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EVALUATING (IN) CONSISTENCY IN INVESTOR-STATE ARBITRATION: A ROADMAP

April 30th, 2018, Ottawa

Submitted by
Ibrahim Jamie Arabi
Erik Shum
John D. Norman
Sarah Rajguru

To : Global Affairs Canada
125 Sussex Drive,
Ottawa, ON

University of Ottawa, Faculty of Law
Fauteux Hall, 57 Louis Pasteur St, Ottawa, Ontario, K1N 6N5, Canada

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A. Executive Summary

Conflicting decisions by tribunals arbitrating investor-State disputes has led to critics proposing overhauling the dispute settlement system. However, the investor-State dispute settlement system is responsible for applying roughly 3,000 treaties, each possessing their own characteristics that could justify apparently inconsistent decisions.

Substantial Inconsistency Attributable to Treaty: Our study of identified areas of controversy and alleged inconsistency show that different outcomes in three areas can be explained by the different treaties applicable in each case. However, even in those cases, the tribunals do not decide with perfect consistency or, in one instance, relies on a detail in a treaty that may not justify their conclusion differing from previous decisions. Specifically:

- **Most Favoured Nation**: These clauses can be subdivided into six different types of clauses and the vast majority of tribunals determine whether procedural provisions can be incorporated based on the type of clause at issue.
- **Denial of Benefits**: These clauses can be subdivided into three different types, and, with a few exceptions, tribunals consistently determine that benefits can be denied retrospectively based on the type of clause at issue.
- **Sovereign Bonds as Investments**: These bonds are consistently found to be investments where the treaty's definition of "investment" refers to public sources of obligations, but one tribunal found sovereign bonds were not investments where the treaty did not specify public obligations.

Most Inconsistency is Unjustified: In eight areas, we find that the inconsistent decisions cannot be explained by differences in treaty language or facts. Instead, these tribunals applied different interpretative approaches or analysis to arrive at widely different conclusion despite similar laws and facts in each.

- ***CME* and *Lauder v the Czech Republic***: Each tribunal applied a different analysis of causation and only one found that the State action, identical in each case, caused a compensable loss to the investor.
- **Countermeasures**: The inconsistent decisions arose from the characterization of the investors rights under the treaty: If the investor has independent rights from the home State, then those rights cannot be denied as a countermeasure targeting the home State. Otherwise, countermeasures can be validly enacted.
- **Fair and Equitable Treatment**: These clauses vary widely but even among tribunals applying the same treaty, there exists inconsistency in the content and level of the clause's obligations.
- ***ICSID*'s Definition of** "**Investment**:" Some tribunals apply *ICSID* Article 25(1) as a limit on the "investments" within the tribunal's jurisdiction and apply one of several variations of the *Salini* test, and apply varying tests to individual elements of that test. Other tribunals only limit their jurisdiction according to their empowering investment treaty.
- **Sales Contracts as Investments**: Some tribunals apply the *Salini* test and come to varying determinations. Other tribunals, despite broad treaty language, categorically presume that sales and services contracts are not investments.
- **Awards as Investments**: Despite similar treaty language, tribunals arrive at different conclusions based on whether an arbitral award should be treated as distinct from the contract from which it arose and whether the *Salini* test applies.
- **Umbrella Clauses**: Tribunals applying similar provisions differ on their applicable to commercial contracts and the impact of exclusive jurisdiction clauses within those contracts.

Improving with Time and Continued Arbitration: Some of these areas of inconsistency may, over time, warrant less concern. There are three areas where the decisions would be consistent but for a single tribunal, or even a single tribunal member. And there is one

area where an inconsistent decision has already lost much of its relevance based on the growing body of tribunals who have rejected its reasoning.

- **Awards as Investments**: *GEA v Ukraine* is the only tribunal to find that an award is analytically distinct from the contract it arose from and is not an investment. Later tribunals have not followed their analysis.
- **Countermeasures**: *Archer Daniel Midlands Co and Tate & Lyle Ingredients Americas, Inc v Mexico* was the only tribunal to find, on the key issue, that investors did not have individual rights included a dissent on that issue.
- **Sovereign Bonds:** Only the *Postova Banka v Greece* tribunal found sovereign bonds were not investments and there was an unpublished or unwritten dissent, potentially on that issue.
- **Umbrella Clauses**: The first tribunal to address the issue, *SGS v Pakistan*, has been frequently criticized, rarely followed, and commentators suspect the position may have been abandoned within investor-State arbitration.

Vague Language Leads to Inconsistency: Other areas of inconsistency can potentially be attributed to vague clauses in the treaties, where a lack of guidance for tribunals unsurprisingly results in varying outcomes.

- **Procurement**: In *NAFTA*, procurement is defined in some chapters but undefined in Chapter 11. As a result, tribunals either apply the definition from another chapter to Chapter 11, or interpret the absence of a definition as meaning that the ordinary meaning of the word is intended to apply.
- **Fair and Equitable Treatment**: The lack of clearly defined legal obligations contained in treaties, amplified by the variations in language among these clauses, leave tribunals to determine the meaning and scope of the clause.

Newer Treaties Provide Clarification: Many modern treaties now include language that helps to address these areas of inconsistency however our review of tribunals' analysis shows

that tribunals will depart from applying a treaty provision's ordinary meaning. This tendency to depart has been, and will likely continue to be, a significant source of inconsistency.

Rebuttable Presumptions: Our review of tribunals' analysis suggests that some tribunals appear to operate on a presumption that can be difficult to displace. Some tribunals, and even some commentators, hold presumptions about the distinction between contract and treaty law, the effect of various types of clauses, and what assets are presumably excluded from investment-treaty protection.

- **Umbrella Clauses**: The *SGS v Pakistan* tribunal held a presumptive distinction between domestic and international law and so was reluctant to elevate contractual breaches to treaty breaches.
- **Most Favoured Nation**: These clauses are often seen as being homogenous, rather than as a general descriptor for six different types of clauses which should lead to different results. Where a treaty uses language that expressly expands the clause, then tribunals tend to find the clause can incorporate procedural provisions from other treaties.
- **Sales Contracts as Investments**: The *Romak v Uzbekistan* tribunal indicated that a treaty must "leave no room for doubt" in its language in order to include sales contracts as investments, indicating that including such contracts would be counterintuitive.

A Higher Threshold for Interpretation: The analysis also indicates how these presumptions can be displaced. Wording that is "clear and convincing" or leaves "no room for doubt" may be sufficient to ensure that tribunals apply their empowering instruments according to the treaties' ordinary meaning and address the areas of unjustified inconsistency in investor-State arbitration.

We have found significant areas of inconsistency. Some inconsistency is largely attributable to differences in law. There are promising signs that some decisions may become

outliers and the greater body of decisions will be consistent. The clarified language in recent treaties should increase consistency in the future. However, current clarified language may not be enough. In order to ensure consistent decisions, treaty drafters should use not just clear, but clear and convincing language expressing their intent in order to ensure tribunals comply with the letter of the law.

1. Introduction

The use of investor-state dispute settlement or "ISDS" has increased dramatically over the past three decades.[1] Inconsistent decisions arising from similar facts have led to growing concern from States and other public interest groups. A lack of consistency would call into question the legitimacy of ISDS as a judicial mechanism and question the viability of continuing to rely upon it in the future.

ISDS is particularly susceptible to inconsistencies due to the lack of an appellate body and *stare decisis*. This gives an enormous amount of power to individual tribunals, who are appointed on an ad-hoc basis, to make any decision they deem appropriate. Moreover, the fact that ISDS tribunals are interpreting and applying some 3,000 treaties and investment chapters with differing provisions contrasts sharply with the WTO's Appellate Body, which is responsible for interpreting and applying a single body of "covered agreements."

This memorandum attempts to identify potential reasons for inconsistent decisions and evaluate the extent of the problem. Due to the large scope of this topic, it was not possible to comprehensively analyze ISDS decisions. Instead, we conducted a comprehensive study of the secondary materials for nine specific areas where the consistency of awards has been questioned. Our findings will be presented systematically by subject in the following order:

1. Most Favoured Nation (MFN) Clauses
2. *CME v Czech Republic* and *Lauder v Czech Republic*
3. Countermeasures
4. Procurement
5. Fair and Equitable Treatment
6. Definition of "Investment"
7. Umbrella (or Observance of Obligations) Clause
8. Denial of Benefits (or Denial of Advantages) Clauses
9. Necessity Defence

[1] Rachel Wellhausen, "Recent Trends in Investor-State Dispute Settlement" (2016) 7:1 JIDS 117 at figure 1.

We confirmed that there is inconsistency in ISDS awards. However, these instances have been largely limited to those where the inconsistency can be explained by differences in law or fact, or where the law itself is unclear. There is often a direct correlation between the wording of the treaty and the decision of the tribunal, illustrating that some of the apparent inconsistency results from the drafting of the treaty rather than a systemic problem with ISDS.

2. Most Favoured Nation (MFN) Clauses

A most favoured nation ("MFN") clause is a provision that ensures that a contracting state cannot treat a covered investor or investment less favourably than that of a third-party state. It allows investors protected under a treaty to benefit from more favourable treatment afforded by the host state to investors under other treaties. These clauses prevent discrimination by host states against investors from other countries.[2]

MFN clauses have become standard in investment agreements; scholars estimate that ninety-five percent of treaties include one.[3]

2.1. Issues: Potential Limitation on the Extent of What Can be Incorporated by an MFN Clause

The main issue that has arisen in disputes involving MFN clauses is to what extent the MFN clause can be used to provide to an investor, protected under a treaty between their home and host State (the "basic treaty"), the benefits under another treaty (a "third-party treaty") to which the host state is a party. Incorporating more favourable treatment into the basic treaty from a third-party treaty is a relatively new phenomenon, but areas of potential inconsistency have emerged.

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[2] Rohan Perera, "The Most-Favoured-Nation Clause and the *Maffezini case"* (2015) ILC Study Group on the MFN Clause Working Paper.
[3] Wolfgang Alschner & Dmitriy Skougarevskiy, "Convergence and Divergence in the Investment Treaty Universe-Scoping the Potential for Multilateral Consolidation" (2016) 8:2 Trade L & DEV 152 at Table 1.

Tribunals are divided as to whether investors can rely on an MFN clause to access more favourable procedural clauses from third-party treaties. Procedural clauses can differ greatly. Some ISDS clauses require the investor to wait in the domestic courts, or commit to a certain dispute settlement mechanism. Other's allow the investor to go immediately to ISDS.

Tribunals have been more consistent in allowing investors to import more favourable substantive clauses, like fair and equitable treatment clauses. The confusion, and potential source of inconsistency, lies in determining which substantive clause confers more favourable treatment.

2.2. Analysis of the Secondary Materials and Leading Jurisprudence

2.2.1. Incorporation of More Favourable Procedural Clauses

After the tribunal in *Maffezini* opened the floodgates in 2000 by allowing the investor immediate access to arbitration through the use of an MFN clause, the ability to import a more favourable arbitration procedure through an MFN clause has become a hotly-contested issue. [4] A number of tribunals have decided for and against this use of MFN clauses. The confusion, and source of apparent inconsistency, is whether MFN clauses are limited to substantive treatment standards for investor protection, or if they can extend to dispute resolution.[5]

Charles Brower has argued that MFN treatment should extend to dispute resolution as dispute resolution provides the advantage of better protection of their investment in the host

[4] *Emilio Agustin Maffezini v Kingdom of Spain*, Decision of the Tribunal on Objections to Jurisdiction, ICSID Case No ARB 97/7, 25 January 2000 [*Maffezini*].
[5] August Reinisch, "The Proliferation of International Dispute Settlement Mechanisms: The Threat of Fragmentation vs. the Promise of a More Effective System? Some Reflections from the Perspective of Investment Arbitration" in Isabelle Buffard et al, eds, *International Law between Universalism and Fragmentation* (Leiden: Martinus Nijhoff, 2008) 107 at 116.

state.[6] The opposing view is that MFN clauses should only apply to treaties' substantive elements, unless the MFN clause was purposely drafted to include other elements.[7]

Users of the system seem to be searching for a general rule that will apply to all MFN clauses to solve the inconsistency. A general rule cannot be created, however, as MFN clauses are not homogenous. Article 31 of the *Vienna Convention on the Law of Treaties* ("VCLT") which states that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning given to the terms of the treaty in their context" encourages outcomes that may appear inconsistent but are justified based on differences in treaty wording.[8] Therefore, the VCLT has contributed to this notion that MFN clauses are inconsistent on whether they extend to arbitration clauses.

In 2015, the International Law Commission ("ILC") identified six separate *sui generis* MFN clauses. Breaking the cases down by the structure of MFN clause, instead of treating all MFN clauses as identical, leads to the conclusion that the decisions are mostly consistent.

The different structures of MFN clause (Table 1):

This table is populated with information from Pavel Sturma's "Goodbye, Maffezini? On the Recent Developments of Most-Favoured-Nation Clause Interpretation in International Investment Law"

	Structure of the Clause	**Treatment**	**BIT**
1.	"Each Contracting Party shall accord investors of the other Contracting Party treatment no less favourable than that accorded to its own investors or investors of a third State and their investments."	Tribunals have consistently found that clauses that do not expressly expand the scope of the word "treatment," cannot expand or create jurisdiction for a dispute settlement body	*Republic of Austria-Czech and Slovak Federal Republic BIT (1990)*
2.	"*In all matters governed by this Agreement*, such treatment	Tribunals have consistently allowed clauses that qualify the	*Argentina-Spain BIT (1991)*

[6] *Austrian Airlines v The Slovak Republic*, Separate Opinion of Charles N. Brower, UNCITRAL, 9 Oct 2009.
[7] Stephen Fietta, "Most Favoured Nation Treatment and Dispute Resolution Under Bilateral Investment Treaties: A Turning Point?", (2005) 4 Intl Arb L Rev 131.
[8] *Vienna Convention on the Law of Treaties*, 23 May 1969, art 1155 UNTS 331, 8 ILM 679 (entered into force 27 January 1980).

	shall be no less favourable than that accorded by each Party to investments made in its territory by investors of a third country." [Emphasis added]	term treatment broadly to expand or create jurisdiction for a dispute settlement body	
3.	"Neither Contracting Party shall in its territory subject investors of the other Contracting Party, *as regards their management, maintenance, use, enjoyment or disposal of their investments,* to treatment less favourable than that which it accords to investors of any third State." [Emphasis added]	Tribunals have found that clauses that specify they relate to management, use, enjoyment or disposal of their investments to include dispute settlement provisions	*UK-Soviet BIT*
4.	"Each Party shall accord to investors of another Party treatment no less favorable than that it accords, *in like circumstances*, to investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments." [Emphasis added]	Tribunals have consistently found that clauses that contain the term treatment to "in like circumstances" to not encompass dispute resolution[9]	*NAFTA*
5.	"Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of a non-Party *with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments*." [Emphasis added]	Tribunals have found that clauses that list specific items it is in respect to does not extend to dispute settlement provisions	*NAFTA*

[9] Caveat to this would be unless dispute settlement were one of the listed obligations.

6.	"Both Contracting Parties, *within the bounds of their own territory*, shall grant investments effected by, and the income accruing to, investors of the other Contracting Party no less favourable treatment than that accorded to investments effected by, and income accruing to, its own nationals or investors of Third States." [Emphasis added] [10]	Tribunals have found that MFN clauses limiting its application to "within the bounds of their own territory" to not extend to dispute settlement provisions[11]	*Italy-Jordan BIT (1996)*

With so many different variations of MFN clauses, it is inappropriate to conceive of them as a single type of clause. Instead it is imperative to think of them as six separate types of clauses, all with different implications.[12] This demonstrates the importance of the drafters' role in defining exactly how their MFN clause is meant to apply.

Scholars have categorized the jurisprudence into two separate categories. There are the tribunals that incorporated a more favourable procedural provision through the MFN clause and those that have not allowed the investor to do so. As noted above, the reasoning for the tribunals' decisions in the majority of these cases can be explained by the wording of the MFN clause in the basic treaty.

[10] *Agreement Between the Government of the Hashemite Kingdom of Jordan and the Government of the Italian Republic on the Promotion and Protection of Investments,* 21 July 1996, art III (entered into force 17 January 2000) [*Italy-Jordan BIT*].
[11] *Salini Costruttori SpA and Italstrade SpA v Kingdom of Morocco,* Decision on Jurisdiction, ICSID Case No ARB/00/4, 31 July 2001 [*Salini*].
[12] Pavel Šturma, "Goodbye, Maffezini? On the Recent Developments of Most-Favoured-Nation Clause Interpretation in International Investment Law" (2016) 15:1 LPICT 81.

2.2.1.1. Tribunals That Have Allowed for An MFN Clause to Incorporate a More Favourable Procedural Provision

The case that first expanded the scope of the MFN clause was *Emilio Augustin Maffezini v Kingdom of Spain*.[13] The *Argentina-Spain BIT* required a claimant to pursue a remedy through the domestic courts for 18 months before proceeding to arbitration. The Argentinian investor, Maffezini, argued that he should be allowed to proceed directly to arbitration because the *Chile-Spain BIT* did not require a waiting period. Maffezini argued that investors from Chile were being treated more favourably, so the MFN clause in the *Argentina-Spain BIT* should be interpreted to require this treatment to be accorded to Maffezini. The MFN clause in *Argentina-Spain BIT* Article IV para 2 read:

> In all matters subject to this Agreement, this treatment shall not be less favorable than that extended by each Party to the investments made in its territory by investors of a third country.[14]

This MFN clause is the second type listed in the 2015 ILC findings.[15] Treatment is conditioned by "[i]n all matters subject to this Agreement,"[16] making its reach very broad. The tribunal interpreted this clause to apply to the dispute settlement provision.

Since it specified "all matters subject to this agreement," the tribunal concluded that the parties intended the clause to include dispute resolution provisions. This language also suggests that applying MFN to dispute settlement provisions is compatible with the *ejusdem generis* principle of interpretation. To be compatible with the *ejusdem generis* principle, an MFN clause

[13] *Maffezini, supra* note 4.
[14] *Agreement Between the Argentine Republic and the Kingdom of Spain on the Reciprocal Promotion and Protection of Investments,* 3 October 3 1991, art IV (entered into force 28 September 1992) [*Argentina-Spain BIT*].
[15] See Table 1.
[16] *Ibid.*

can only apply to matters belonging to the same category as that which the clause itself relates. This means that if an MFN clause expressly extends its scope of applicability to all matters of the agreement, the category of the clause is everything in the agreement. This would include procedural provisions. If the MFN clause was narrowed in its applicability to a finite list of terms, the clause's category would only be those items listed. Therefore, unless procedural provisions were included in the list, the clause would not extend to them.

The tribunal, perhaps in recognition of the potential floodgate they were opening, chose to limit their decision. The tribunal decided that the MFN clause could not extend to provisions of the treaty that involved important matters of public policy. In the tribunal's view, this meant, for example, that fork-in-the-road provisions[17] and requirements to exhaust local remedies[18] could not be bypassed no matter the wording of the provision.[19]

Siemens AG v Argentina expanded the application of the MFN clause rather drastically from the calculated point where the tribunal in *Maffezini* chose to leave it. [20] A German investor failed to first submit the dispute to the domestic courts, as required by the BIT. The German investor argued to go directly to arbitration by invoking the MFN clause in Article 3(1) of the *Germany-Argentina BIT* to incorporate the more favourable procedural provisions from the *Chile-Argentina BIT*. The MFN clause in *Siemens* provides:

[17] In "fork-in-the-road" clauses, the claimant investor must make a choice between pursuing its claims against the state either through the arbitration mechanisms provided in the relevant BIT or in local courts or other venues provided for in the relevant contractual mechanisms; See Deborah Ruff & Trevor Tan, "Fork-in-the-Road clauses" (2015) 5 IAR 12.
[18] Requirements to "exhaust local remedies" forces an investor to pursue a domestic solution to the complaint, using the judicial system of the host state, for a pre-determined amount of time before being able to proceed to international arbitration.
[19] *Maffezini, supra* note 4.
[20] *Siemens AG v Argentine Republic*, Decision on Jurisdiction, ICSID Case No ARB/02/8, 3 August 2004.

