Arbitral Lawmaking and State Power: 
An Empirical Analysis of the Evolution of Investor-State Arbitration

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Colleagues: The paper is partly based on data collected and analyzed for a book project, now in press: The Evolution of International Arbitration: Judicialization, Governance, Legitimacy (OUP, with Florian Grisel).

The paper is long. For those pressed for time, I would recommend reading only the introduction and parts III and IV, and the talk will focus only on those sections (pp. 1-7, and 22-49). Comments and discussion on the rest are, of course, welcome.

If you are unfamiliar with treaty-based investor-state arbitration, I would also recommend part 1, which provides an introduction to, and overview of, the system. If you are interested in the Argentina cases, you might wish to look at part II.

– Alec Stone Sweet

Tables and Figures
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The trading world is governed by two regimes of global scope. The first is a public law regime embodied by the World Trade Organization. The second is constituted by international commercial arbitration [ICA], private law arrangements backed up by the public enforcement mechanisms under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958). In the realm of foreign direct investment [FDI], there is no equivalent of the WTO and its Appellate Body. Instead, disputes between foreign investors and host states are resolved through different routes. Investors may sue public authorities in the courts of the host state. Or a state entity and a foreign investor – as parties to a contract – may agree to arbitrate; being contractual disputes, they are typically processed through the ICA regime. Since the late-1990s, the most common jurisdictional basis for investor-state arbitration [ISA] is a treaty, whether bi-lateral (a BIT), regional (e.g., chapter 11 of NAFTA), or sectoral (e.g., the Energy Charter, signed by European and Central Asian states).

In the standard political economy account of ISA, the generic problem investors confront is one of commitment, which can be simply summarized as follows. Assume a world in which private investors (X) in some states hold stocks of investment capital, while capital-poor states compete to attract investors. Assume that X is risk-averse, and will therefore prioritize investing in relatively stable environments. In this situation, to attract foreign direct investment (FDI), any state (Y) must persuade X that her investment will be safe, and that Y will not expropriate it (at least not without adequate compensation), or subject it to ruinous regulatory changes that would destroy its profitability (so-called “indirect” expropriation). The dilemma is particularly acute in situations in which the investor has high sunk costs, and capital is relatively immobile (the so-called “hold-up” problem). A standard solution – creating judicially enforceable property rights for investors against the state – is viable only if X trusts Y’s courts. Because X may have good reason to wish to avoid Y’s courts, harnessing “a-national” arbitration to enforce X’s rights is one obvious solution.

When it comes to FDI, regime-building requires the active participation of states. The present regime is rooted in treaties through which states pre-consent to arbitral jurisdiction ex ante, knowing that, in any actual proceeding ex post, they will always be the respondent. As Pauwelyn rightly stresses, the crucial question is “why [would states] ever agree – and continue to agree – to limit their sovereign powers over foreign investors” through the delegation of authority to international arbitrators?1 One part of the answer is that, as economic globalization has progressed, states share joint interests in promoting and attracting FDI, for which they compete with one another. In expressing the matter this simply, I do not mean to understate the fierce complexity of the processes through which, in fact, these interests become manifest and are transformed into law and policy. But another part of the answer concerns their preferences to depoliticize dispute settlement. In line with broader trends in international economic law, states replaced dyadic systems – which were based on brute force, diplomacy, and unilateral assertions of jurisdiction – with rule-based triadic dispute resolution. States had long relied on diplomatic means of protecting “aliens” and their investments, to which, after World War II, they added more articulated legal instruments, best exemplified by treaties of Friendship, Navigation, and Commerce. But these treaties did not provide for third-party dispute resolution. In the 1980s, a new generation of investment agreements combined with the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States [ICSID Convention] to constitute ISA as we know it today. Both capital-

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exporting and importing states had reasons to buy in to the regime, which they have done steadily ever since.

Over the past two decades, ISA has developed at a spectacular rate, while generating controversy among state officials, and within the arbitral profession and scholarly community. This paper focuses empirical attention on what is, arguably, the major source of controversy: the arbitral construction of international investment law, and the effects of that lawmaking on determinations of state liability. For reasons discussed, arbitrators, the agents of states, have been the authors of much of the substance of that law since the field’s take-off in the late-1990s. In the past decade, states, as principals and primary lawmakers, have rematerialized, which has placed reform of the regime on the agenda. The broad purpose of the paper is to assess empirically (a) the development of arbitral lawmaking and (b) state responses to that case law. The paper proceeds as follows. Part 1 provides an overview of the evolution of treaty-based ISA. Part 2 surveys the development of precedent in the regime, followed by a case study of the so-called “Argentina cases,” which were generated by that state’s economic meltdown in the early 2000s. These cases, more than any others, have directed attention to issues of legal certainty, precedent, and appeal in ISA. Part 3 focuses on how tribunals have constructed the two most arbitrated provisions of investment treaties: the prohibition of “indirect expropriation,” and the investor’s entitlement to “fair and equitable treatment.” Part IV directs attention to the treaty-making activities of states, and the extent to which they have used their treaty powers to overriding arbitral jurisprudence, or to constrain tribunals’ interpretive authority. Each section presents analysis, in the form of basic descriptive statistics, of relatively comprehensive data we compiled on final awards on the merits (liability) and on treaty-making. ² Parts 2 and 3 present detailed case studies, in the mode of “process-tracing,” of arbitral lawmaking. In the conclusion, I briefly address legitimacy debates, in light of the paper’s findings.

