In the early 1930s, the arbitration case between Finnish shipowners and the British government over the use of certain Finnish vessels during World War I provides a rich field of study in international arbitration and the local remedies rule. This case, adjudicated in Stockholm, raises fundamental questions about the exhaustion of local remedies and the jurisdiction of international tribunals.

The Context and Claims

The case arose from the requisitioning of Finnish vessels by Russia during World War I, which were subsequently used by Britain. Finnish shipowners sought compensation, arguing that the British government had unlawfully used their property. The British countered that the shipowners had not exhausted all local remedies available in the UK, thus barring them from seeking international arbitration.

The Local Remedies Rule

At the heart of this dispute is the local remedies rule, which requires that claimants exhaust all available domestic legal avenues before turning to international arbitration. The British government insisted that the Finnish shipowners should have utilized the War Compensation Court and provisions under the Indemnity Act. They argued that these were adequate remedies that the shipowners had ignored.

On the other hand, the Finnish government contended that pursuing these remedies would have been futile. They pointed out that the Arbitration Board had already determined that the ships were requisitioned by Russia. According to them, this ruling should be treated as **res judicata**, meaning the matter had already been adjudicated and should not be re-litigated in another forum.

Arguments Presented

During the hearings, both sides presented robust arguments. The British government acknowledged the finality of the Arbitration Board’s decision but maintained that the shipowners could have appealed. They suggested that an appeal could have clarified whether the requisition by Russia was valid, thereby opening the door for claims based on British interference.

The Finnish government, however, argued that appealing would

have been redundant and likely dismissed as frivolous. They cited principles of estoppel and **res judicata** to assert that re-litigating the same facts before another court would be unnecessary and legally unsound.

Requisition vs. Interference

A critical issue was whether the acts constituted a requisition by Russia or an interference by Britain. If the requisition by Russia was invalid, then the British use of the ships could be considered an interference, necessitating compensation under the Indemnity Act. The British government, however, maintained that their actions were legitimate, especially if the Russian requisition stood.

The Arbitrator’s Decision

The arbitrator ruled in favor of the Finnish shipowners, stating they had exhausted all reasonable local remedies. This decision was pivotal, affirming that seeking further recourse in the War Compensation Court would have been redundant and that the principle of **res judicata** applied.

This ruling underscored that the local remedies rule does not obligate claimants to pursue futile or redundant legal actions. It emphasized the need for claimants to demonstrate the ineffectiveness or inadequacy of local remedies convincingly.

Key Takeaways

1. **Exhaustion of Local Remedies:** This case affirms the necessity for claimants to exhaust domestic remedies but also clarifies that redundant or futile remedies do not need to be pursued. It highlights the balance between thoroughness and practicality in legal redress.
2. **Principle of Res Judicata:** The decision underscores the importance of **res judicata** in international arbitration, preventing the re-litigation of issues already decided

by competent authorities. This principle ensures judicial efficiency and the finality of decisions.
3. **Complexities of Wartime Actions:** The arbitration sheds light on the legal challenges associated with wartime requisitions and the responsibilities of states in such contexts. It highlights the need for clear legal standards to address the use of private property during conflicts.
4. **Role of International Arbitration:** The case exemplifies the significance of international arbitration in resolving state disputes. It underscores the binding nature of arbitration agreements and the role of arbitral awards in providing definitive resolutions.

Conclusion

The arbitration between Finnish shipowners and the British government serves as a critical reference point in international law and arbitration. It demonstrates the application of the local remedies rule, the principle of **res judicata**, and the legal intricacies of property requisition during wartime. This case continues to offer valuable lessons for practitioners, illustrating the necessity of exhausting local remedies and the pivotal role of international arbitration in achieving just outcomes.

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