> Article 3(1): None of the Contracting Parties shall accord in its territory to the investments of nationals or companies of the other Contracting Party or to investments in which they hold shares, a less favorable treatment than the treatment granted to the investments of its own nationals or companies or to the investments of nationals or companies of third States.[21]
>
> Article 3(2): None of the Contracting Parties shall accord in its territory to nationals or companies of the other Contracting Party a less favorable treatment of activities related to investments than granted to its own nationals and companies or to the nationals and companies of third States.[22]

Despite the narrow wording of the MFN clause, the tribunal allowed the German investor immediate access to arbitration.

This provision is quite different from the one in *Maffezini*.[23] The MFN clause that Maffezini relied on expressly expanded its applicability to "all matters of the agreement." As can be seen above, in Article 3(1) and Article 3(2) of the *Germany-Argentina BIT*, the clause was not expanded but limited to applying "in its territory." Due to the difference in structure of the clause (not extending it to "all matters"), it is possible this decision was counter to the *ejusdem generis* principle.[24] As mentioned above,[25] the *ejusdem generis* principle would only allow an MFN clause to apply to matters of the same category to which the clause relates.[26] There is a substantial difference between substantive obligations and procedural obligations.[27] The former set out the obligations of states to accord treatment to investors and their investments, and the latter set out the rights and obligations of investors and their investments to ensure that the obligations owed to

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[21] *Treaty Between the Federal Republic of Germany and the Argentine Republic on the Encouragement and Reciprocal Protection of Investments,* 9 April 1991, art 3(1) (entered into force 8 November 1993) [*Germany-Argentina BIT*].
[22] *Ibid,* art 3(2).
[23] *Maffezini, supra* note 4.
[24] Fietta, *supra* note 7.
[25] *Maffezini, supra* note 4.
[26] *Ambatielos (Greece v United Kingdom),* Award of the Commission of Arbitration, [1963] RIAA 91.
[27] PR Thulasidhass, "Most-Favoured-Nation Treatment in International Investment Law: Ascertaining the Limits through Interpretative Principles" (2015) 7:1 Amsterdam LF 19.

them are enforced. Since the MFN clause's category was not expressly expanded to include the procedural provisions, the MFN clause should not extend beyond the substantive elements of the agreement.

Another question in *Siemens* was what parts of the dispute resolution provision could be imported. Once Argentina conceded that the MFN clause imported the dispute resolution clause, they argued it also imported the qualifications to use it. These qualifications in the third-party agreement are part of the treatment afforded to those investors.[28] If the goal were to give an investor protected under the basic treaty the same level of treatment provided to investors under other agreements it must import the full picture. The MFN clause would otherwise provide better treatment than the third-party agreement which would go against the very notion of what an MFN clause is. The tribunal however decided to allow the complainant to import only the ability to arbitrate without the whole "package;"[29] most notably a fork-in-the-road provision. Since a fork-in-the-road provision, as discussed in footnote 17, is a detriment to the investor, this provision was most likely put in as part of a compromise between the parties on how favourable to make the procedural provisions of the treaty. Since it would have been contemplated at the time of the negotiation, it would be part of the "package."

Therefore, the *Siemens* decision does introduce some inconsistency to the use of MFN clauses but not much weight has been given to it by subsequent tribunals.[30]

[28] Patrick Dumberry, "Shopping for a Better Deal: The Use of MFN Clauses to Get 'Better' Fair and Equitable Treatment Protection" (2017) 33:1 Arb Intl 1 [Dumberry, "Shopping for a Better Deal"].
[29] *Ibid.*
[30] It was decided early on in the jurisprudence on the issue and is viewed as an outlier. One of the arbitrators on the tribunal, Professor Bello Janeiro, later admitted that his views have changed on the subject since. Janeiro said that more sophisticated analysis has now emerged that the tribunal did not have access to when deciding *Siemens*.

In *Gas Natural v Argentina*, the Spanish investor argued that they should be given the same treatment under the *Argentina-Spain BIT* as is provided to US investors under the *Argentina-US BIT*. [31] US investors had the ability to proceed directly to arbitration, whereas Spanish investors had to first attempt the domestic courts in Argentina. Article IV (2) of the *Spain-Argentina BIT* contained the MFN clause:

> In all matters governed by the present Agreement, such treatment shall not be less favorable than that accorded by each Party to investments made in its territory by investors of Third States.[32]

This MFN clause is the same as the one examined in *Maffezini*. The parties conditioned the term "treatment" with "all matters governed by the present Agreement." This would logically include the arbitration provisions, meaning that extending the clause to arbitration would be consistent with the principle of *ejusdem generis*. The tribunal added that access to arbitration is a significant means of protection for foreign investors. A delay in arbitration results in a lesser degree of protection, meaning less favourable treatment. The tribunal allowed the investor to incorporate the arbitration clause from the *Argentina-US BIT*.

RosInvest Co UK Ltd v Russia[33] presents a variation from the previous decisions examined in this section. A UK claimant investing in Yukos alleged Russia's discriminatory and expropriative actions made its investment essentially worthless. The *UK-Soviet BIT* only conferred jurisdiction to an arbitral tribunal for matters that involved the determination of the amount of compensation for expropriation. RosInvest argued that, through the MFN clause in the BIT, they

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[31] *Gas Natural SDG, SA v Argentine Republic*, Decision on Jurisdiction, ICSID Case No ARB/03/10, 17 June 2005.
[32] *Argentina-Spain BIT, supra* note 15, art 4(2).
[33] *RosInvestCo UK Ltd v The Russian Federation*, Award on Jurisdiction, SCC Case No V079/2005, 1 October 2007 [*RosInvest*].

should be able to expand the jurisdiction conferred to the tribunal by importing the arbitration clause from *Denmark-Russia BIT*. Article 3(2) from the *UK-Soviet BIT* provides as follows:

> (2) Neither Contracting Party shall in its territory subject investors of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investments, to treatment less favourable than that which it accords to investors of any third State.[34]

Referring back to the 2015 ILC report, this clause fits into the third type. The inclusion of "use" and "enjoyment" convinced the tribunal to allow the MFN clause to expand the tribunal's jurisdiction. It said that Danish investors, through the *Denmark-Russia BIT*, were better able to protect their investments as the treaty granted them a procedural option should their "use" or "enjoyment" be interfered with.

2.2.1.2. Tribunals That Did Not Allow an MFN Clause to Incorporate a More Favourable Procedural Provision

In *Salini Costruttori SpA and Italstrade SpA v Jordan* the Italian claimant attempted to bring a claim in arbitration for contract costs still owing from their dam project in Jordan.[35] The *Italian-Jordan BIT* stipulated in Article 9(2) that contract issues could not proceed to arbitration.[36] The Italian claimants attempted, through the MFN clause in the *Italian-Jordan BIT*, to incorporate more favourable procedural provisions from the *Jordan–US*[37] and *Jordan–UK BIT*s.[38] The procedural provisions in these treaties were more favourable as the investors were permitted to

[34] *Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics for the Promotion and Reciprocal Protection of Investments,* 6 April 1989, art III (entered into force 3 July 1991) [*UK-Soviet BIT*].
[35] *Salini, supra* note 11.
[36] *Italy-Jordan BIT, supra* note 10, art 9(2).
[37] *Treaty Between the Government of the United States of America and the Government of the Hashemite Kingdom of Jordan Concerning the Encouragement and Reciprocal Protection of Investment,* 2 July 1997 (entered into force 12 June 2003) [*Jordan-US BIT*].
[38] *Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Hashemite Kingdom of Jordan for the Promotion and Protection of Investments,* 10 October 1979 (entered into force 24 April 1980) [*Jordan-UK BIT*]

take all claims to arbitration, including contract disputes. Article 3(1) of the *Italian-Jordan BIT* states:

> Both Contracting Parties, within the bounds of their own territory, shall grant investments effected by, and the income accruing to, investors of the Contracting Party no less favourable treatment than that accorded to investments effected by, and income accruing to, its own nationals or investors of Third States.[39]

This clause is an example of the sixth type of MFN clause found in the 2015 ILC report. Its application was constrained through the wording "within the bounds of their territory." The tribunal focused on the intention of the parties when entering into the agreement. Due to Article 9(2) specifically expressing that they did not wish contract disputes to proceed to arbitration, the tribunal would not allow an MFN clause to trump its specifically-negotiated authority.

Plama Consortium Ltd v Bulgaria involved a Cyprus investor operating in Bulgaria and furthered the logic set forth in *Salini*.[40] The *Bulgaria-Cyprus BIT*, which was drafted while Bulgaria was still communist, had a very narrow arbitration clause. It only allowed limited questions about the amount of compensation to proceed to international arbitration.[41] The Cyprus investor wanted to use the MFN provision in the *Bulgaria-Cyprus BIT* to incorporate the protections from the *Bulgaria-Finland BIT*. The MFN provision provided that:

> Each Contracting Party shall apply to the investments in its territory by investors of the other Contracting Party a treatment which is not less favourable than that accorded to investments by investors of third states.[42]

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[39] *Italy-Jordan BIT, supra* note 10, art 3(1).
[40] *Plama Consortium v Republic of Bulgaria*, Decision on Jurisdiction, ICSID Case No ARB/03/24, 8 Feb 2005 [*Plama*].
[41] *Agreement between the Government of the People's Republic of Bulgaria and the Government of the Republic of Cyprus on Mutual Encouragement and Protection of Investments,* 24 December 1993, art 4 (entered into force 18 May 1988) [*Bulgaria-Cyprus BIT*].
[42] *Ibid.*

This MFN clause does not condition the term "treatment;" it is therefore classified as the first kind of MFN clause. The tribunal did not allow the tribunal's jurisdiction to be expanded. The tribunal stated that if an MFN clause is to extend to dispute resolution mechanisms, it must be clearly stated. An example of this would be the second type of MFN clause from the 2015 ILC report,[43] or preferably the approach the UK, has taken by explicitly stating that their MFN provisions extend to dispute resolution clauses.[44]

Austria Airlines v Slovakia follows the results seen in the previous two cases.[45] The *Austrian-Slovakia BIT* specified in Article 8 that only disputes about the amount of compensation owed for expropriation, but not the merits of the expropriation claim, could proceed to arbitration. The Austrian claimant attempted to use the MFN clause to import a more general clause. Article 3(1) of the *Austria-Slovakia BIT*:[46]

> Each Contracting Party shall accord to investors of the other Contracting Party and to their investments treatment that is no less favorable than that which it accords to its own investors or to investors of any third states and their investments.

The *Austria-Slovakia BIT* does not condition the term "treatment," placing it into the first type of classification of MFN clauses. The tribunal stated it would be "paradoxical" to invalidate specific intent by virtue of the "general, unspecified intent" expressed in the MFN clause.[47] Therefore, the tribunal would not allow the MFN clause to expand the scope of the arbitration clause.

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[43] See Table 1.
[44] *Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of (Insert name here) for the Promotion and Protection of Investments* [*UK Model BIT*].
[45] *Austrian Airlines v The Slovak Republic*, Final Award, UNCITRAL, 9 Oct 2009 [*Austrian Airlines*].
[46] *Agreement Between the Republic of Austria and the Czech and Slovak Federal Republic Concerning the Promotion and Protection of Investments,* 15 October 1990, art III(I) (entered into force 1 October 1991) [*Austria-Slovakia BIT*].
[47] *Austrian Airlines, supra* note 45.

2.2.1.3. Conclusion on the of MFN Clause's Incorporating Procedural Provisions

The *sui generis* approach to interpreting MFN provisions helps to explain some of the apparent inconsistencies in the decisions of tribunals. If the basic treaty has an MFN clause that has been expressly expanded in application, the parties to the agreement can feel confident that it will extend to the substantive provisions of the agreement.[48] If the MFN clause was drafted without any expansive language or if it has been constrained, states and investors can operate confidently knowing that it will not extend to the substantive provisions of the agreement.[49]

2.2.2. MFN Clause's Incorporating Substantive Provisions

It is generally accepted that incorporating substantive provisions through an MFN clause is permitted.[50] However, the extent of the evaluation and subsequent incorporation is an aspect of this that has managed to develop academic opposition. Should the evaluation be limited to the specific provision that affords the third-party better treatment? Or should it be expanded to the complete "package" of provisions that were negotiated to achieve that level of treatment? An additional area that has presented specific difficulties are the clauses pertaining to fair and equitable treatment or "FET." The issue has been how can the tribunal determine if the FET provision in a third-party treaty does in fact provide "better" treatment than the clause in the basic treaty.

2.2.2.1. Opposing Views on the Extent of the Evaluation and Subsequent Incorporation

[48] *Maffezinni, supra* note 4; *Gas Natural, supra* note 32; *RosInvest, supra* note 34.
[49] *Plama, supra* note 40; *Salini, supra* note 11; *Austrian Airlines, supra* note 6.
[50] *RosInvest*, *supra* note 33; David Caron & Esme Shirlow, "Most-Favored-Nation Treatment: Substantive Protection" in Meg Kinnear et al, eds, *Building International Investment Law: The First 50 Years of ICSID* (Kluwer Law International, 2016) 399 at 400.

The most common practice for evaluating which investor is receiving better treatment has been for the tribunal to compare the specific provisions. This method operates under the assumption that each provision is independent from the rest of the treaty and has its own treatment.[51] This method was used in *Salini*, where the tribunal only compared the two independent dispute resolution clauses without considering other provisions, in this case a fork-in-the-road provision, that could impact the dispute resolution provision.[52] This decision has since been highly criticized for allowing the investor to "cherry-pick" a provision from the third-party treaty.[53]

The second method is to look at not just the individual provision, but the "package," with the package being everything that the provision in question was connected with during the negotiation phase.[54] The parties may have allowed a more favourable provision to the investor into the agreement because of a separate provision that constrains its impact. Tony Cole, through the "package" concept, is suggesting that if the investor wants to incorporate that favourable provision they must also incorporate everything else in the agreement that was drafted in contemplation of it. This provides a more complete picture for the tribunal during the initial evaluation to determine if it does provide better treatment. It also prevents the investor in the basic treaty from being placed in a better position than the third-party investor.

2.2.2.2. FET Clauses

[51] Tony Cole, "The Boundaries of Most Favored Nation Treatment in International Investment Law" (2012) 33:537 Mich J Intl L. 537.
[52] *Salini, supra* note 11.
[53] Fietta*, supra* note 7.
[54] Cole*, supra* note 51.

Tribunals consistently allow an MFN clause to incorporate a more favourable FET provision. In the cases we have reviewed, the tribunal has allowed them to do so every time.[55]

MTD Equity Bhd v Chile is the seminal decision in this area.[56] The tribunal focused on the breadth of the MFN clause in question, stating that if the parties had not wanted to include FET provisions then they should have excluded them when drafting the MFN clause. This view was echoed by Professor Patrick Dumberry, stating that the extent of the application of the MFN clause in the basic treaty to substantive elements can be decided by the states when choosing to draft the clause broadly or with exceptions.[57] Tony Cole agrees with Dumberry in principle, but would exclude incorporation from third-party treaties that went into effect before the basic treaty.[58] Cole's rationale for this is that if an MFN clause can apply to agreements already in existence, there could be situations where the clause expressly negotiated between the States was never in effect between them.[59] This demonstrates some difference in academic opinion, but has not been reflected in the cases.

Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan is an example where a tribunal allowed the claimant to import an FET clause from a third-party treaty when there was not one in the basic treaty. [60] Bayinder, an investor from Turkey, used the MFN clause in the

[55] Dumberry, "Shopping for a Better Deal," *supra* note 28.
[56] *MTD Equity Sdn Bhd and MTD Chile SA v Republic of Chile*, Award, ICSID Case No ARB/01/7, 25 May 2004 [*MTD Equity*].
[57] Dumberry*, supra* note 28.
[58] Cole*, supra* note 51.
[59] *Ibid* at 56.
[60] *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan,* Decision on Jurisdiction, ICSID Case No ARB/03/29, 14 November 2005 [*Bayindir*].

Pakistan-Turkey BIT[61] to import an FET clause from the *Pakistan-Switzerland BIT*.[62] The claimant relied on the preamble to the *Pakistan-Turkey BIT* which stated that "fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment and maximum effective utilization of economic resources" to show that the parties to the treaty contemplated the importance of FET.[63] This, in conjunction with the MFN clause not expressly stating that it did not extend to FET, convinced the tribunal to allow the investor to import the FET clause from the *Pakistan-Switzerland BIT*.[64]

When evaluating whether the FET provision in the third-party treaty provides better treatment than the one in the basic treaty, the tribunal looks to see if the FET provision is linked to customary international law ("CIL").[65] If it is not conditioned and limited by CIL, the tribunal looks at the plain meaning of "fair" and "equitable." This is generally understood to provide a higher level of protection than that provided by the minimum standard of treatment or "MST."

*Merrill and Ring Forestry LP v Canada*is an outlier on this issue.[66] The tribunal stated that the MST standard has evolved considerably in the past few years. They decided that MST has evolved to the point where any behaviour against a foreigner by the State that could be viewed as "unreasonable" would be a violation of this standard. If the MST standard had evolved to this point it would drastically lower the threshold, making it much easier for States to breach it. Dumberry states that this decision should not be followed by future tribunals as the decision did not cite any

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[61] *Agreement Between the Islamic Republic of Pakistan and the Republic of Turkey Concerning the Reciprocal Promotion and Protection of Investments*, 16 March 1995 (entered into force 3 September 1997) [*Pakistan-Turkey BIT*].
[62] *Agreement Between the Swiss Confederation and the Islamic Republic of Pakistan on the Promotion and Reciprocal Protection of Investments*, 11 July 1995 (entered into force 6 May 1996) [*Pakistan-Swiss BIT*].
[63] *Pakistan-Turkey BIT, supra* note 61.
[64] *Pakistan-Swiss BIT*, *supra* note 62.
[65]Dumberry, *supra* note 28.
[66] *Merrill and Ring Forestry LP v Canada,* Award, ICSID Case No UNCT/07/1, 31 March 2010.

examples of state practice when rendering their decision.[67] UNCTAD also denounced the decision, stating the tribunal failed to provide "cogent reasons" for their findings on the evolution of CIL.[68]

This rejection by the legal community of the tribunal's decision in *Merrill*, reinstates the decision in *LFH Neer and Pauline Neer v United Mexican States* as the seminal case in determining the scope of the MST standard.[69] The tribunal in *Neer* stated that: "The treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency."[70] In 2009, the tribunal in *Glamis Gold, Ltd v The United States of America* affirmed this high threshold for MST stating that: "that is sufficiently egregious and shocking- a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons."[71]

Neer and *Glamis* demonstrate the high threshold of MST making it a difficult standard for States to breach. That is why stand-alone clauses are generally viewed as requiring better "treatment" of investors than those tied to CIL.

2.2.2.3. Conclusion on MFN Clauses Incorporating Substantive Clauses

MFN clauses can incorporate substantive provisions, including FET provisions. This has been demonstrated consistently throughout tribunals' decisions.[72] When tribunals determine

[67] Patrick Dumberry, "The Prohibition against Arbitrary Conduct and the Fair and Equitable Treatment Standard under NAFTA Article 1105" (2014) 15 JWIT 117 at 147 [Dumberry, "Arbitrary Conduct"].
[68] *Ibid* at 147.
[69] *LFH Neer and Pauline Neer (USA) v United Mexican States*, 4 RIAA 60 (2006) 15 October 1926.
[70] *Ibid* at 61–62.
[71] *Glamis Gold, Ltd v The United States of America,* Award, UNCITRAL, 8 June 2009 at 268.
[72] *MTD Equity, supra* note 56; *Bayinder, supra* note 60.

which FET provision grants better treatment, the specific wording of the provision as well as its relationship with MST is indicative of which one offers more favourable treatment.

2.3. Conclusion

The extent of what the investor is allowed to incorporate through the use of an MFN clause is largely determinative of the exact wording of the clause. To incorporate a procedural provision, the MFN clause's application needs to be expanded by the parties. The inverse of this is true for substantive provisions: the MFN clause's application needs to be constrained for an MFN clause to not be able to incorporate a substantive provision.

3. *CME/Lauder v Czech Republic*

3.1. Issue: Inconsistent Awards from Parallel Proceedings

The *CME v Czech Republic*[73] and *Lauder v Czech Republic*[74] decisions have been heralded as the "ultimate fiasco in investment arbitration."[75] Mr. Lauder initiated a claim against the Czech Republic personally under the *US-Czech Republic BIT* and then again as the controlling shareholder of CME under the *Netherlands-Czech Republic BIT*. These cases had the same facts and the same arguments, but were decided completely differently by two different tribunals. Mr. Lauder's claim was dismissed, while CME was awarded damages of US$270 million, with interest.

[73] *CME Czech Republic BV v The Czech Republic*, Final Award, UNCITRAL, 14 March 2003 [*CME*].
[74] *Ronald S Lauder v The Czech Republic,* Award, UNCITRAL, 3 September 2001 [*Lauder*].
[75] Reinisch*, supra* note 5 at 116.

3.2. Analysis of the Secondary Materials and Leading Jurisprudence

3.2.1. CME v Czech Republic

CME, a Dutch corporation, brought an action on February 22, 2000 against the Czech Republic for their treatment of its Czech Republic subsidiary, CNTS. The Czech Media Council, in an attempt to appease the public, chose to not award a lucrative broadcasting license to CNTS but to CET 21 (a wholly-owned Czech company). Due to the Czech Media Council not wanting any foreign ownership of CET 21, they would not allow CME to invest directly into the company, but allowed CNTS to enter into a partnership with CET 21. In this partnership, CNTS was to have exclusive rights to all broadcasting control and CET 21 was to hold the license to ensure that the license stayed with a wholly Czech Republican-owned company. This partnership performed well, forming the TV station "TV NOVA," which was an instant hit. They made significant profits for the first two years from 1994-1996. In 1996, the Media Council asked for the companies to reorganize and, during the reorganization, the conditions of the license held by CET 21 were changed to weaken their relationship with CNTS. In 1999 the head of CET 21, Dr. Železnŷ, ended the exclusive broadcasting services deal CET 21 had with CNTS and replaced them with other broadcast providers.

CME proceeded to make a claim against the Czech Republic under the UNCITRAL Arbitration Rules, as they claimed the actions and omissions of the Czech Media Council were the cause of CNTS losing its exclusive broadcasting contract. The tribunal found that the Czech Republic was at fault and awarded damages to CME of US$270 million, with interest.

The *Lauder* decision, released ten days before the *CME* decision, found the claim failed on causation. The *CME* tribunal explained a causal connection between the Czech Republic's measures and CME's loss in three steps. First, the Czech Media Council forced CNTS to change

the original licensing agreement issued in 1993. Second, that the State should be responsible for damages to a foreign investor even if they are not the sole cause of the damages. This second point was needed as Dr. Železnŷ was the main cause of the damages to CNTS. Third, that the Czech Media Council must have understood the foreseeable consequences of its actions.

3.2.2. Ronald S Lauder v Czech Republic

Ronald S. Lauder is a US citizen who created the media holding company CME in 1991 and had a 99% interest in CNTS, CME's Czech subsidiary. Prior to the separate action commenced by CME, Lauder initiated a claim on August 19, 1999 against the Czech Republic.

Lauder advanced the same claim, based on the same facts as CME, but was unable to convince the tribunal that the Czech Republic's discriminatory acts were the cause of CME's losses. The tribunal agreed that the Czech Republic breached their treaty obligations in 1993, by imposing the obligation on CNTS to operate through a partnership with CET 21. But the tribunal said that Lauder had the onus of proving that no intervening actions superseded the discriminatory acts. He had to show that the actions of CET 21 "were not so unexpected and so substantial as to have to be held to have superseded the initial cause and therefore become the main cause of the ultimate harm."[76] The tribunal stated that he did not accomplish this for two reasons. First, he did not protest the change as proposed by the Czech Republic Media Council in 1993. second, they said it was completely unforeseeable that Lauder would act in such a way as to allow Železnŷ to pursue his own interests without having to rely on CME. The tribunal concluded that the actions of Železnŷ were the real cause of the damage which had been inflicted on the claimant. The 1993 breach of the treaty was too remote to qualify as a cause for the damages.

[76] *Lauder, supra* note 74 at para 234.

The diverging results of these decisions is a clear example of inconsistency taking place in investor-State arbitration, reducing the legitimacy of international investment law.[77]

3.2.3. Reasons for Inconsistency

3.2.3.1. Lis Pendens

The inconsistency here would have been solved by consolidating the proceedings.[78] The claimants, CME and Lauder, both proposed consolidation but due to the tribunals strict application of *lis pendens* doctrine the proposal was rejected.[79]

The *lis pendens* doctrine prevents parallel litigation and conflicting results by not allowing claimants to have ongoing proceedings against the same party for the same issue.[80] The tribunals in *CME v Czech Republic* and *Ronald S. Lauder v Czech Republic* strictly applied the three-part test to determine if the doctrine could be used to consolidate the proceedings. The test requires that the parties be identical, the proceedings concern the same subject matter and, are the same cause of action. Both tribunals came to the result that the test was not satisfied to consolidate the proceedings. The claimants to the dispute were not the same and the governing BITs to the disputes were different, forcing the tribunals to maintain two separate sets of proceedings. The tribunal in *Lauder* further justified their conclusion of the test by determining that there was "no possibility" that another court or tribunal could come to a conclusion consistent or inconsistent with the award they would issue for damages claimed by Ronald S. Lauder.

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[77] Gabriel Orellana Zabalza, *The Principle of Systemic Integration: Towards a Coherent International Legal Order* (Zurich: Lit Verlag, 2012) at 29.
[78] Ian Laird & Rebecca Askew, "Finality versus Consistency: Does Investor-State Arbitration Need an Appellate System", online: (2005) 7:2 J App Pr & Pro 285 at 300.
[79] Frank Spoorenberg & Jorge E Viñuales, "Conflicting decisions in International Arbitration" (2009) 8:1 LPICT 91 at 98.
[80] Nadine Balkanyi-Nordmann, "The Perils of Parallel Proceedings" (2001) 56:4 Disp Resol J 20 at 23.

Strict applications such as this will increase parallel proceedings which will in turn create more conflicting decisions.

North American Free Trade Agreement ("*NAFTA*") Article 1126 attempts to address the concern of having multiple parallel proceedings. Article 1126(2) allows the tribunal to hear multiple proceedings at once where there is a question of fact or law in common. This eliminates the risk that inconsistent awards will be rendered in parallel proceedings.

In practice, Article 1126(2) has had mixed results. The sugar wars cases[81] were the first attempt to consolidate proceedings.[82] A consolidation tribunal was formed and they decided to not allow the three proceedings to be consolidated. Their reasoning for this was the direct competition between the three corn syrup companies and the confidentiality complications this would present during the tribunal.

A second example of this, was the US filing to consolidate the Softwood lumber cases.[83] This consolidation tribunal allowed the consolidation to take place. The consolidation tribunal's decision was based on the fact that the questions of fact and law were largely the same, and that the interests of fair and efficient resolution of the claims merited the assumption of jurisdiction over all claims.[84]

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[81] *Corn Products International, Inc. v United Mexican States,* Order of the Consolidation Tribunal, ICSID Case No ARB(AF)/04/1, 20 May 2005; *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc v United Mexican States*, Order of the Consolidation Tribunal, ICSID Case No ARB(AF)/04/05, 20 May 2005.
[82] Catherine Yannaca-Small, "Consolidation of Claims: A Promising Avenue for Investment Arbitration?", in *International Investment Perspectives*, 2006 (Paris: OECD Publication, 2006) 225 at 231.
[83] *Canfor Corp v United States of America; Terminal Forest Products Ltd v United States of America; Tembec Inc et al v United States of America,* Order of the Consolidation Tribunal, ICSID, 7 September 2005.
[84] Yannaca-Small*, supra* note 82 at 232.

3.3. Conclusion

The *CME v Czech Republic* and *Ronald S. Lauder v Czech Republic* decisions blemished the integrity of international law through their completely inconsistent decisions. However, these decisions have drawn much more public attention to the issue of inconsistency in ISDS. This has resulted in more pressure on States to address any areas that have the potential to create inconsistency. An example of this being the addition of Article 1126(2) to *NAFTA*.

4. Countermeasures

The customary international law of countermeasures allows a state to suspend the performance of an obligation owed to another state to encourage the other state to comply with its international obligations.[85] Only three cases have contemplated countermeasures in relation to *NAFTA*.[86] All three cases, loosely referred to as the "sugar wars" cases, involved essentially the same facts, the same respondent state (Mexico), investors from the same home state (United States), the same impugned government measures, and the same treaty provisions (*NAFTA* Chapter 11). These similarities allow for an isolated assessment of the inconsistencies in the three different tribunals' analyses of countermeasures. The outcomes of these awards were informed, in large part, by different conceptions of investor rights and whether such rights exist independent of the rights of investors' home states. The literature commenting on these cases suggests that while countermeasures may be invoked in some circumstances, the rights of investors are not derivative of their states of nationality. Thus, as a general principle, countermeasures cannot be used to avoid

[85] Jansen Calamita, "Countermeasures and Jurisdiction: Between Effectiveness and Fragmentation" (2011) 42:2 Geo J Intl L 233 at 233.

[86] *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc v United Mexican States*, Award, ICSID Case No ARB(AF)/04/5, 21 November 2007 [*ADM*]; *Corn Products International, Inc v United Mexican States*, Decision on Responsibility, ARB(AF)/04/1, 15 January 2008 [*CPI*]; *Cargill, Incorporated v United Mexican States*, Award, ICSID Case No ARB(AF)/05/2, 18 September 2009 [*Cargill*].

obligations owed to an investor. Because this issue is grounded in customary international law ("CIL"), the conclusions in this section are applicable beyond the *NAFTA* context.

4.1. Issue: Inconsistency in the Tribunals' Interpretations

In the sugar wars cases, inconsistencies appear in the tribunals' interpretations of whether investors hold substantive or procedural rights independent of their home states. Two of three tribunals found that investors hold independent rights, while the third came to the opposite conclusion. Consequently, those two tribunals concluded that countermeasures could not be used as a defence to preclude wrongfulness, as countermeasures in CIL exist for the purpose of counteracting a target state's non-performance of its obligations, as opposed to an attack against investors. Additionally, the tribunals differed in their conception of the law of countermeasures, reflecting another source of inconsistency: varied interpretive approaches to CIL. Another source of inconsistency is evinced by dissenting opinions on the above issues, demonstrating that not all arbitrators within each panel agree with interpretations of CIL and the laws of the *NAFTA*.

4.2. Analysis of the Secondary Materials and Leading Jurisprudence

In 2002, the Mexican Congress adopted a series of measures to "stop the displacement of domestic cane sugar by imported [high fructose corn syrup ("HFCS")] soft drinks and syrup sweetened HFCS."[87] The Congress imposed a 20 per cent tax on the transfer and importation of soft drinks using any sweetener other than cane sugar; a 20 per cent tax on the commissioning, mediation, agency, representation, brokerage, consignment, and distribution of soft drinks using non-cane sugar sweeteners; and several administrative requirements for taxpayers subject to these

[87] *ADM*, *supra* note 86 at para 80; Junianto Losari & Michael Ewing-Chow, "Legitimate Countermeasures in International Trade Law and their Illegality in International Investment Law" in Photini Pazartzis et al, eds, *Reconceptualising the Rule of Law in Global Governance, Resources, Investment and Trade* (London: Bloomsbury Publishing, 2016) 405 at 413.

taxes.[88] These measures were challenged before the WTO and eventually resolved when the US and Mexico agreed to achieve free trade in HFCS by 2008 and to repeal the above taxes.[89] Despite this resolution, three US investors filed claims against Mexico under *NAFTA* Chapter 11. In these proceedings, Mexico attempted to justify the measures by arguing that they were legitimate countermeasures against the US for its violation of *NAFTA* Chapter 3 and 20.[90] Mexico alleged that the US restricted imports of Mexican sugar, violating *NAFTA* Chapter 3, and blocked an attempt of an inter-state dispute settlement which Mexico could have challenged the US's restriction, thereby violating *NAFTA* Chapter 20.[91] In the three cases, Mexico argued that the defence arises from CIL.[92] The following analysis focuses on the availability of this defence under CIL according to each tribunal.

4.2.1. Tribunals Hold Varied Conceptions of Investor Rights Under NAFTA Chapter 11

The *ADM* tribunal found that countermeasures are available as a defence in the context of *NAFTA* Chapter 11. This tribunal delved into whether Chapter 11 of the *NAFTA* "provides a self-contained mechanism endorsing substantive and procedural rights for qualified investors; and whether these rights are independent of the legal relationship between the Member States."[93] In this inquiry, the tribunal considered whether investors: (i) trigger arbitration proceedings against a state by stepping into the shoes and asserting the rights of their state of nationality; (ii) hold only procedural rights to claim state responsibility before a tribunal (called the intermediate theory); or (iii) are vested with direct independent rights and that they are immune from the legal relationship

[88] Losari & Chow, *supra* note 87 at 413.
[89] *ADM*, *supra* note 86 at para 97; *Cargill*, *supra* note 86 at para 124; Losari & Chow, *supra* note 87 at 413.
[90] *ADM*, *supra* note 86 at para 110; *Cargill*, *supra* note 86 at para 379; *CPI, supra* note 86 at para 144.
[91] Calamita, *supra* note 85 at 245–246.
[92] *ADM, supra* note 86 at para 110; *Cargill, supra* note 86 at para 379; *CPI, supra* note 86 at para 158.
[93] *ADM, supra* note 86 at para 161.

between the member States.[94] The tribunal relied on *Loewen Group, Inc & Raymond Loewen v United States of America*, which decided that parties hold only procedural rights, pursuant to the intermediate theory.[95] This theory articulates that while an investor may hold procedural rights, it lacks substantive rights, which ultimately belongs to its home state.[96] In line with this theory, the defence of countermeasures *may* preclude wrongfulness of violations under Chapter 11 because individuals do not hold rights pursuant to the *NAFTA*.

Contrary to the above finding, the *CPI* tribunal decided that countermeasures cannot affect the rights of a party other than the state responsible for the prior breach, as per Article 49 of the ILC Articles.[97] The tribunal was of the opinion that an investor has rights of its own, distinct from those of its home state.[98] It stated that the "fiction" in the notion of diplomatic protection need not continue because in investor-state arbitration, the state of nationality does not control the conduct of the case, nor do they receive compensation resulting from an investor's claim. The tribunal relied on *Republic of Ecuador v Occidental Exploration and Production Co.* in coming to this conclusion, which held the same view on investor rights.[99] Thus, according to the *CPI* tribunal, investors possess individual substantive rights, independent of their home states.

The *Cargill* tribunal adopted reasoning very similar to that of the *CPI* tribunal: investors under *NAFTA* Chapter 11 possess individual substantive rights independent of its home state.[100]

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[94] *Ibid* at para 166.
[95] *ADM, supra* note 86 at 163–166.
[96] *Loewen Group, Inc & Raymond v United States of America,* Award, ICSID Case No ARB(AF)/98/3 26 June 2003 at para 223; *ADM*, *supra* note 86 at para 177; Losari and Chow, *supra* note 87 at 416.
[97] *CPI, supra* note 86 at para 164; Losari & Chow*, supra* note 85 at 417.
[98] *CPI*, *supra* note 86 at para 168; Losari & Chow, *supra* note 85 at 417.
[99] *CPI*, *supra* note 86 at para 173; *Occidental Petroleum Corporation and Occidental Exploration and Production Company v The Republic of Ecuador*, Award, ICSID Case No ARB/06/11, 5 October 2012 at paras 14–22; Losari & Chow*, supra* note 85 at 417.
[100] *Cargill*, supra note 86 at 386.

According to the *Cargill* tribunal:

> . . . . countermeasures may operate only to preclude the wrongfulness of an act that is not in conformity with an obligation owed to the offending State. Countermeasures may not preclude the wrongfulness of an act in breach of obligations owed to third States [not party to the proceedings]. The tribunal similarly is of the opinion that countermeasures would not necessarily have any such effect in regard to specific obligations owed to *nationals* of the offending State, rather than to the offending State itself. Thus, the tribunal finds Respondent's assertion that "[a] legitimate countermeasure against the United States is necessarily legitimate against United States' nationals" to be overbroad.[101]

The *Cargill* tribunal justified this opinion on the basis that the investor institutes the claim, thus calling a tribunal into existence, and is the named party in the proceedings.[102]

Another notable difference between the awards is that the *CPI* and *Cargill* tribunals decided that even if countermeasures were available to Mexico as a defence, it could not determine whether the requisite elements of a countermeasure under CIL were present because the United States was not party to the proceedings. The *ADM* tribunal, on the other hand, "did not see this as a problem" and assessed the applicability of countermeasures to the facts of the dispute.[103] Thus, while the *ADM* tribunal decided that the criteria for successfully mounting a countermeasures defence were not met, the *CPI* and *Cargill* tribunals did not reach this point, as it found that jurisdictional barriers removed the need to even consider whether the criteria could be met. All three tribunals decided that Mexico's countermeasures defence failed, but for very different reasons.[104]

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[101] *Cargill*, *supra* note 86 at para 420; also see *CPI, supra* note 86 at para 191 and *Cargill*, *supra* note 86 at para 430.
[102] *Cargill*, *supra* note 86 at para 426; Losari & Chow, *supra* note 85 at 417.
[103] Donald McRae, "Countermeasures and Investment Arbitration" in Meg Kinnear et al, eds, *Building International Investment Law: The First 50 Years of ICSID* (Kluwer Law International, 2015) 495 at 499.
[104] *Ibid*; Losari & Chow believe that the award turned on the issue of investor rights; See Losari & Chow, *supra* note 85.

The inconsistency between the tribunals is compounded by Arthur Rovine's concurring opinion on the *ADM* tribunal, which undermines the other arbitrators' conclusions on investor rights. Rovine does not accept his colleagues' approach to investor rights and countermeasures, as exemplified by the following statement:

> These Articles obviously do not mean that all the rules of diplomatic protection and customary international law no longer apply at *NAFTA*. They do mean that the core of the diplomatic protection rule, state espousal of claims to enforce state obligations on behalf of the espousing state's nationals, is not part of *NAFTA*, and that instead *NAFTA* investors have their own individual rights to enforce such state obligations. That is the assurance that NAFTA investors received from the States Parties. That is the "Purpose" of *NAFTA*.[105]

Rovine's opinion is more akin to the reasoning of the *Cargill* and *CPI* tribunals than the *ADM* majority. This is perhaps a signal that, in the future, tribunals will make decisions with the assumption that investors have substantive rights independent of their home states. Nonetheless, an investor or State cannot be certain how a tribunal will dispose of a claim of countermeasures in ISDS at this point in time.

4.3. Conclusion

Each tribunal's varied conception of investor rights under CIL informed their decisions on whether countermeasures are available to states as a defence for the non-performance of *NAFTA* Chapter 11 obligations. In sum, inconsistency in the sugar wars cases' treatment of countermeasures is rooted in varying interpretations of investor rights under CIL, including reliance on different preceding awards, and internal differences of opinion within tribunals. The three tribunals are not completely settled on whether investors have substantive rights independent of their states of nationality, as explained above. Nevertheless, Arbitrator Rovine's concurring

[105] *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc v United Mexican States*, Concurring Opinion of Arthur W Rovine, ICSID Case No ARB(AF)/04/5, 20 September 2007 at para 77.

opinion in *ADM*, which undermined his colleagues' conclusions on the rights investors hold, supports a practice of recognizing investor's independent rights, as his reasoning closely resembled the *CPI* and *Cargill* awards. The fact that the most recent of the three awards (*CPI* and *Cargill*), in combination with the *ADM* dissent, recognized the independent, substantive rights of investors also speaks to a higher level of support in the jurisprudence for the *CPI* and *Cargill* tribunals' conclusions.

5. Procurement

Procurement exceptions allow states, in certain circumstances, to be excepted from performing certain treaty obligations when purchasing goods or services. In the *NAFTA* context, the scope of what constitutes procurement has been interpreted differently on three occasions. In short, the inconsistency has created multiple definitions of procurement in the jurisprudence which may lead future tribunals to choose from one or the other. This is problematic because this inconsistency may leave states unsure as to when they are excepted through the government procurement provision in the *NAFTA*. This section exhibits the inconsistency that exists among Chapter 11 tribunals on the definition of procurement and how this has fared in three awards. The most recent of the three awards is discussed in greater detail to illustrate the analytical and interpretive framework of a contemporary tribunal.

5.1. Issue: The Definition of Procurement

Tribunals disagree on the appropriate interpretative approach to the definition of procurement in the *NAFTA* Article 1108(7)(a). Although the definition of procurement was not a major factor for all of the awards discussed in this segment, the differing interpretative approaches and definitions, if followed by future tribunals, could have important implications for investors and States where the definition is dispositive of the claim.

5.2. Analysis of the Secondary Materials and Jurisprudence

5.2.1. The Mesa Tribunal Adopted a Definition of Procurement that is Broad and Unqualified

In a recent award, *Mesa Power Group LLC v Government of Canada* ("*Mesa*"), the Mesa Power Group, a renewable energy producer, claimed that the Ontario Power Authority ("OPA") applied its Feed-In Tariff Program ("FIT Program" or "the Program") Rules unfairly, preventing it from obtaining FIT Contracts.[106] The OPA established the FIT Program to purchase renewable energy while providing a fixed price for electricity delivered into Ontario's grid. The Mesa Power Group alleged that the OPA violated a number of *NAFTA* provisions, including national treatment (Article 1102) and most favoured nation (Article 1103). Canada was ultimately saved by the procurement exception in Article 1108(7)(a).

The tribunal addressed the ordinary meaning and context of procurement. This determination fell on the tribunal because no definition of the term exists in Article 1108. The tribunal referred to *ADF Group v United States of America* ("*ADF*") and *United Parcel Service of America Inc v Government of Canada* ("*UPS*"). The *ADF* tribunal stated that procurement refers to the act of obtaining, through labour or purchase.[107] The tribunal agreed with those tribunals' broad approach, rejecting the Mesa Power Group's claim that the term procurement should be construed narrowly, as it is an exception.[108] Despite accepting those tribunals' broad approach, differences in the definition exist in each award. This is discussed in the following section.

The tribunal rejected Mesa Power Group's claim that other instances of the phrase in the *NAFTA* should be relied upon for interpretation. The tribunal stated that instances of procurement

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[106] *Mesa Power Group, LLC v Government of Canada,* Award, PCA Case No 2012-17, 15 June 2017 at para 207 [*Mesa*].
[107] *Ibid* at paras 408, 409; *ADF Group Inc v United States of America,* Award, ICSID Case No ARB(AF)/00/1, 9 January 2003 [*ADF*].
[108] *Mesa, supra* note 106 at paras 405, 409.

in each *NAFTA* Chapters must be interpreted in light of the purpose of the chapter in which the phrase exists – namely, those definitions located in Chapters 3, 10, 12, and 15.[109] The Mesa Power Group, for example attempted to import the definition of procurement from Article 1502(4), which shares the narrow language of the procurement exception in the General Agreement on Tariffs and Trade ("*GATT*") Article III:8(a). The tribunal rejected this argument because Article 1502(4) is specific to measures concerning certain monopolies, thus contemplating different measures than those in *NAFTA* Chapter 11.[110] The tribunal also rejected the reliance on Article 1001(5), regarding government procurement, because it defines which activities are to be captured by Chapter 10. In other words, it is a "carve-in" in Chapter 10, as opposed to the "carve-out" in 1108(7)(a), which *excludes* procurement activities from various Chapter 11 obligations.[111]

The Mesa Power Group then argued that procurement is a term of art.[112] The Mesa Power Group submitted that the tribunal should look to international economic law, such as *GATT* Article III:8(a), which qualifies procurement so that measures do not constitute procurement if they are "with a view to commercial resale."[113] Importing these caveats to the definition of procurement may have prevented Canada from being saved by the exception, as the OPA resold electricity to the final consumer after obtaining the electricity itself. However, the Mesa Power Group's argument was rejected on the grounds that the *NAFTA* Parties could have drafted a narrow definition of "procurement" if they saw fit, but decided not to.[114] Ultimately, the tribunal found

[109] *Ibid* at para 417.
[110] *Ibid.*
[111] *Ibid* at paras 426, 439.
[112] *Ibid* at para 432.
[113] *Ibid* at para 433.
[114] *Ibid.*

that because "procurement by a Party or a state enterprise" is not qualified by other language in Article 1108(7)(a), the OPA's act of reselling electricity is irrelevant in this procurement inquiry.

5.2.2. The Mesa, ADF, and UPS Tribunals Adopt Different Interpretations of Procurement

This section evaluates the *Mesa* tribunal's interpretation of the term procurement in *NAFTA* Article 1108(7)(a) in relation to the *ADF* and *UPS* tribunals' definition. This section demonstrates that the differences in the tribunals' definitions of procurement are a result of different interpretive approaches, as well as an incomplete adoption of the definition of procurement from preceding awards.[115] In any case, this inconsistency demonstrates the need to apply a single definition of procurement.

The *Mesa* tribunal adopted a broad, almost unqualified, definition of procurement, as explained above. The tribunal refused the Mesa Power Group's arguments in favour of importing the definition located in Article 1001(5) because it is a carve-in, whereas Article 1108(7)(a) is a carve-out.[116] The *ADF* tribunal used the language from Article 1001(5) to inform the definition of procurement in Article 1108(7)(a).[117] Thus, this tribunal relied on other *NAFTA* provisions while the *Mesa* tribunal refused to do so. Instead, the *Mesa* tribunal applied the ordinary meaning of the term, in combination with the existing text in Article 1108(7)(a), leading to different definitions of procurement.

The *ADF* tribunal began its inquiry by stating that procurement is not defined in Chapter 11 "but it is defined in NAFTA Chapter 10," indicating that the tribunal sought to rely on the definition of procurement in Chapter 10.[118] It then referred to the text of Article 1001(5) which,

[115] *United Parcel Service of America v Government of Canada*, Award, ICSID Case No UNCT/02/1, 24 May 2007. [*UPS*].
[116] *Mesa, supra* note 106 at paras 426, 439.
[117] *ADF, supra* note 107 at paras 160–170.
[118] *Ibid* at para 161.

unlike the term procurement in Article 1108(7)(a), is qualified by certain limitations.[119] These limitations include:

> (a) non-contractual agreements or any form of government assistance, including cooperative agreements, grants, loans, equity infusions, guarantees, fiscal incentives, and government provision of goods and services to persons or state, provincial and regional governments; and
>
> (b) the acquisition of fiscal agency or depository services, liquidation and management services for regulated financial institutions and sale and distribution services for government debt.[120]

Because, in that award, the United States did not redistribute the products it procured to any another entity, the exceptions of Article 1001(5)(a) and (b) did not impact the outcome of the award. The *Mesa* tribunal's interpretative approach, which did not rely on Article 1001(5) or the exceptions in (a) or (b), led to a broad definition of procurement. In that award, the Government of Canada resold the energy that it procured, but the resale was irrelevant and the transaction in question fell within the tribunal's broad definition of procurement. However, it is possible that if the *Mesa* tribunal adopted the same definition of procurement as the *ADF* tribunal, the resale could have been construed as a form of assistance or the provision of goods, causing the transaction to fall outside of that definition of procurement. It is also foreseeable that other types of transactions undertaken by governments may be met with challenge if tribunals in the future adopt the *ADF* tribunal's definition. Take, for example, a transaction where a government procures and redistributes a product. Whether the government is saved by the procurement exception located Article 1108(7)(a) will largely be dependent on whether the tribunal adopts the definition in the

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[119] *Ibid.*

[120] *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States,* 17 December 1992 Can TS 1994 No 2, arts 1001(5)(a)–(b) (entered into force I January 1994) [*NAFTA*].

ADF award, the definition in the *Mesa* award, or its own novel definition. Thus, the inconsistency discussed in this section is likely to continue, and will become more pronounced, when facts involve transactions such as the example described above.

It should also be noted that the *Mesa* tribunal stated that "the tribunal in *ADF* relied on the chapeau of Article 1001(5) and not on the limitations of sub-paragraphs (a) and (b) of that provision."[121] This statement conflicts with the *ADF* tribunal's express inclusion of these limitations in its definition of procurement.[122] This illustrate that the *Mesa* tribunal misconstrued the definition of procurement set out by the *ADF* tribunal. The *Mesa* tribunal, however, was correct in stating that the *UPS* tribunal did not include the limitations mentioned above. While the *Mesa* tribunal's error might not have impacted the award, it demonstrates that the tribunal itself was not clear on preceding tribunals' interpretations of the procurement exception in Chapter 11.

5.3. Conclusion

The inconsistencies under this topic stem largely from (i) variance in interpretative approaches, as illustrated in the comparison of the *ADF* and *Mesa* awards and (ii) the adoption of different scopes for the term "procurement" among tribunals. While the awards discussed above did not turn on definitions of procurement in each award, the differences in their scopes pose unpredictability in the law for future litigants. It will be difficult for litigants to discern whether tribunals will reinterpret definitions of procurement, as did the *Mesa* tribunal, or whether they will rely on interpretations by preceding tribunals, such as the *UPS* tribunal and its partial acceptance of the definition in the *ADF* award. The inconsistencies are likely to pose more uncertainty to parties when the respondent state redistributes procured goods in a manner described under Article

[121] *Mesa, supra* note 22 at para 429.
[122] *ADF, supra* note 23 at paras 161–162.

1001(5)(a) or (b), as the exceptions listed thereunder have been accepted by some, but not all, tribunals in their interpretations of procurement under Article 1108(7)(a).

6. Fair and Equitable Treatment

Fair and equitable treatment ("FET") is an investor protection, the content of which has been contested for several decades. In many investment treaties, including the *Energy Charter Treaty* ("*ECT*"), issues as to whether full protection and security ("FPS") provides protections beyond FET remain to be settled. FPS standards have been held by some tribunals to have standards no higher than the minimum standard of treatment ("MST") in CIL, while others have found the opposite. Generally, tribunals have come to different conclusions on whether FPS reflects the broader FET standard and CIL or whether it sets an independent standard.[123] The inconsistency stems largely from undefined language within treaties regarding these provisions.

This discussion refers to *ECT* jurisprudence and arbitral awards under various BITs, despite the variance in treaty language. Scholars such as Christoph Schreuer have examined these issues in this manner, as both the *ECT* and the impugned BITs include provisions regarding both FPS and FET and because the inconsistencies generally stem from the lack of clarification on how the language in the provisions is to be interpreted. The *NAFTA* jurisprudence is omitted, however, as the Free Trade Commission's ("FTC") 2001 Notes of Interpretation of Certain *NAFTA* Chapter 11 Provisions stated that "the [concept] of "fair and equitable treatment" . . . [does] not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens."[124] The *NAFTA* tribunals have followed this

[123] Christopher Schreuer, "Full Protection and Security" (2010) 1:2 *J Intl Disp Settlement* 1 at 2 [Schreuer, "Full Protection and Security"].
[124] Jacob Stone, "Arbitrariness, the Fair and Equitable Treatment Standard, and the International Law of Investment" (2012) 25 *Leiden J Intl L* 77 at 83.

interpretation consistently, which is why these cases are not discussed.[125] However, the ECT and the BITs discussed here have not been subject to such interpretation and, as such, are inconsistent. This is why assessing the jurisprudence under those treaties is appropriate. Linkages to CIL also warrant a cross-treaty analysis, as interpretations of international law are factors contributing to the widespread inconsistency addressed in this section. This section recognizes, however, that cross-treaty analysis is limited in its ability to render widespread conclusions, as slight differences in treaty language and tribunal practices factor into the inconsistency.

6.1. Issue: FPS Provisions

As mentioned above, the central issues that are addressed in this section are whether FPS provisions exist in addition to FET standards and whether FPS standards are to be higher or at par with the minimum standard of treatment found in CIL. While these are important issues, they are by no means exhaustive of the debates surrounding FET and related provisions.

6.2. Analysis of the Secondary Materials and Leading Jurisprudence

6.2.1. The Relationship Between FPS and FET Provisions

The *Petrobart v The Kyrgyz Republic* and *Noble Ventures Inc v Romania* awards both suggest that those tribunals view the FET standard to be an overarching principle that includes the other standards mentioned in Article 10 of the *ECT*: MST and FPS.[126] Similarly, the *Wena Hotels v Egypt* and *Occidental v Ecuador* tribunals regarded FET and FPS standards as one.[127] However, the *Azurix v Argentina* tribunal interpreted these standards in the *Argentina-US BIT* to be separate,

[125] Schreuer, "Full Protection and Security", *supra* note 123 at 40.
[126] Christoph H Schreuer, Paul D Friedland & William W Park, "Selected Standards of Treatment Available Under the Energy Charter Treaty: Fair and Equitable Treatment (FET): Interactions with Other Standards" in Graham Coop & Clarisse Ribeiro, eds, *Investment Protection and the Energy Charter Treaty* (New York: JurisNet, LLC, 2011) 63 at 65–66 [Schreuer et al, "Selected Standards"]
[127] *Ibid* at 66–67.

claiming that the FPS standard is in addition to the lower FET standard of protection against physical violence. The tribunal stated that the protection and security standard extended beyond physical violence and includes the obligation to provide a "secure investment environment."[128] These awards, while not exhaustive of all the jurisprudence, are representative of the inconsistency regarding the relationship between FPS and FET provisions and their standard(s). Thus, the inconsistency arises because some tribunals view both FPS and FET as having only one standard, while others find that "a violation of another standard may lead to a violation of FET or, conversely, a violation of FET triggers a violation of the other standard."[129]

Some authors argue that because FET and FPS are listed separately, it follows that they each hold their own standard.[130] To the contrary, some commentators claim that words and phrases besides "fairness" and "equity," are immaterial to the inquiry, suggesting that only one standard exists in practice.[131]

6.2.2. The Relationship Between FPS and CIL

Similar to the relationship between FPS and FET, inconsistencies exist in relation to FPS and CIL, which is linked to CIL. Namely, whether FPS provisions have independent standards or references to the international MST under CIL has caused debate.[132] As mentioned above, the FTC interpreted FET and MST to be one standard within the *NAFTA*. However, this has not been the case with all other treaties.

This issue is illustrated by comparing the *ELSI v Italy* and *Noble Ventures v Romania*

[128] *Ibid* at 67.
[129] *Ibid* at 66.
[130] *Ibid* at 68.
[131] Kenneth J Vandevelde, *United States Investment Treaties: Policy and Practice* (Boston: Kluwer Law and Taxation, 1992) at 76.
[132] Schreuer, "Full Protection and Security", *supra* note 123 at 10.

awards. The claims were brought under the *Treaty of Friendship, Commerce and Navigation Between the US and the Italian Republic* ("*FCN Treaty*") and the *US-Romania BIT*, respectively. These awards are used for comparison because both treaties were submitted by the US and contain similar language. The *FCN Treaty* extended the MST standard by including that the investor "shall enjoy in this respect the full protection and security required by international law."[133] The ICJ in *ELSI v Italy* found that this meant that the standard goes further than what CIL requires. However, in *Noble Ventures v Romania,* the tribunal found that "full protection and security" was limited to the minimum standard of treatment, according to the CIL standard.[134] Although some differences might exist between the treaties and the practices of various tribunals, there is a clear inconsistency in whether the standard is the minimum standard of treatment under CIL or an autonomous standard which sets out a greater level of protection than the CIL standard.

This has been attributed to the lack of clarification in the language within treaties.[135] Scholars have noted that the dearth of "clearly defined statement[s] of legal obligations" are largely to blame for the inconsistencies in FET and FPS standards and their relationships to CIL.[136] As mentioned above, however, the differences between treaties is also a factor in this inconsistency, as particularities in treaty language impact intra-treaty interpretations of certain definitions and provisions. It is probable that such differences had at least some impact on the differences between the FPS standards in the *ELSI* and *Noble Venture* awards. Both tribunals recognized that the FPS standard is linked to CIL, but the slightly different language in the *FCN Treaty*'s FPS provision likely factored into the *ELSI* tribunal's view of FPS as having a standard

[133] *Ibid* at 11.
[134] *Ibid* at 12.
[135] Kendra Leite, "The Fair and Equitable Treatment Standard: A Search for a Better Balance in International Investment Agreements" (2016) 32:1 Am U Intl L Rev 363 at 371.
[136] Schreuer, "Full Protection and Security", *supra* note 123 at 12.

higher than the what is required by CIL. Specifically, the *FCN Treaty* uses the language "most constant protection" as opposed to "full protection" which might have led to the *ELSI* tribunal's conclusion on this matter.

6.3. Conclusion

6.3.1 Reasons for Inconsistency

6.3.1.1 Some Treaties Include Definitions to Prevent Inconsistent Interpretations

To prevent these inconsistencies, treaty drafters are in some cases including lists and specific obligations in their FET provisions to avoid ambiguity in their meanings.[137] An example of this exists in the Association of Southeast Asian Nations ("*ASEAN*") Comprehensive Investment Agreement, which was created in 2009. The *ASEAN* Comprehensive Investment Agreement's investor treatment provision, located in Article 11, states that:

> 1. Each Member State shall accord to covered investments of investors of any other Member State, fair and equitable treatment and full protection and security.
>
> 2. For greater certainty:
>
> (a) fair and equitable treatment requires each Member State not to deny justice in any legal or administrative proceedings in accordance with the principle of due process; and
>
> (b) full protection and security requires each Member State to take such measures as may be reasonably necessary to ensure the protection and security of the covered investments.[138]

Article 11(2)(a) and (b) provide definitions of the standards in order to avoid multiple interpretations. Other examples of a clarification include the FTC's interpretive note linking its

[137] *Ibid* at 28–29.
[138] *Association of South-East Asian Nations Comprehensive Investment Agreement*, 26 February 2009, art 11 (entered into force 24 February 2012).

MST, FET, and FPS provision with one standard.[139]

6.3.2. Implications

Much of the inconsistency regarding the above standards is generated because of a lack of specificity in the provisions themselves, leaving tribunals to interpret the provisions with little guidance. It is possible that definitions clarifying the meaning and scope of FET, MST, and FPS, including any express linkages to CIL, will alleviate some inconsistency regarding this matter. While this is true, variation in treaty language and tribunals must be accounted for, as illustrated by comparing the difference between the FPS standards set out by the tribunals in *ELSI* and *Noble Ventures*. In any case, the absence of clear standards detracts from states' ability to clearly understand what is expected of them in regard to investor protection.

7. Definition of "Investment"

The definition of "investment" determines the *ratione materiae*, or the subject matter, of the treaty.[140] Where a claimant does not have an eligible investment, the tribunal has no jurisdiction over the dispute and the treaty's dispute resolution provisions are unavailable to the claimant. Inconsistent interpretation of the term "investment," and the impact of the term's use in *ICSID Convention* Article 25(1), suggests that some claims that were dismissed or accepted might have reached a different outcome under a differently-constituted tribunal.

There are a few different iterations of the definition of "investment" in investment treaties, or broader trade treaties that also deal with investments.[141] These definitions can be broken into

[139] Leite, *supra* note 135 at 377–378.
[140] For an example, see the *Treaty Between the Government of the United States of America and the Government of Bolivia Concerning the Encouragement and Reciprocal Protection of Investment*, 17 April 1998, art III (entered into force 6 June 2001) [*US-Bolivia BIT*]: "Neither Party shall expropriate or nationalize a covered investment either directly or indirectly."
[141] Alain Pellet, "The Case Law of the ICJ in Investment Arbitration" (2013) 28:2 ICSID Rev at 224; The definition of "investment" has been described as an "unfortunate jurisprudential mess."

the following types: enterprise-based, exhaustive lists, and broad, asset-based non-exhaustive lists.[142] Most treaties apply a broad, asset-based definition and even those with exhaustive lists include such broad categories of investments that they remain similar to the broad, asset-based definitions.[143]

7.1. Issue: Potential Limitations on What a Treaty Can Define as an "Investment"

There are some issues that were the subject of past debate, such as whether indirect shareholding can be an investment, portfolio investments qualify (holding shares in a company but not taking any controlling or managing role), and non-business assets can constitute an investment. However, we have not found recent controversy on those subjects.

The controversial issues that continue to exist include whether (a) *ICSID Convention* Article 25(1) limits what investments can be subject to arbitration under ICSID, and on a related note, if the limitations of Article 25(1), as defined by jurisprudence,[144] should be considered outside of ICSID;[145] (b) a commercial sales or service contract can be investments;[146] (c) whether

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[142] UNCTAD, "Scope and Definition" in *UNCTAD Series on Issues in International Investment Agreements II* at 21–24, 34 (UNCTAD/DIAE/IA/2010/2) [UNCTAD Scope].

[143] Catherine Yannaca-Small, "Definition of Investor and Investment in International Investment Agreements" in *Understanding Concepts and Tracking Innovation* (2008) at 47–48, 50; Mahnaz Malik, "Bulletin #1 Definition of Investment in International Investment Agreement" (2009) *IISD Best Practices Series* at 3; Zachary Douglas, *The International Law of Investment Claims* (Cambridge: Cambridge University Press, 2009) at 343; *Fedax NV v Republic of Venezuela*, Decision of the Tribunal on Objections to Jurisdiction, ICSID Case No ARB/96/3, 11 July 1997 at 34 [*Fedax*].

[144] *Fedax*, *supra* note 143; *Salini Morocco*, *supra* note 11.

[145] *Romak SA v Republic of Uzbekistan*, Award, PCA Case No AA280, 26 November 2009 [*Romak*]; *GEA Group Aktiengesellschaft v Ukraine*, Award, ICSID Case No ARB/08/16, 31 March 2011 [*GEA*]; *Alps Finance v Slovak Republic*, Award, UNCITRAL, 5 March 2011 [*Alps Finance*]; *Poštová Banka, AS and Istrokapital SE v Hellenic Republic*, Award, ICSID Case No ARB/13/8, 9 April 2015 [*Postova Banka*]; *Malaysian Historical Salvors SDN, BHD v Government of Malaysia*, Award of Jurisdiction, ICSID Case No ARB/05/10, 17 May 2007 [*MHS*]; UNCTAD Scope at 41–42, 48–49, 51–65.

[146] Crina Baltag, "Keeping up with the Notion of Investment: the Case of the Energy Charter Treaty" *Kluwer Arbitration Blog* (April 16, 2012), online: <http://arbitrationblog.kluwerarbitration.com/2012/04/16/keeping-up-with-the-notion-of-investment-the-case-of-the-energy-charter-treaty/>; When discussing two decisions about commercial contracts as investments, Baltag described the definition of investment as being "one of the most controversial issues" under ICSID. See also James Crawford, "Treaty and Contract in Investment Arbitration"

"claims to money" (and similar phrases) includes an arbitral award;[147] and (d) whether sovereign bonds can be investments.[148]

7.2. Analysis of the Secondary Materials and Leading Jurisprudence

7.2.1. Leading Cases on "Investment" in ICSID, Commercial Contracts, Awards, and Sovereign Bonds

Tribunals have found that all four of issues (a) through (d) can be related to a central question: Does the term "investment" have inherent characteristics? If the term has inherent characteristics, such as an element of risk, duration, and a contribution to the host state, then even if an asset is among the examples of investments listed in the treaty, that asset will not be protected by the treaty.[149]

Issues (b) though (d) involve the question of whether a tribunal should accept the ordinary meaning of the wording of the treaty. The majority of these treaties use language broad enough to encompass commercial contracts, arbitral awards, and sovereign bonds, however some tribunals

(2008) 24:3 Arb Intl at 362 [Crawford Contract]: "an ordinary contract for the supply of goods and services" is not an investment contract.

[147] *Romak*, *supra* note 145; *Alps Finance*, *supra* note 145; *Saipem SpA v People's Republic of Bangladesh*, Decision on Jurisdiction and Recommendation on Provisional Measures, ICSID Case No ARB/05/07, 21 March 2007 [*Saipem*]; *ATA Construction, Industrial and Trading Company v Hashemite Kingdom of Jordan*, Award ICSID Case No ARB/08/2, 18 May 2010 [*ATA*]; *GEA*, *supra* note 145; *White Industries Australia Ltd v Republic of India*, Final Award, UNCITRAL, 30 November 2011 [*White Industries*]; Loukas A Mistelis, "Award as an Investment: The Value of an Arbitral Award of the Cost of Non-Enforcement" (2013) 28:1 ICSID Rev [Mistelis Award].

[148] Pietro Ortolani, "Are Bondholders Investors? Sovereign Debt and Investment Arbitration after *Poštová*" (2017) 30 Leiden J Intl L [Ortolani]; *Abaclat and Others v Argentine Republic*, Decision on Jurisdiction and Admissibility, ICSID Case No ARB/07/5, 4 August 2011 [*Abaclat*]; *Ambiente Ufficio SpA and Others v Argentine Republic*, Decision on Jurisdiction and Admissibility, ICSID Case No ARB/08/9, 8 February 2013 [*Ambiente*]; *Giovanni Alemanni and Others v Argentine Republic*, Decision on Jurisdiction and Admissibility, ICSID Case No ARB/07/8, 17 November 2104 [*Alemanni*]; *Postova Banka*, *supra* note 145; Belen Olmos Giupponi, "ICSID Tribunals and Sovereign Debt Restructuring-Related Litigation; Mapping the Further Implications of the *Alemanni* Decision" (2015) 30:3 ICSID Rev at 564 [Giupponi].

[149] Antoine Martin, "Definition of 'Investment': Could a Persistent Objector to the Salini Tests be Found in ICSID Arbitral Practice?" (2011) 11:2 Global Jurist at 13–14 [Martin Objector], referring to *Romak, supra* note 149 at para 180; *Pantechniki SA Contractors & Engineers (Greece) v Republic of Albania*, Award, ICSID Case No ARB/07/21, 30 July 2009 at para 43 [*Pantechniki*].

have interpreted the term more narrowly where the tribunals believe the treaty parties did not intend to cover such "investments."

Despite the close relationship between these issues, they warrant being addressed separately as the commentary has addressed these issues separately.

7.2.1.1. ICSID Convention Article 25(1)

Jurisprudence on the definition of "investment" must be divided up into non-ICSID and ICSID branches. Outside of ICSID, an investment must only meet the treaty's definition of investment to be found within the arbitration tribunal's jurisdiction *ratione materiae*. Under ICSID arbitration, an "investment" must meet both the treaty's definition and *ICSID Convention* Article 25(1).[150]

Cases decided under ICSID have relied on earlier decisions considering the term "investment" in Article 25(1), which required a purported investment to have certain characteristics to qualify for investor-State arbitration under ICSID. The majority of tribunals determining jurisdiction under ICSID arbitration apply a "double test."[151] This test requires the investment to both meet the treaty's definition and possess the characteristics of an "investment" established in Article 25(1) jurisprudence. Some non-ICSID tribunals (such as those consituted

[150] *Joy Mining Machinery Ltd v Arab Republic of Egypt*, Award on Jurisdiction, ICSID Case No ARB/03/11, 6 August 2004 at para 50 [*Joy Mining*]; UNCTAD Scope, *supra* note 143 at 52–53.

[151] Ilyas U Musurmanov, "The Implications of *Romak v Uzbekistan* for Defining the Concept of Investment" (2013) 20 Australian Intl LJ at 108 n 14, 122. Also called a "double check" in Mistelis Award, *supra* note 147 at 82; a "double-barreled test" in *MHS*, *supra* note 145 at 55; or a "dual test" in Christoph H Schreuer, Loretta Malintoppi, August Reinisch, & Anthony Sinclair, *ICSID Convention Commentary*, 2nd ed (Cambridge: Cambridge University Press, 2009) at 117 [Schreuer, "ICSID"]; or "double-check" by *White Industries, supra* note 147 at para 7.4.9 and *Alps Finance, supra* note 145 at para 240.

under UNCITRAL) have maintained that an "investment" must possess those inherent characteristics even outside of ICSID.[152]

Fedax v Venezuela and *Salini v Morocco* attempted to establish the characteristics of an "investment" under Article 25(1), but failed to stop the continual debate and variation.[153] The *Salini* tribunal identified four characteristics inherent to investments, which later became known as the objective test.[154] In order to meet the implied requirement of an "investment" under Article 25(1), a purported investment must include a commitment of resources, a certain duration, an element of risk, and some form of economic contribution to the host state.[155] Some tribunals have extended the list of characteristics to as many as six.[156] However, recent tribunals have tended to follow the test put forth in *Salini*, albeit with only the first three characteristics.[157] A debate continues in academic commentary and tribunals' decisions. Some maintain that these characteristics are requirements for an investment to exist.[158] Others maintain that these characteristics are merely typical of investments.[159]

Even if the characteristics of an investment are agreed upon, the application of the *Salini* test is inconsistent.[160] Using just one characteristic as an example, tribunals have disagreed on the

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[152] *Romak, supra* note 145 at paras 180–208; *Alps Finance*, *supra* note 145 at paras 240–243. *White Industries, supra* note 147 at paras 4.1.10–4.1.13 applied the test however said it was unnecessary. *Postova Banka, supra* note 145 at paras 356—359 did not indicate whether or not the objective definition of "investment" needed to be applied outside of ICSID but reviewed the issue. And under ICSID but where objective qualities of an "investment" are discussed: *Pantechniki, supra* note 149 at paras 46–48.
[153] Martin Objector, *supra* note 149 at 2.
[154] Mavluda Sattorova, "Defining Investment Under the ICSID Convention and BITs: Of Ordinary Meaning, Telos, and Beyond" (2012) 2 Asian J of Intl L at 269.
[155] *Ibid* at 269.
[156] Musurmanov, *supra* note 151 at 111.
[157] Musurmanov, *supra* note 151 at 111–112.
[158] Martin Objector, *supra* note 149 at 2.
[159] Schreuer, "ICSID", *supra* note 151 at 153; Musurmanov, *supra* note 151 at 110; Martin Objector, *supra* note 149 at 2. According to Martin Objector, *supra* note 149 at 7, this idea originated with *Fedax* and was described in *MHS, supra* note 145 at para 70.
[160] Martin Objector, *supra* note 149 at 7–9.

magnitude of the "contribution" required to pass the test. *Bayindir v Pakistan* required "substantial resources during significant periods of time."[161] The *Malaysian Historical Salvors v Malaysia* tribunal required a "significant" contribution to the host state's economy and public interest, which the underwater salvage operation at issue lacked.[162] *Jan de Nul v Egypt* merely required "any dedication of resources [having] economic value."[163] The *CSOB v Slovak Republic* tribunal considered a contribution to the host state's public interest sufficient, despite the lack of a transfer of resources to the host state.[164] The *Patrick Mitchell v Congo* annulment committee indicated that a contribution need not be "sizable or successful," it merely needed to be a "contribution in one way or another" and could even include "contributions of a cultural and historical nature."[165]

The above tribunals appeared to apply an absolute criterion while the *Joy Mining* tribunal required a contribution to meet a relativistic criterion. The tribunal downplayed the "relatively substantial" value of the machinery the claimant sold to Egypt, as well as the bank guarantees the claimant was required to arrange as part of the contract for sale of the machinery. The tribunal compared the machinery's contribution to the size of the entire mining project.[166] It is not clear, but this suggests that the *Joy Mining* tribunal required not just an objectively substantial contribution, but a substantial contribution relative to the project being contributed to. If so, that would make a certain contribution to a small operation sufficient to qualify as an investment, but an identical contribution to a large operation insufficient.

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[161] Martin Objector, *supra* note 149 at 7.
[162] *Ibid*, citing *MHS*, *supra* note 145 at paras 114, 123.
[163] Martin Objector, *supra* note 149 at 8 citing *Jan de Nul NV and Dredging International NV v Arab Republic of Egypt*, Decision on Jurisdiction, ICSID Case No ARB/04/13, 16 June 2006 at paras 102–106 [*Jan de Nul*].
[164] *Ibid*.
[165] *Ibid* at 88–90.
[166] *Joy Mining*, *supra* note 150 at paras 15, 57, 63.

The range of thresholds applied to merely one among anywhere between three and six posited characteristics demonstrates the level of inconsistency among tribunals. Multiple thresholds applied to other characteristics would amplify the level of inconsistency. The inconsistency is further multiplied once the occasional application of the *Salini* test outside of ICSID arbitration and the different interpretations of the *Salini* characteristics, as strict requirements or merely typical characteristics, is considered.

7.2.1.2. Goods and Services Contracts

Both under ICSID and outside of ICSID, tribunals have come to different conclusions about whether goods and services contracts can constitute an investment. Some tribunals found the definition of "investment" in the treaty sufficiently broad to cover such contracts. Other tribunals found, despite the broad language defining "investment," that sales and services contracts could not be covered investments if they lacked the inherent characteristics of an investment, or due to the implications of allowing procurement contracts to qualify for treaty protection.

The *Jan de Nul* tribunal determined a dredging operation in the Suez Canal could be considered an "investment" when defined as "any kind of assets and any direct or indirect contribution in cash, in kind or in services, invested or reinvested in any sector of economic activity."[167] The annulment committee for the *Malaysian Historical Salvors* decision also found that a service contract, for undersea salvage, could be considered an "investment" within the treaty's example investment category: "claims to money or to any other performance under contract having a financial value."[168] The *SGS v Paraguay* tribunal found that a service contract

[167] *Jan de Nul*, *supra* note 163 at para 105.
[168] Cyrus Benson, Penny Madden & Ceyda Knoebel, "Covered Investment," *The Investment Treaty Arbitration Review*, 1st ed (London: Law Business Research Ltd, 2016), online: <https://thelawreviews.co.uk/edition/the-investment-treaty-arbitration-review-edition-1/1136196/covered-investment>.

to provide customs inspections and certification services is a BIT-protected "asset" and within the example of "claims to money or any performance having an economic value."[169] Applying the broad, asset-based definition in the *Energy Charter Treaty*, the *Petrobart* tribunal found a gas condensate sales contract was an investment.[170]

The *Romak v Uzbekistan* tribunal, however, found a wheat supply contract failed to qualify as an investment despite a similarly-broad definition: "every kind of assets and in particularly… claims to money or to any performance having an economic value."[171] The tribunal considered the *Salini* characteristics as reflecting the inherent characteristics of an investment, applicable even in an UNCITRAL arbitration, and found that the delivery of wheat did not qualify as a "contribution" as they were not in furtherance of an economic venture, but merely the delivery of goods in expectation of payment.[172] The *Joy Mining* and *Nova Scotia Power v Venezuela* tribunals found similar BIT language did not capture commercial sales contracts, with both tribunals expressing their reticence to make every commercial arrangement with a State or State agency into a BIT-covered investment.[173] Despite similar treaty language, tribunals have concluded differently on whether sales and service contracts are treaty-covered investments and applied different reasoning to do so.

7.2.1.3 Awards as Investments

[169] *Société Générale de Surveillance SA v Paraguay,* Decision on Jurisdiction, ICSID Case No ARB/07/29, 12 February 2010, at paras 83–84 [*SGS Paraguay*].
[170] *Petrobart Ltd v Kyrgyz Republic*, Arbitral Award, SCC Case No 126/2003, 29 March 2005 at para VIII 6.29 [*Petrobart*].
[171] *Romak, supra* note 145 at paras 174, 242.
[172] Musurmanov, *supra* note 151 at 116 citing *Romak*, *supra* note 145 at para 222. The tribunal also found the delivery, despite spanning five months, lacked duration as it did not constitute a lasting commitment, and lacked risk as it did not involve anything more than the commercial risk of non-payment.
[173] Benson, *supra* note 168; *Joy Mining, supra* note 150 at para 58; *Nova Scotia Power Inc (Canada) v Venezuela*, Decision on Jurisdiction, UNCITRAL, 22 April 2010: The decision is in Spanish so I have not reviewed its reasoning.

Multiple tribunals have considered whether an arbitral award is a BIT-protected investment. Some tribunals considered an award as a part, or change in form, of an underlying investment and concluded that the award was an investment. Other tribunals considered whether an award, by itself, is a credit or claim to a sum of money, and arrived at different conclusions.

The *Saipem v Bangladesh* tribunal found that an award was an investment, defined as "credits for sums of money," when the award was not considered alone but as a single operation including the breached construction contract that gave rise to the award.[174] Applying similar reasoning and a similarly-worded definition, the *White Industries v India* tribunal found that an award, as a crystallization of the underlying breached contract, was an investment under both the BIT's definition and applying the *Salini* test under *ICSID* Article 25(1).[175] Neither *Saipem* nor *White Industries* decided on whether the award itself was an investment.[176]

The *GEA v Ukraine* tribunal applied the *Salini* test and found the award, in itself, failed, and thereby could not constitute an investment under the BIT in ICSID arbitration.[177] Further, the *GEA* tribunal maintained that the award and the underlying contract "remain analytically distinct"

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[174] Mistelis Award, *supra* note 147 at 75. See also *Chevron Corp (USA) and Texaco Petroleum Corp v Republic of Ecuador*, Interim Award, UNCITRAL, 1 December 2008 at paras 179–186 for a similar conclusion. See also *Marco Gavazzi and Stefano Gavazzi v Romania*, Decision on Jurisdiction, Admissibility and Liability, ICSID ARB/12/25, 21 April 2015 at para 120 [*Gavazzi*]: The majority found "an award which compensates for an investment… is a claim to money covered by the BIT as an investment."

[175] Mistelis Award, *supra* note 147 at 82. See also *Frontier Petroleum Services Ltd v Czech Republic*, Final Award, UNCITRAL, 12 November 2010 at para 231 [*Frontier*] for a similar conclusion regarding an award but, being an UNCITRAL proceeding, not applying the *Salini* test.

[176] *Saipem, supra* note 9 at paras 126–128; *White Industries, supra* note 147 at paras 7.6.1–7.6.3.

[177] Mistelis Award, *supra* note 147 at 79–80; *GEA, supra* note 145 at paras 138, 162: The *Germany-Ukraine BIT* defines an investment as "assets of any kind, in particular… claims to funds used to create material or immaterial values and claims to performances having such value… Any change to the form in which assets are invested shall not affect their nature as investments."

and the award would have to qualify as an investment in itself.[178] The tribunal unequivocally stated that they would not decide differently even if the underlying contracts were investments.[179]

The tribunal in the recent case of *Anglia Auto v Czech Republic* adds to the growing jurisprudence in favour of an award being a "claim to money" and, therefore, an investment.[180] The tribunal further stated that the *Salini* test or objective definition of "investment" need not be applied, as the arbitration was not subject to any ICSID restrictions.[181] The *Anglia Auto* tribunal also went a step further than past tribunals by finding that the award itself was a BIT-protected investment, and not just an investment when considered as part of the underlying contract.[182] This latest decision builds upon the "clear trend supporting the proposition that investment treaty arbitration" can provide a mechanism to protect an arbitral award.[183] The *GEA* decision may be an outlier in the face of a growing number of decisions finding awards to be BIT-protected investments.

7.2.1.4. Sovereign Bonds

Sovereign bonds represent a significant potential source of claims, as evidenced by the arbitral decisions resulting from the Argentinian and Greek debt defaults. The single published decision resulting from the Greek default arrived at a different outcome than the three earlier decisions arising from the Argentinian default.

[178] Mistelis Award, *supra* note 147 at 80.
[179] *GEA*, *supra* note 145 at para 153.
[180] *Anglia Auto Accessories Ltd v Czech Republic*, Final Award, SCC Case V 2014/181, 10 March 2017 at para 153 [*Anglia Auto*].
[181] *Ibid* at para 150.
[182] *Ibid* at paras 151–153.
[183] Mistelis Award, *supra* note 147 at 86.

The majorities in *Abaclat* and *Ambiente Ufficio*, and the tribunal in *Alemanni* all found that Argentina's sovereign bonds possessed the qualities of an "investment," as defined by the BIT and by the jurisprudence arising from *ICSID* Article 25(1).[184] In 2015, in the wake of the Greek debt crisis, the *Postova Banka* tribunal departed from this line of decisions and found that sovereign bonds failed to meet either the BIT's or the *ICSID* Article 25(1) jurisprudence's definition of "investment."[185] The *Postova Banka v Greece* tribunal relied on minor differences in the BIT's language and, like the dissenting opinions in *Abaclat* and *Ambiente Ufficio*, the indirect relationship between the bondholders and the host State to determine that the bonds were not BIT-protected investments.[186]

7.2.1.5. Some Newer Treaties Have Tried to Address the Confusion

Some modern treaties, such as the *Comprehensive and Economic Trade Agreement* ("*CETA*") have already addressed the uncertainty by explicitly excluding certain assets, such as purely commercial contracts (such as a sale of goods contract) and arbitral awards arising from those contracts.[187] Others, such as the 2004 US Model BIT and *ASEAN Comprehensive Agreement*, have explicitly included some of the characteristics normally associated with *ICSID* Article 25(1) as requirements for an investment to qualify for BIT protection.[188] Considering the variation in analysis among tribunals applying facts to those characteristics, as described above, this approach is unlikely to result in entirely consistent decisions. Under ICSID arbitrations, some observe that

[184] *Fedax*, *supra* note 143; *Salini Morocco*, *supra* note 11.
[185] *Postova Banka, supra* note 145 at paras 359–360. The decision refers to the majority of the tribunal's finding that the bonds failed the objective test, however the dissenting arbitrator did not issue a separate decision so it is unclear where the disagreement may lie.
[186] Francesco Montanaro, "Poštová Banka and Istrokapital SE v Hellenic Republic Sovereign Bonds and the Puzzling Definition of 'Investment' in International Investment Law" (2015) 30:3 ICSID Rev at 553.
[187] *Comprehensive Economic and Trade Agreement*, 30 October 2016, art 8.1 (entered into force 21 September 2017) [*CETA*].
[188] Malik, *supra* note 143 at 5, 10, 14–18.

a *jurisprudence constante* has already begun to emerge around the term "investment," which reflects the ordinary, economic meaning of the word captured by the *Salini* test.[189] Arbitration under these more recent treaties, which exclude specific assets or explicitly include characteristics of investments that emerged from ICSID arbitrations, should produce more consistent outcomes.

7.3. Conclusion

7.3.1. Reasons for Inconsistency: Arguably, text-*centric versus purpose-centric interpretations of "investment," and a detail in BIT language regarding public debts*

Some tribunals' analysis touches on details within the text of the treaty to justify a position but primarily it arises from differences in interpretative approach: Do all assets that fall under a treaty's example category of a protected investment, like "a claim to money," qualify as investments or does the term "investment" possess an objective meaning?[190] One position could be described as focusing on the ordinary meaning of the term "claims to money" (or other examples listed in the definition) and the other focusing on the ordinary meaning of the word "investment" as well as the purpose of the BIT.[191]

The recent *Postova Banka* decision looked beyond the treaty's "investment" definition's chapeau, which broadly defined an investment as "every kind of asset."[192] The tribunal instead focused on a detail in the treaty's non-exhaustive list of examples. Identical examples did not exist in *Abaclat, Ambiente Ufficio*, or *Alemanni*: the *Slovakia-Greece BIT* specifically protected

[189] Emmanuel Gaillard & Yas Banifatemi, "Chapter 8: The Long March Towards a Jurisprudence Constante on the Notion of Investment," in Meg Kinnear, Geraldine R Fischer, *et al* (eds), *Building International Investment Law: The First 50 Years of ICSID* (Kluwer Law International: Kluwer Law International, 2015) at 123–124.
[190] Montanaro, *supra* note 186 at 552–554.
[191] Martin Objector, *supra* note 149 at 12–13 cites *Romak*, *supra* note 145 at paras 183–184: a "mechanical application" of the examples within the BIT's definition was "manifestly absurd or unreasonable" as that approach ignored the purpose of the BIT.
[192] Similar to *Romak, supra* note 145, as described in Musurmanov, *supra* note 151 at 114, which also included "any kind of asset" in the definition's chapeau and the tribunal did not interpret the chapeau literally.

debentures of a company in Article 1(1)(b), and "loans, claims to money or to any performance having a financial value" under Article 1(1)(c). The treaty makes no mention of debentures or loans to public bodies, whereas the *Argentina-Italy BIT* at issue in *Abaclat*, *Ambiente Ufficio* and *Alemanni* referred to "obligations, private or *public* titles or any other right to performances or services having economic value" [emphasis added]. The *Postova Banka* tribunal found that public debt was not captured under Article 1(1)(b) and that bonds, tradable in the secondary market, were not of the same nature as loans or claim to money which entail contract privity.[193] This conclusion, and the analysis regarding contractual privity, depart from the line of reasoning in the three earlier Argentinian disputes and indicate that tribunals may exclude a large potential source of investor-State claims—sovereign bonds—from BIT protection based on minute differences in treaty wording.[194]

One tribunal suggests that this problem can be solved, and some progress towards a solution has already been made. The *Alemanni* tribunal pointed out that the Contracting Parties to the *Italy-Argentina BIT* could have excluded sovereign bonds from the BIT's definition of "investment," as later BITs have done.[195] Their failure to do so supported the tribunal's finding that the bonds were intended to be covered investments.

More recent treaties, such as the Canadian 2003 model FIPA and agreements such as the *COMESA Common Investment Area* and *ASEAN Comprehensive Agreement*, specifically exclude claims to money arising out of commercial sales and services contracts and related financing. This

[193] Ortolani, *supra* note 148 at 393–394; Montanaro, *supra* note 186 at 552–553. However, some find the tribunal's claim on the second part unconvincing. For example, Ortolani, *supra* note 148 at 395–397; Montanaro, *supra* note 186 at 555 also does not accept the textual differences as fully explaining the tribunal's decision.
[194] Ortolani, *supra* note 148 at 403.
[195] Guipponi, *supra* note 148 at 578, 588; *Alemanni, supra* note 148 at para 152.

should assist tribunals in determining whether "investments," like those at issue in *Petrobart* and *Joy Mining Machinery*, are covered by the treaty.[196]

The *CETA* also excludes awards arising from commercial sales and services contracts, which should assist tribunals when considering the "investments" similar to those at issue in *Romak*, *Postova Banka*, and *GEA*, among others.

However, more explicitly-worded treaties may not solve the problem entirely. The application of the *Salini* characteristics to the facts of each case varies, as described above. Tribunals have also expressed their resistance to applying a literal interpretation of the treaty, as evidenced by the frequent disregard for the chapeau of the definition of "investment." The *Romak* tribunal expressed the view that a treaty must meet a high bar to displace the common understanding of the term:

> [C]ontracting States are free to deem any kind of asset or economic transaction to constitute an investment as subject to treaty protection. Contracting States can even go as far as stipulating that a "pure" one-off sales contract constitutes an investment, even if such a transaction would not normally be covered by the ordinary meaning of the term "investment." *However, in such cases, the wording of the instrument in question must leave no room for doubt that the intention of the contracting States was to accord to the term 'investment' an extraordinary and counterintuitive meaning*.[197] [emphasis added]

The ordinary meaning of of treaty text may not be enough. Some tribunals may still insist upon an unequivocal expression of intent to justify a departure from what the tribunal considers the norm.

8. Umbrella (or Observance of Obligations) Clauses

[196] Malik, *supra* note 143 at 3, 16–17. See also Benson, *supra* note 168.
[197] *Romak, supra* note 145 at para 205.

An umbrella clause allows an investor to bring to arbitration disputes that would normally fall outside of an investment treaty. These clauses potentially allow an investor to avoid a host State's domestic courts, or a contract's specified dispute-resolution mechanism, and settle the dispute via investor-State arbitration.

8.1. Issue: Internationalizing Contract Breaches and Exclusive Jurisdiction Clauses' Effects[198]

Umbrella clauses vary in language but are often similar to: "Each Party shall observe any obligation it may have entered into with regard to investments."[199] These clauses have been interpreted in a variety of ways, leading to inconsistent outcomes.[200] Tribunals have read these clauses as elevating all breaches of State obligations towards investments, including contractual obligations, to BIT violations.[201] Other tribunals have narrowly interpreted such provisions to only apply to breaches of obligations that would otherwise have violated the BIT (this interpretation essentially renders the umbrella clause ineffectual).[202] Other tribunals have arrived at interpretations between the two extremes, allowing the umbrella clause to elevate contractual

[198] An additional issue we will not address, in order to maintain a manageable scope for this paper, is the umbrella clause's effect on contractual breaches by State entities or on investors enforcing breaches in the contracts of their subsidiaries. See Nick Gallus, "An Umbrella just for Two? BIT Obligations Observance Clauses and the Parties to a Contract" (2008) 24:1 Arb Intl.

[199] *Treaty Between United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment,* 14 November 1991, art II(2)(c) (entered into force 20 October 1994); 1984 and 1987 US Model BITs. *Ibid* at 157–158 referenced the *Germany-Pakistan BIT*: "Either Party shall observe any other obligation it may have entered into with regard to investments by nationals or companies of the other Party." A wide range of formulations is described in "Chapter 9 – Observance of Undertakings" in Andrew Newcombe & Lluis Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International: Kluwer Law International, 2009) at 444–448.

[200] Mary E Footer, "Umbrella Clauses and Widely-Formulated Arbitration Clauses: Discerning the Limits of ICSID Jurisdiction" (2017) 16 Law & Prac Intl Cts & Trib at 98.

[201] Crawford Contract, *supra* note 146 at 368.

[202] Crawford Contract, *supra* note 146 at 368, referring to *Société Générale de Surveillance SA v Islamic Republic of Pakistan*, Decision of the Tribunal on Objections to Jurisdiction, ICSID Case No ARB/01/13, 6 August 2003 at paras 163–174 [*SGS Pakistan*]; and *Joy Mining, supra* note 150 at paras 80–81.

breaches under particular circumstances and terms, such as where there is no exclusive jurisdiction clause contained in the contract to settle disputes.[203]

8.2. Analysis of the Secondary Materials and Leading Jurisprudence

8.2.1. Leading Cases for the Broad and Narrow Interpretations, and the Effect of Exclusive Jurisdiction Clauses in the Contract

The two leading cases are *SGS v Pakistan* and *SGS v Philippines*, with the first decided a few months before the second and the second tribunal having the benefit of the earlier decision.[204]

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[203] The underlying contract's exclusive dispute resolution provision was honoured in *SGS Société Générale de Surveillance SA v Republic of the Philippines*, Decision of the Tribunal on Objections to Jurisdiction, ICSID Case No ARB/02/6, 29 January 2004 [*SGS Philippines*]; *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC BV v Republic of Paraguay*, Decision of the Tribunal on Objections to Jurisdiction, ICSID Case No ARB/07/9, 29 May 2009 [*BIVAC Paraguay*]; *Toto Costruzioni Generali SpA v Republic of Lebanon*, Decision on Jurisdiction, ICSID Case No ARB/07/12, 11 September 2011 [*Toto Costruzioni*]; *Malicorp Ltd v Arab Republic of Egypt*, Award, ICSID Case No ARB/08/18, 7 February 2011; *Bosh International, Inc and B&P Ltd Foreign Investments Enterprise v Ukraine*, Award, ICSID Case No ARB/08/11, 25 October 2012 [*Bosh*]; *Compañía de Aguas del Aconquija SA and Compagnie Générale des Eaux/Vivendi Universal v Argentine Republic*, Award, ICSID Case No ARB/97/3 21 November 2000 [*Vivendi I*]; however other tribunals have found otherwise, see *Compañía de Aguas del Aconquija SA and Compagnie Générale des Eaux/Vivendi Universal v Argentine Republic*, Decision on Annulment, ICSID Case No ARB/97/3, 3 July 2002 [*Vivendi II*]; *SGS Paraguay, supra* note 31; *Eureko BV v Republic of Poland*, Partial Award, *ad hoc*, 19 August 2005 [*Eureko*]; *LG&E Energy Corp, LG&E Capital Corp, LG&E International Inc v Argentine Republic*, Award, ICSID Case No ARB/02/1, 25 July 2007 [*LG&E*]. This exclusive forum selection clause is discussed further in Jarrod Wong, "Umbrella Clauses in Bilateral Investment Treaties: Of Breaches of Contract, Treaty Violations, and the Divide Between Developing and Developed Countries in Foreign Investment Disputes" (2006) 14:1 Geo Mason L Rev at 166–168. There are other interpretations that limit the umbrella clause to just contracts entered into by the state, or breached by the state, using puissance publique such as *CMS Gas Transmission Co v Argentine Republic*, Award, ICSID Case No ARB/01/8, 12 May 2005 [*CMS*], an approach criticized in Crawford Contract, *supra* note 146 at 368 and Newcombe & Paradell, *supra* note 199 at 470–471.

[204] *SGS Pakistan, supra* note 202; *SGS Philippines*, *supra* note 203. *Fedax, supra* note 143, addressed the umbrella clause but was not clear in that the umbrella clause was dispositive for its conclusion.

The clause in *SGS v Pakistan*: "Either Contracting Party *shall constantly guarantee the observance of commitments* it has entered into with respect to the investments of the investors of the other Contracting Party" [emphasis added].

The clause in *SGS v Philippines*: "Each Contracting Party *shall observe any obligation* it has assumed with regard to specific investments in its territory by investors of the other Contracting Party" [emphasis added].

The *SGS v Pakistan* tribunal found that the umbrella clause at issue could not have such sweeping effect as elevating all of a host State's contractual breaches to BIT breaches without "clear and convincing evidence" of that being the treaty parties' intent.[205] The tribunal expected that interpreting otherwise would burden the host State by "incorporating by reference an unlimited number of State contracts, as well as other municipal law instruments setting out State commitments."[206]

The *SGS v Philippines* tribunal came to a different conclusion when interpreting a more straightforward umbrella clause and responded directly to the *SGS v Pakistan* tribunal's analysis. The *SGS v Philippines* tribunal found that the plain language of the clause would indicate that contractual obligations ("any obligation") would be elevated by the umbrella clause, and the results would not be as far-reaching as the *SGS v Pakistan* tribunal expected: the umbrella clause's effect would be limited to State obligations towards investments.[207]

[205] Wong, *supra* note 203 at 152; *SGS Pakistan, supra* note 202 at para 167, or "clear and persuasive" at para 173.
[206] *SGS Pakistan, supra* note 202 at paras 167–168.
[207] Newcombe & Paradell, *supra* note 199 at 451–452.

This divergent approach to interpretations arise despite the wording of the clauses differing only "slightly."[208] Where the text differs, the differences generally do not justify the variance in decisions; when tribunals apply identical treaties, they still at times diverge in their conclusions.[209]

The widely-diverging interpretations among the two leading cases had a far smaller impact on the outcome than it would appear: *SGS v Pakistan* did not consider a breach of contract to be a breach of the BIT; *SGS v Philippines* found a breach of contract was a breach of the BIT, but deferred to the contract's exclusive jurisdiction clause by staying proceedings under the BIT pending completion of the contract's dispute-settlement mechanism.[210] In the end, neither tribunal addressed the claimed contractual breaches on their merits.

The *BIVAC v Paraguay*, *Toto Costruzioni v Lebanon*, and *Bosh International v Ukraine* tribunals arrived at similar conclusions to the *SGS v Philippines* tribunal in regards to exclusive jurisdiction clauses: disputes arising from a contract must be adjudiciated according to the provisions of the contract.[211] However, in a similar manner as the *SGS v Philippines* tribunal, the *BIVAC v Paraguay* tribunal reserved the right to consider the claim on its merits, depending on the outcome of the contractual dispute-settlement.[212]

The *Eureko v Poland*, *LG&E v Argentina*, and *SGS v Paraguay* tribunals all considered the contractual breach claims, via umbrella clauses, on their merits, despite the existence of contractual

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[208] Katharina Diel-Gligor, *Towards Consistency in International Investment Jurisprudence: A Preliminary Ruling System for ICSID Arbitration* (Leidin: Brill Nijhoff, 2017) at 145; Katherine Jonckheere, "Practical Implications from an Expansive Interpretation of Umbrella Clauses in International Investment Law" (2015) 11.2 SC J of Intl L & Bus at 148. However, Crawford Contract, *supra* note 146 at 367: "the clause in *SGS v Pakistan* was curiously worded and might have given grounds for a narrower construction."
[209] Andrés Rigos Sureda, "Chapter 27: The Umbrella Clause" in Meg Kinnear, Gerladine R Fischer, *et al* (eds), *Building International Investment Law: The First 50 Years of ICSID* (Kluwer Law International: Kluwer Law International, 2015) at 386; Jonckheere, *supra* note 208 at 148.
[210] Jonckheere, *supra* note 68 at 153; *Wong, supra* note 203 at 158–159.
[211] Footer, *supra* note 59 at 103–105; Jonckheere, *supra* note 208 at 153–155; Newcombe & Paradell, *supra* note 199 at 471–472.
[212] Footer, *supra* note 200 at 103.

dispute-settlement mechanisms.[213] The *SGS v Paraguay* tribunal found that a contractual breach would violate the umbrella clause and the exclusive jurisdiction clause of the contract should only be deferred to where the parties to the contract provide an express waiver, or "clearly waive," the right to arbitrate under the BIT.[214]

8.3. Conclusion

8.3.1. Reasons for Inconsistency: Interpretative approaches and, potentially, the factual context

The differences in interpretation between the two leading cases largely arises from an emphasis on the potential outcome of the interpretation, such as making most other substantive obligations in the BIT "superfluous" and opening the floodgates to minor breaches, versus accepting the literal reading of the provision.[215]

The tribunal in *SGS v Pakistan* accepted that the ordinary meaning of the provision would elevate contractual breaches to treaty breaches; however, it refused to accept that interpretation due to the implications of such an interpretation.[216] The tribunal demanded "clear and persuasive" evidence of the Contracting Parties' intent before accepting an interpretation that would result in such an expansive effect and found the text of the treaty itself was insufficiently clear or persuasive.[217] The decision reflects the "strong presumption" for maintaining the "clear distinction" between the breach of a contract and a breach of a treaty.[218]

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[213] Jonckheere, *supra* note 208 at 155.
[214] *SGS Paraguay*, *supra* note 31 at para 180; Jonckheere, *supra* note 208 at 156–157.
[215] Christoph Schreuer "Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road" (2004) J of World Investment & Trade at 252–253 citing *SGS Pakistan, supra* note 202 at para 168; Crawford Contract, *supra* note 146 at 368–369; Gallus, *supra* note 198 at 158; Newcombe & Paradell, *supra* note 199 at 465–467; Sureda, *supra* note 209 at 379; Jonckheere, *supra* note 208 at 146.
[216] Footer, *supra* note 200 at 99; Jonckheere, *supra* note 208 at 146.
[217] Sureda, *supra* note 209 at 376.
[218] Wong, *supra* note 203 at 153; Footer, *supra* note 200 at 95.

The tribunal in *SGS v Philippines* accepted the ordinary meaning of the provision and understood the implications of the interpretation to be far less extreme. This interpretation of the provision and the implications is supported by notable publicists such as Professor James Crawford.[219]

According to the 2009 review of decisions conducted by Professor Newcombe and Mr. Paradell, the approach taken in *SGS v Pakistan* "remains an isolated and probably already abandoned position."[220] The "prevailing interpretation" is reflected by *SGS v Philippines*: The clause is given its literal interpretation, requiring States to fulfill obligations made toward investments, including contractual commitments, applying the law of that contract where applicable.[221]

Even among the cases that largely follow the broad interpretation of the umbrella clause in *SGS v Philippines*, there is a wide range of outcomes.[222] We have not identified any distinction in the umbrella clauses at issue, or the rule of interpretation applied by the tribunals, that explains the differences in treatment of exclusive jurisdiction clauses.

The inconsistency in outcome may be explained, in part, based on two details of the analysis applied by the tribunals. First, both the *SGS v Philippines* and *BIVAC v Paraguay* tribunals considered the exclusive jurisdiction clause as an issue of admissibility. Both tribunals found jurisdiction over the contract claims however opted not to admit the claims at least until settlement

[219] Diel-Gligor, *supra* note 68 at 145; Crawford Contract, *supra* note 146 at 370. See also Newcombe & Paradell, *supra* note 199 at 449–450. But see Sureda, *supra* note 209 at 381–386, which describes four tribunals that largely follow *SGS v Philippines* but also describes the *SGS v Pakistan* tribunal's approach being followed in *El Paso Energy International Co v Argentine Republic,* Award, ICSID Case No ARB/03/15, 31 October 2011.
[220] Newcombe & Paradell, *supra* note 199 at 470; Jonckheere, *supra* note 208 at 144.
[221] Newcombe & Paradell, *supra* note 199 at 470.
[222] See Section 8.2. See also Jonckheere, *supra* note 208 at 160–161; Footer, *supra* note 200 at 107.

of the disputes were attempted under the contract.[223] This suggests that the progress of any proceedings under the contract's dispute-settlement mechanism, or the futility of even attempting to resolve the dispute under the contract, may inform the tribunal's decision to exercise their jurisdiction over a contractual breach via an umbrella clause. Perhaps if the investor could demonstrate that domestic courts or the contract's dispute-settlement mechanism were impractical or ineffectual, the tribunals would have admitted the claims directly. And perhaps the the tribunals that did admit the claims directly did so because they believed the contract's dispute-settlement mechanism was unlikely to resolve matters.

Second, the *SGS v Paraguay* tribunal provides a threshold for exclusive jurisdiction clauses to meet in order to preclude BIT arbitration: an express and clear waiver of the right to BIT arbitration would preclude that tribunal from exercising jursidiction over a contract claim. If contracts at issue indicate that the exclusive jurisdiction clause precluded treaty arbitration, tribunals might be more consistent in denying jurisdiction or refusing to admit claims for contractual breaches. Similarly, if treaties specify that specific contractual provisions would prevail over those of the treaty, tribunals might more consistently defer to the contract's dispute-settlement mechanism.[224]

9. Denial of Benefits (or Denial of Advantages) Clauses

Denial of benefits clauses allow a host State to deny some or all of the benefits of a treaty to an investor, should the investor meet certain criteria. Typically, for benefits to be denied, the investor must be a national of a State with which the host State does not maintain relations.

[223] Footer, *supra* note 200 at 101–103.
[224] For example, see *Gavazzi, supra* note 174 at para 124, where the applicable treaty indicated: "In case of specific contracts between an investor and either Contracting Party, the provisions of these contracts, without prejudice of the provisions of the present Agreement, will prevail for the concerned investor."

Alternatively, to be denied benefits, the investor must be both: owned or controlled by a non-treaty party State, and lacking substantial business activities in its home State. If those criteria are met, these clauses allow a host State to exercise its right to deny benefits.

9.1. Issue: Can Benefits Be Denied After the Dispute has Been Submitted to Arbitration?

Denial of benefits litigation in investor-State arbitration has been relatively rare and recent, beginning with *Plama v Bulgaria* in 2005.[225] One particular area of inconsistency has emerged across a significant number of cases that is worth addressing: the retrospective and prospective application of the denial of benefits.[226] The question at the heart of the issue is: to defeat a claim, must benefits be denied by the host State before the notice of arbitration is filed, or can the denial be invoked after?[227]

9.2. Analysis of the Leading Jurisprudence and Commentary

9.2.1. Leading Cases for the Three Types of Denial of Benefits Clauses

[225] Emmanuel Gaillard, "Part 1 – Investments and Investors Covered by the Energy Charter Treaty" in Clarisse Ribeiro (ed), *Investment Arbitration and the Energy Charter Treaty* (JurisNet, LLC: JurisNet, LLC, 2006) at 70 [Gaillard, "ECT"]; *Plama Consortium Ltd v Republic of Bulgaria*, Decision on Jurisdiction, ICSID Case No ARB/03/24, 8 February 2005 [*Plama*].

[226] Lindsay Gastrell & Paul-Jean Le Cannu, "Procedural Requirements of Denial-of-Benefits' Clauses in Investment Treaties: A Review of Arbitral Decision" (2015) 30:1 ICSID Rev 2015 at 84. There are other areas of potential inconsistency or, more accurately, lack of clarity in the interpretation of denial of benefits provisions. However, the term "substantial business activities" has only been treated to significant and conclusive analysis in three cases: *Petrobart, supra* note 170; *Limited Liability Company AMTO v Ukraine*, Final Award, SCC Case No 080/2005, 26 March 2008; and *Pac Rim Cayman LLC v Republic of El Salvador*, Decision on the Respondent's Jurisdictional Objections, ICSID Case No ARB/09/12, 1 June 2012 [*Pac Rim*].

[227] There exists further variation on when exactly benefits must be denied where it was found to be prospective in its application, perhaps even before the investment is made (*Plama*, *supra* note 40). However no subsequent tribunal has followed that reasoning: See Gastrell, *supra* note 226 at 84. One tribunal found benefits had to be denied before a dispute arose: *Anatoli Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Traiding Ltd v Republic of Kazakhstan,* Award, SCC Case V 116/2010, 19 December 2013 [*Ascom*]. Other tribunals found benefits had to be denied before arbitration: *Liman Caspian Oil BV and NCL Dutch Investment BV v Republic of Kazakhstan,* Excerpts of Award, ICSID Case No ARB/07/14, 22 June 2010 [*Liman*]; *Yukos Universal Ltd (Isle of Man) v Russian Federation,* Interim Award on Jurisdiction and Admissibility, PCA Case No AA 227, 30 November 2009 [*Yukos*]. See Mark Feldman, "Chapter 33: Denial of Benefits after Plama v. Bulgaria" in Meg Kinnear, Geraldine R Fischer, *et al* (eds), *Building International Investment Law: The First 50 Years of ICSID* (Kluwer Law International: Kluwer Law International, 2015) at 471.

The *Plama* tribunal found that under the *Energy Charter Treaty*'s denial of benefits provision, the host State could only deny benefits prospectively.[228] The host State must deny benefits before the investor makes their investment, and certainly before the investor initiates arbitration.[229] Tribunals interpreting the *ECT* after the *Plama* decision arrived at less extreme, but similar conclusions: that benefits had to be denied prior to the dispute arising or to the investor initiating arbitration.[230]

The *GAI v Bolivia* tribunal found, under the *Bolivia-US BIT*'s denial of benefits provision, that benefits could be denied retroactively.[231] The provision at issue: "Each Party reserves the right to deny to a company of the other Party the benefits of this Treaty if nationals of a third country own or control the company and… the company has no substantial business activities in the territory of the Party under whose laws it is constituted or organized." With one exception, other tribunals interpreting similarly-worded provisions in US BITs also found that benefits could be denied retrospectively.[232]

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[228] *Energy Charter Treaty*, signed 17 December 1991, 2080 UNTS 100, art 17(1) (entered into force 16 April 1998) [*ECT*]: "Each Contracting Party reserves the right to deny the advantages of this Part to: (1) a legal entity if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the Area of the Contracting Party in which it is organised."

[229] *Plama, supra* note 40 at para 165.

[230] *Yukos, supra* note 227 at para 458; *Ascom, supra* note 227 at para 745; *Khan Resources Inc, Khan Resources BV, CAUC Holding Company Ltd v Government of Mongolia*, Decision on Jurisdiction, PCA Case No 2011-09, 25 July 2012 at paras 426–431 [*Khan Resources*]; *Sempra Energy International v Argentine Republic*, Decision on Objections to Jurisdiction, ICSID Case No ARB/02/16, 11 May 2005 at para 386 [*Sempra*]. *Liman, supra* note 227 at para 227 found similarly, but allowed an exception for retrospectively denying benefits if facts to support denying benefits come to light after arbitration has begun.

[231] *Guaracachi America, Inc and Rurelec PLC v Plurinatonal State of Bolivia,* Award, PCA Case No 2011-17, 31 January 2014 at paras 376–377 [*GAI*]. *US-Bolivia BIT, supra* note 140, art XII.

[232] Gastrell, *supra* note 226 at 89–92; Tribunals have found benefits could be denied according to the deadline for challenging jurisdiction: *Ulysseas, Inc v Republic of Ecuador*, Interim Award, UNCITRAL, 28 September 2010 at para 172 [*Ulysseas*]; *Empresa Eléctrica del Ecuador, Inc v Ecuador,* Award, ICSID Case No ARB/05/9, 2 June 2009 at para 71 [*EMELEC*]. But one tribunal found benefits could only be denied prospectively based on a similar provision. The tribunal also determined that the host State, Argentina, could not deny benefits on other grounds, so their finding on prospective application was not dispositive. See, *Pan American Energy LLC, and BP Argentina Exploration Company v Argentine Republic*, Decision on Preliminary Objections, ICSID Case No ARB/04/8, 27 July 2006 at para 204 [*Pan American*].

The *Pac Rim v El Salvador* tribunal applied the denial of benefits clause in *CAFTA*, which required prior notification and, if requested, consultation between the home and host States.[233] The tribunal determined that the clause could be applied retrospectively, accepting its invocation by the host State 18 months after the notice of arbitration was submitted.[234]

9.3. Conclusion

9.3.1. Reasons for Inconsistency: With Some Exceptions, Varying Treaty Texts Resulting in Different Outcomes.

The apparent inconsistency can largely be reconciled based on a careful reading of each of the relevant clauses. Denial of benefits clauses can be separated into three variants: (a) one limited to denying substantive benefits, and not the right to arbitration, such as in the *Energy Charter Treaty*;[235] (b) one that denies the benefits of the entire treaty or agreement without requiring consultation before doing so, such as in many US BITs;[236] and (c) one that requires notification and, potentially, consultation between the relevant States prior to denying the entire treaty's benefits, such as in *CAFTA*.[237]

As the *ECT* does not allow a host State to deny the investor the benefit of arbitration, nearly all tribunals find that benefits must be denied prospectively, prior to the investor invoking its right to arbitration. Both the *Plama* and *Yukos v Russia* tribunals found that retrospective application

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[233] *Pac Rim*, *supra* note 226 at para 1.5: *CAFTA*, art 10.12(2): "Subject to Articles 18.3 (Notification and Provision of Information) and 20.4 (Consultations), a Party may deny the benefits of this Chapter to an investor of another Party that is an enterprise of such other Party and to investments of that investor if the enterprise has no substantial business activities in the territory of any Party, other than the denying Party, and persons of a non-Party, or of the denying Party, own or control the enterprise."
[234] *Pac Rim, supra* note 226 at para 4.84.
[235] Gastrell, *supra* note 226 at 85; Feldman, *supra* note 227 at 469.
[236] Gastrell, *supra* note 226 at 85.
[237] *Ibid* at 85; Feldman, *supra* note 227 at 469–470; however, the author did not have the benefit of a later 2016 decision, which applied a similar denial of benefits provision as that found in *CAFTA*: *Ampal-American Israel Corp, EGI-Fund (08-10) Investors LLC, EGI-Series Investments LLC, BSS-EMG Investors LLC, and Mr. David Fischer v Arab Republic of Egypt*, Decision on Jurisdiction, ICSID Case No ARB/12/11, 1 February 2016 [*Ampal*].

would conflict with the purpose of the *Energy Charter Treaty* to promote longterm cooperation.[238] However, under the other variants, the benefit of arbitration can be denied, effectively denying the tribunal jurisdiction to hear the dispute.[239] Tribunals coming to this conclusion did not consider the applicable BITs' object and purpose; further, the BITs' object and purpose did not explicitly state that the economic cooperation sought after was longterm.[240] In such cases, benefits can be denied retrospectively, before the deadline for challenging jurisdiction (generally by the submission of the Statement of Defence or counter-memorial, according to ICSID, UNCITRAL, and PCA arbitration rules).[241]

Plama, the first tribunal to consider *ECT* Article 17(1), determined that the denial of benefits clause only applied to the substantive obligations in the treaty, going to the merits of the case, and not the tribunal's jurisdiction.[242] The *Plama* tribunal considered the impact that denying benefits retrospectively would have on an investor, who presumably had already made an investment expecting to receive treaty protection, and determined that benefits could only be denied prospectively.[243]

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[238] *Plama, supra* note 40 at paras 161–165; *Yukos, supra* note 227 at 457; Gastrell, *supra* note 226 at 88–90. *Khan Resources, supra* note 89 at 426: the tribunal came to the same conclusion but relied more generally on the *ECT*'s object and purpose.
[239] Gastrell, *supra* note 226 at 85, 89–92.
[240] *GAI*, *supra* note 231 at paras 371–384; *US-Bolivia BIT*, *supra* note 140; *Ulysseas, supra* note 232 at para 172–173; *EMELEC, supra* note 92 at para 71; *Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment*, 28 August 1993 (entered into force 11 May 1997).
[241] *ICSID Arbitration Rules*, r 41(1); *ICSID Additional Facility Rules*, art 45(2); 1976 *UNCITRAL Arbitration Rules*, art 21(3); 2013 *UNCITRAL Arbitration Rules*, art 23(2); *PCA Arbitration Rules 2012*, art 23(2).
[242] Gaillard, "ECT", *supra* note 225 at 71; Gastrell, *supra* note 226 at 81; Carmen Núñez-Lagos & Javier García Olmedo, "The invocation of "denial of benefits clauses": when and how?" (February 17, 2014), *Kluwer Arbitration Blog,* online: <http://arbitrationblog.kluwerarbitration.com/2014/02/17/the-invocation-of-denial-of-benefits-clauses-when-and-how-2/>.
[243] *Plama, supra* note 40 at para 162; see also Núñez-Lagos, *supra* note 242.

The *GAI* tribunal did not apply the *ECT*'s denial of benefits clause but the *Bolivia-US BIT*'s clause, which denied benefits to the entire treaty, including the host State's consent to arbitration.[244] The *GAI* tribunal found that benefits could be denied as late as in the Statement of Defence, well after the Notice of Arbitration had been submitted.[245]

The *GAI* tribunal considered the purpose of the denial of benefits provisclauseion and found the purpose compatible with denying benefits retrospectively: "Whenever a BIT includes a denial of benefits clause, the consent by the host State to arbitration itself is conditional and thus may be denied by it, provided that some objective requirements concerning the investor are fulfilled."[246] An investor knows that if they meet certain conditions, they could be denied the BIT's benefits, and should expect that the benefits could be withdrawn. It is practical that the host State's right to deny exists after benefits are claimed and the host State can determine whether or not that investor's benefits could and should be denied.[247]

CAFTA's denial of benefits clause has been interpreted in a similar manner. However, as that clause requires notification and, if requested, consultation between the home and host States prior to denying benefits, such notification and consultation must take place before benefits can be denied.[248] Once the notification and consultation has taken place, then benefits must be denied according to the applicable procedural rules for jurisdictional challenges.[249] The *Pac Rim* tribunal

[244] *GAI*, *supra* note 231 at paras 371, 378–382.
[245] *Ibid* at paras 378–382.
[246] *Ibid* at para 372.
[247] *Ibid* at para 379.
[248] *Ampal, supra* note 237 at paras 145–151.
[249] *Pac Rim, supra* note 226 at paras 4.85, 4.92. Potential retrospective effect is consistent with how some have interpreted the similar denial of benefits provision found in *NAFTA*, art 1113, according to Rachel Thorn & Jennifer Doucleff, "Part I Chapter 1: Disregarding the Corporate Veil and Denial of Benefits Clauses: Testing Treaty Language and the Concept of 'Investor,'" in Michael Waibel, Asha Kaushal, *et al* (eds), *The Backlash against Investment Arbitration* (Kluwer Law International: Kluwer Law International, 2010) at 25.

found that that benefits could be denied even two years after the dispute arose, as long as benefits were denied as soon as possible or as late as in the counter-memorial.[250] This shows that the *Pac Rim* tribunal considered an objection based on benefits being denied as a jurisdictional challenge; the counter-memorial was the deadline for challenging the tribunal's jurisdiction under the procedural rules governing that dispute.[251]

The *Egypt-US BIT*'s denial of benefits provision similarly requires prior consultation between home and host States, but has been interpreted differently.[252] The *Ampal v Egypt* tribunal found that the host State, Egypt, attempted to deny benefits prior to any consultation.[253] As a result, Egypt could not deny the treaty's benefits to the investor.[254] However, the tribunal nonetheless concluded that benefits under the *Egypt-US BIT* must be denied prior to the registration of the Request for Arbitration.[255] The tribunal applied *ICSID Convention* Article 25(1), which the tribunal interpreted as stating that jurisdiction of the Center is determined when the Request for Arbitration is registered and consent to arbitration cannot be unilaterally withdrawn after.[256] The tribunal does not explain why it applies this deadline for denying jurisdiction rather than the deadline found in the *ICSID Arbitration Rules* applicable to the dispute and applied by the *Pac Rim* tribunal, whose analysis the tribunal considered for other issues.[257] This may be evidence of inconsistent outcomes arising from differences in advocacy and submissions as Pac Rim did not appear to argue in its written submissions that notice had to be provided, or benefits had to be

[250] *Pac Rim, supra* note 226 at paras 4.84–4.85.
[251] *Pac Rim, supra* note 226 at para 4.85; *ICSID Arbitration Rules*, r 41(1).
[252] *Ampal, supra* note 237 at paras 145–147.
[253] *Ibid* at paras 149–141.
[254] *Ibid* at para 154.
[255] *Ibid* at para 167.
[256] *Ibid* at paras 165–168.
[257] *Ibid* at paras 21, 31; *Pac Rim, supra* note 226 at para 4.85. However, the tribunal did apply *ICSID Arbitration Rules,* r 41(1) for other jurisdictional objections, see *Ampal, supra* note 237 at paras 174–176.

denied, prior to submitting the dispute to arbitration based on *ICSID Convention* Article 25(1).[258] Had Pac Rim made that argument, perhaps the *Pac Rim* tribunal would have decided in a manner consistent with the *Ampal* tribunal.

The inconsistency in interpreting denial of benefits provisions can largely be traced to the wording of each of the three variants of the provision. The only other inconsistent findings that cannot be easily explained by textual differences are found in the *Liman Caspian Oil v Kazakhstan* and *Pan American & BP v Argentina* decisions. The *Liman Caspian Oil* tribunal merely indicates that retrospectively denying benefits under the *ECT* is possible on an exceptional basis, where the grounds to do so only emerge after the notice of arbitration has been submitted.[259] The *Pan American & BP* tribunal found that the *Argentina-US BIT*, with a similar provision to the *Bolivia-US BIT*, only permitted benefits to be denied prospectively. However, the tribunal provided no analysis or reasoning to support that conclusion and found that the investor could not be denied benefits in that case as both substantive requirements to do so were not met: the investor was not owned or controlled by third-State investors and did not lack substantial business activities in their home State.[260] The tribunal's findings on prospective application were not comprehensively explained and also not dispositive. The *Liman* decision could be seen as a minor departure in exceptional circumstances from the line of decisions under the *ECT* and the *Pan American* departure could be seen as less meaningful on the facts, as their conclusion that benefits had to be denied prospectively was not dispositive in that case.

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[258] *Pac Rim*, *supra* note 226, Notice of Intent; Notice of Arbitration; Claimant Pac Rim Cayman LLC's Response to Respondent's Preliminary Objection; Claimant Pac Rim Cayman LLC's Rejoinder on Respondent's Preliminary Objection; Claimant Pac Rim Cayman LLC's Counter-Memorial Response to Respondent's Preliminary Objection at paras 339–373; Claimant Pac Rim Cayman LLC's Rejoinder on Respondent's Objections to Jurisdiction at paras 196–225.
[259] *Liman, supra* note 227 at para 227.
[260] *Pan American, supra* note 92 at para 204.

What little inconsistency in this area that may remain can be addressed by making the denial of benefits language mandatory: where the requirements to deny benefits are met, the treaty's benefits are automatically denied to the investor without any further positive action by the host State.[261] If benefits are automatically denied, the tribunal would only be left to determine if the criteria to do so were met as a jurisdictional issue and would not need to consider if the right to deny benefits was exercised in a timely manner.

10. Argentinean Cases on the Necessity Defence

The defense of necessity provides that a state may not be liable for actions taken to "safeguard an essential interest against a grave and imminent peril."[262] The Argentinean cases involving the necessity defence are one of the most often cited examples of inconsistency in investment arbitration. In the early 2000s, Argentina experienced a severe financial crisis and sought to limit its consequences by adopting a series of regulatory measures. As a result, foreign investors were deprived at least in part of their investments and many commenced proceedings against Argentina. Argentina defended itself by raising a necessity defence based on customary international law ("CIL") as well as the Non-Precluded Measures ("NPM") clause, Article XI, found in the *US - Argentina BIT*.[263]

10.1. Issue: Could Argentina Be Excused for BIT Violations Under the Necessity Defence?

Although Argentina's necessity plea was raised in almost identical circumstances, it received different interpretations by tribunals. Not only did tribunals disagree as to whether

[261] Gastrell, *supra* note 226 at 97.
[262] *See* Int'l Law Comm'n, Draft Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries, art. 25, U.N. Doc. A/56/10 (2001) [ILC Draft Articles], available at http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.
[263] Treaty between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment of November 14, 1991, in force from October 20, 1994.

Argentina was excused from breaches of treaties (10.2.1.), but also they also differed in their interpretation of Argentina's necessity plea. In this regard, the tribunals reached different conclusions as to both the content of the necessity defence under customary international law (10.2.2.) and the content of the US-Argentina BIT's NPM clause (10.2.3.). This section will consider the following cases: *CMS v Argentina*,[264] *LG&E v Argentina*,[265] *Continental Casualty Co. v Argentina*,[266] *Enron v Argentina*[267] and *Sempra v Argentina*,[268] *BG v Argentina*,[269] and *National Grid v Argentina*.[270]

10.2. Analysis of the Secondary Materials and Leading Jurisprudence

10.2.1. Outcome Inconsistency in Leading Cases

The Argentinean cases involving the necessity defense reached contradictory outcomes. Whereas the Tribunals in *CMS v Argentina, Enron v Argentina, Sempra v Argentina, BG Group Plc. v Argentina, and National Grid v Argentina* rejected Argentina's necessity defence, the tribunals in *LG&E v Argentina* and *Continental Casualty v Argentina* accepted Argentina's necessity plea.

The awards were subject to annulment proceedings. The *CMS* and *Continental Casualty* decisions were subject to unsuccessful annulment proceedings. The *CMS* annulment committee refused to annul the award but found it necessary to observe that the tribunal erred when it equated

[264] *CMS Gas Transmission Co. v Argentine Republic*, Award, ICSID Case No. ARB/01/8, 12 May 2005 [CMS Award].
[265] *LG&E Energy Corp. v Argentine Republic*, Decision on Liability, ICSID Case No. ARB/02/1, 3 October 2006 [LG&E, Decision on Liability]; Stephen W. Schill, International Investment Law and Host State's Power to Handle Economic Crises: Comment on the ICSID Decision in LG&E v. Argentina, 24 J. Int'l Arb. 265 (2007).
[266] *Continental Casualty Co. v Argentine Republic, Award*, ICSID Case No. ARB/03/9, 5 September 2008 [Continental Award].
[267] *Enron Corp et al v The Argentine Republic*, Award, ICSID Case No. ARB/01/3, 22 May 2007 [Enron Award].
[268] *Sempra Energy Int'l v Argentina,* Award, ICSID Case No. ARB/02/16, 28 September 2007 [Sempra Award].
[269] *BG Group v Argentina*, UNCITRAL Award, 24 December 2007 [BG Award].
[270] *National Grid P.L.C. v Argentine Republic*, UNCITRAL Award, 3 November 2008 [National Grid Award].

US - Argentina BIT Article XI and ILC Article 25.[271] It reasoned: "Article [25] concerns, inter alia, the consequences of the existence of the state of necessity in customary international law, but before considering this Article, even by way of obiter dicta, the Tribunal should have considered what would have been the possibility of compensation under the BIT if the measures taken by Argentina had been covered by Article XI."[272] The *Continental Casualty* annulment committee found that the tribunal acted entirely within its powers and clearly put forth its reasons.[273]

The *Sempra* and *Enron* decisions were subject to favourable annulment proceedings. The *Sempra* annulment committee annulled the award due to the tribunal's reliance on Article 25 of the ILC's Articles over Article XI of the Treaty, which the committee considered a "manifest excess of powers."[274] Finally, the *Enron* annulment committee partially annulled the award, finding error in the tribunal's necessity analysis.[275] It reasoned that the tribunal was under an obligation to determine whether the measures taken by Argentina were the "only way" to safeguard its essential interests.[276] The *Enron* annulment committee found that the tribunal did not apply the ILC Article 25 to make its determination, but instead relied an expert opinion on an economic issue, amounting to a failure to apply the applicable law.[277]

10.2.2. What Is the Content of the Necessity Defence Under Customary International Law?

[271] *CMS Gas Transmission Co. v Argentine Republic*, ICSID Case No. ARB/01/8, Decision of the Ad Hoc Committee on the Application for Annulment of the Argentine Republic, 25 Sept. 2007. [CMS Annulment].
[272] *Ibid* at para 146.
[273] *Continental Casualty Company v The Argentine Republic*, ICSID Case No. ARB/03/9, Decision on the Application for Partial Annulment, and the Application for Partial Annulment, 16 September 2011, at para. 262 ss. [Continental Casualty Annulment].
[274] *Sempra Energy Int'l v Argentine Republic*, ICSID Case No. ARB/02/16, Decision on the Argentine Republic's Application for Annulment of the Award, 29 June 2010 [Sempra Annulment].
[275] *Enron Corp. & Ponderosa Assets, LP v Argentine Republic*, ICSID Case No. ARB/01/3, Decision on the Application for Annulment of the Argentine Republic, 30 July 2010 [Enron Annulment].
[276] *Ibid* at para 377.
[277] *Ibid.*

The tribunals analyzing Argentina's necessity defence differed in their analysis on the applicability of the defence under customary international law. The variation in their analysis is discussed below.

When argued successfully, the necessity defence precludes the wrongfulness of a state's actions and allows the state to avoid liability. Under customary international law, the necessity defence can only be invoked in exceptional circumstances.[278] Article 25 of the International Law Commission Draft Articles on the Responsibility of States for Internationally Wrongful Acts (ILC Article) enunciates the relevant criteria of the necessity doctrine in customary international law.[279] It provides:

> *1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:*
>
> *(a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and*
>
> *(b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.*
>
> *2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:*
>
> *(a) the international obligation in question excludes the possibility of invoking necessity; or*
>
> *(b) the State has contributed to the situation of necessity.*[280]

[278] Andrea K. Bjorklund, "*Emergency exceptions: State of necessity and force majeure"* in P. Muchlinski, F. Ortino and C. Schreuer (eds.), Oxford Handbook of International Investment Law (Oxford University Press, 2008), at 459.
[279] *Ibid.*
[280] Article 25, *ILC Draft Articles, supra note 262.*

Tribunals have given different interpretations to three of the conditions under ILC Article 25, namely whether: (i) the peril was imminent; (ii) the course of action was the only means available to resolve the peril; and (iii) Argentina had contributed to the creation of the crisis.

First, tribunals arrived at different conclusions as to the gravity of the peril, namely the Argentine economic crisis. While the *CMS* tribunal qualified the economic crisis as a catastrophe, it held that the peril was not severe enough to meet the threshold required by ILC Draft Article 25.[281] In order to make its determination, the *CMS* tribunal compared the Argentinian crisis to other contemporary economic crises around the world.[282] In contrast, the *LG&E* tribunal, in finding that the crisis met the threshold to invoke the necessity defence required under CIL, did not compare the situation in Argentina to that of other crises. Instead, the *LG&E* tribunal observed the social and economic factors existing in Argentina.[283] Among other things, it noted Argentina's decline in gross domestic product, rising unemployment, and the widespread protests and unrest.[284] The *LG&E* tribunal was unconvinced by the Claimant's contention that the economic crisis fell within normal business cycle fluctuations. [285] The *LG&E* tribunal concluded that the evidence presented by the Argentina demonstrated that the crisis threatened the "total collapse of the Government and the Argentine State."[286] The *Continental Casualty* tribunal's analysis of the Argentinian crisis was largely similar to that of the *LG&E* tribunal.[287] It held that the situation could not be addressed by ordinary measures and that the gravity of the peril therefore met the

[281] *CMS Award, supra* note 264 at para 91-94; *See further:* Graham Mayeda, "International Investment Agreements between Developed and Developing Countries: Dancing with the Devil? Case Comment on the Vivendi, Sempra and Enron Awards", (2008) 4 McGill International Journal of Sustainable Development, Law & Policy at 189.
[282] *Ibid.*
[283] *LG&E Decision on Liability*, *supra* note 265 at paras 231-240.
[284] *Ibid.*
[285] *Ibid at para 231,* citing Claimants' Post-Hearing Brief, at 14.
[286] *Ibid* at 231.
[287] *Continental Award, supra* note 266, at 79.

requirements of the necessity defence.[288] Like the *LG&E* and *Continental Casualty* tribunals, the *Enron* tribunal analyzed the situation prevailing in Argentina but was unconvinced that the crisis was grave enough to successfully invoke the necessity defense under customary international law.[289] It reasoned that the evidence did not demonstrate that the "events were out of control or had become unmanageable."[290]

Second, tribunals disagreed as to whether Argentina disposed of other means to protect its essential interest or if its course of action was the only available measure to protect itself. The *Sempra, Enron* and *CMS* tribunals compared the Argentine crisis to other crises and held that other means were available under like circumstances.[291] In contrast, the *LG&E* tribunal examined the situation in Argentina and found that no other means were available to resolve the issue.[292]

Third, as to the question of Argentina's contribution to the creation of the crisis, the tribunals disagreed on the relevance of the previous administrations' policies. The *LG&E* tribunal solely reviewed the actions of the current administration and did not factor in policies of past administrations.[293] The *Continental Casualty* tribunal factored in the behaviour of past administrations and noted that those policies were endorsed by the international community as a beneficial economic policy.[294] The *Continental Casualty* tribunal held that Argentina could not be faulted for keeping those economic policies and, in that sense, could not be seen as having contributed to its economic crisis.[295] The *CMS* tribunal noted that the economic crisis had domestic

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[288] *Ibid.*
[289] *Enron Award, supra* note 267, at 307.
[290] *Ibid.*
[291] *Sempra Award, supra* note 268, at 351*; Enron Award, supra* note 267, at paras 306-309; *CMS Award, supra* note 264 at 324.
[292] *LG&E Decision on Liability, supra* note 265 at para 257.
[293] *Ibid* at para 256.
[294] *Continental Award, supra* note 266, at para 224.
[295] *Ibid.*

and international causes; however, in holding that Argentina contributed to the economic crisis, it noted that the failing policies should have been corrected or changed. [296]

10.2.3. Is the US-Argentina BIT's Non-Precluded Measure Clause a Separate or Distinct Defence From Necessity Under Customary International Law?

Tribunals' interpretation of the *US-Argentina BIT*'s NPM clause differed on the content of the clause, specifically whether the clause is a distinct defense from the necessity defense under customary international law, and the effect of a successful invocation of the NPM clause. However, the tribunals broadly agreed on both their power to decide on the NPM clause's application as well as its scope. Article XI of the *US-Argentina BIT*, the NPM clause, provides as follows:

> *This treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.*[297]

While tribunals' decisions take distinct approaches as to the content of NPM clauses, they agreed on the scope and applicability of the provision. The tribunals agreed that the clause could be invoked in cases of severe economic crises.[298] Before turning to the substantive analysis of Article XI, the tribunals determined whether the provision is a self-judging. Argentina argued that the State could make a good faith determination of the measures necessary to maintain public order or protect its essential security interests within the meaning of Article XI. The tribunals rejected

[296] *CMS Award*, *supra* note 264 at paras 159, 329.
[297] Article XI, *US-Argentina BIT*, *supra* note 263.
[298] Stanimir A. Alexandrov, "On the Perceived Inconsistency in Investor-State Jurisprudence" (2011) Oxford University Press at 66.

Argentina's submission and found that the clause could not be invoked unilaterally by the State, rather the power to decide on its application belonged to the tribunal.[299]

As to the content of the NPM clause, both the *LG&E* and *Continental Casualty* tribunals interpreted the NPM provision without applying the elements of customary international law, reasoning that the clause provides a separate and distinct defence than the necessity defence under customary international law.[300] The *Continental Casualty* tribunal applied the legal test of Article XX of the *General Agreement on Tariffs and Trade* ("*GATT*"), from which Article XI of the *US–Argentina BIT* is derived to determine the relevant criteria applicable to the invocation of the necessity defence.[301]

The tribunals in *CMS*, *Enron*, and *Sempra* applied the criteria of the necessity defence under customary international law to interpret the NPM provision.[302] The *Enron* tribunal reasoned that given that the provision is silent on the conditions to be met to successfully invoke the NPM clause, it becomes "inseparable from the customary law standard."[303]

A third area of substantive disagreement among the tribunals and annulment committees is the question of compensation. Whereas the *CMS*, *Enron* and *Sempra* tribunals found that the provision does not negate state responsibility to pay compensation for actions that harm investors,

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[299] *Ibid.*
[300] *LG&E Decision on Liability, supra* note 265 at para 245; *Continental Award, supra* note 266 at paras 166, 167; Alexis Martinez, "Invoking State Defenses in Investment Treaty Arbitration", in Michael Waibel, Asha Kaushal & Kyo-Hwa Liz Chung (eds.), The Backlash Against Investment Arbitration: Perceptions and Reality (The Hague: Kluwer Law International, 2010) at 315 [Alexis Martinez].
[301] *Continental Award, supra* note 266, at paras 193 ss.
[302] *Alexis Martinez, supra* note 300 at 315.
[303] *Enron Award, supra* note 267, at para 328.

the *CMS*, *Sempra* annulment committees and *Continental Casualty*, *LG&E* tribunals found that the provision can preclude compensation.[304]

11. Conclusion: Some Inconsistency Exists, but Can Be Reduced by Unequivocal Treaty Language

There are numerous examples of tribunals that have decided inconsistently when faced with similar disputes. There are a few areas of inconsistency that can largely be attributed to differences in applicable treaties, such as concerning MFN clauses, denial of benefits clauses, and sovereign bonds as investments. However, a few tribunals have arrived at inconsistent decisions on these issues even when applying similar treaties. And the *Postova Banka* tribunal found sovereign bonds were not protected investments based on a minor detail in the treaty.

In most areas of inconsistency we have studied, the differences in tribunals' interpretations and decisions cannot be easily explained by differences in fact or law when reviewing tribunals' analysis. When the inconsistent decisions are analyzed in detail, we often find layers of inconsistency application of law and analysis that emphasizes the degree of variation between tribunals.

For example, tribunals diverge widely in the number of characteristics apply under the *Salini* test, what threshold is sufficient to satisfy the characteristic, and whether the test is applicable at all. In another example, some tribunals find umbrella clauses have virtually no effect while others find they can elevate breaches of contract. And among those latter tribunals, they widely differ on how exclusive jursidiction clauses within the contracts should be treated. And in the most egregious example of inconsistent analysis, the *Mesa* tribunal appeared to consider, but

[304] William W. Burke-White, "The Argentine Financial Crisis: State Liability Under BITs and the Legitimacy of the ICSID System" (2008) Faculty Scholarship Paper 193 at 15-16; *LG&E Decision on Liability, supra* note 265, at para 261[William W. Burke-White].

significantly mischaracterize, the earlier *ADF* tribunal's analysis.

Despite these inconsistencies, the practical impact on investors and States is often muted. The *ADM* tribunal found that coutnermeasures could be enacted, in theory, but found could not be in the circumstances of that case. The inconsistent interpretation of "procurement" was not dispositive in *ADF* or *UPS*. And despite finding that contractual breaches could be elevated by an umbrella clause, both the *SGS v Philippines* and *BIVAC v Paraguay* tribunals deferred to the contract's exclusive jurisdiction clause and did not address the breach on its merits.

Some of the inconsistencies can also be attributed to a single tribunal, or even a single arbitrator. A single tribunal, *GEA*, has decided that an arbitral award is not an investment, and that tribunal applied reasoning different than any other in doing so. A change of a single arbitrator on the *ADM* tribunal may have led to consistent conclusions and analysis. Potentially, a single arbitrator on the *Postova Banka* tribunal could have shifted the majority to finding sovereign bonds to be protected investments. Over time, these decisions may prove to be an outlier and, like *SGS v Pakistan*¸have little lasting impact on future tribunal decisions or continued inconsistency.

But some of the more prominent examples of inconsistency can largely be attributed to vague language within the treaties. For example, FET provisions have been identified as lacking clearly defined legal obligations which unsurprisingly leads to variation among tribunals determining extent of those obligations. Newer treaties, which often directly address past areas of inconsistency, should help address this problem going forwards.

However, evidence suggests that even clear language may not be enough to keep tribunals from deciding inconsistently. Some tribunals, such as *Plama*, *Salini*, *Romak*, and *SGS v Pakistan*, have refused to accept the ordinary meaning of a provision where doing so would result in a significant increase in the scope of the treaty. *Plama* and *Salini* acknowledged that the text of an

MFN clause could be read to allow an investor to import dispute-settlement benefits. *Romak* found that a BIT could define a one-time sales contract as an investment. *SGS v Pakistan* found that the umbrella clause at issue could be interpreted to elevate contract breaches to treaty breaches. However, all four tribunals refused to interpret the provision in a manner so far afield from the tribunals' presumptions about investment treaties or specific clauses without clear and persuasive evidence that the treaty parties intended such profound results.[305] This suggests unequivocal language is necessary where a treaty intends counterintuitive effects.[306]

The problem of inconsistency may not be quite as broad as some imagine, however the inconsistency can go several layers deeper than is readily apparent. Tribunals may not interpret vague provisions consistently, or even apply clear provisions consistently, but they remain largely responsive to the text of the treaties. The analysis of tribunals across several areas of inconsistent decision making reveal that tribunals apply a *sui generis* interpretation to a provision where drafters apply clear and convincing language expressing their intent. If drafters succeed in doing so, the jurisprudence shows that tribunals are far more likely to consistently decide disputes based strictly on their empowering instruments.

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[305] Footer, *supra* note 200 at 100, specifically describes the *SGS v Pakistan* tribunal as relying on an international law presumption against interpreting an umbrella clause broadly.
[306] *Romak, supra* note 145 at para 205.

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