A preliminary conceptual point merits emphasis, not least, to avoid misunderstandings. The paper proceeds on the view that arbitral lawmaking is registered through the development and use of precedent-based frameworks of argumentation and justification. Precedent-based lawmaking enables and constrains arbitral authority, grounds discourse on the legitimacy of arbitral lawmaking, and stokes demand for supervision and appeal (part 2). At the same time, the concept of precedent is deeply contested by scholars, the bar, arbitrators, and officials of the major arbitration centres.³ I define precedent as that stream of normative materials, issuing from past awards, that (a) parties plead in submissions, and that (b) tribunals rely upon to justify their awards and approaches to decision-making.⁴ One observes it in practice when actors invoke doctrines, general principles, standards, tests, and interpretive techniques that tribunals have curated as case law. As an analytical matter, I distinguish between (a) “precedent,” and (b) how much any tribunal believes itself to be constrained by precedential materials, though these two phenomena may become tightly interdependent in practice. It matters what kind of authority actors are invoking when they summon precedent. As we will see, an increasing number of tribunals have embraced the following nascent rule: the more “settled” is the relevant case law, the weightier is the justificatory burden placed on any tribunal that would depart from it. Such a rule, if generally adopted, significantly hardens persuasive authority, adding express presumptions and burdens when it comes to pleadings and reason-giving. I define the concept of a “system of appeal” restrictively,

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² Yale Law School Data Sets (cited in tables and figures).
as any stable procedure that authorizes the annulment of a past award, depriving it of legal effect, on the basis of errors in legal reasoning. Today, it is widely recognized that a de facto doctrine of precedent exists in ISA, and the question of whether and how to provide for a mechanism of appeal is being intensively debated.

I Investor-State Arbitration: An Overview

After World War II, the polarized ideological context of decolonization and the intensification of the Cold War made wide agreement on basic principles of FDI within the developing world, and international development policy more generally, all but impossible. Whether developing states had a right to expropriate foreign investors (as a means of furthering development goals), and how takings should be compensated (if at all) were core questions. By the end of the 1980s, the situation had changed, as the strictures of neo-liberal economics diffused from advanced industrial to developing states, and the developing world abandoned Marxist-inspired policies. Most important for our purposes, the demand for FDI in capital-poor states soared, as a means of funding new infrastructure projects, modernizing manufacturing and service industries, and privatizing public utilities and other poorly-performing, state-held assets. Capital-rich states welcomed this new openness, which the World Bank and International Monetary Fund also strongly supported. The initial bargain was relatively straightforward: in return for new FDI, host states would agree to arbitrate investment disputes.

Treaties

Figure 1 plots the annual and cumulative numbers of new international investment agreements concluded since 1980. By the end of 2015, the total stood at 3,304, consisting of 2,946 bilateral investment treaties (BITs) and 358 other agreements. Despite these vertiginous numbers, most of these agreements share common features. First, they create substantive law for FDI. Provisions typically prohibit expropriation (direct and indirect) without a compelling public interest justification, followed by full and adequate compensation; they announce principles of non-discrimination (national and most-favored nation treatment); and, as tribunals have construed the ubiquitous “fair and equitable treatment” standard [FET], they confer on investors a wide range of due process guarantees, as well as an obligation to honor investors’ “legitimate expectations” with regard to regulatory stability (see part 3). Second, they establish state liability for the violation of an investor’s rights. Third, they commit states to compulsory arbitration. Most BITs pre-commit the parties to arbitration at the International Centre for the Settlement of Investment Disputes (ICSID), under ICSID Convention and Rules. But agreements may also give parties a choice of arbitral venue, including at any major arbitration house under UNCITRAL Rules, or at ICSID.

----- Figure 1 here ----- ICSID dominates the world of ISA. Figure 2 charts the cumulative number of ratifications by states of the Convention, which has reached 156. The ICSID Convention established the Centre and its competences, laid down a mix of mandatory and default rules of procedure, and required the domestic courts of member states to enforce ICSID awards, just as they would a “final judgment” of their own legal

5 As Oscar Schachter put it in 1984: “Apart from the use of force, no subject of international law has aroused as much debate and strong feelings as standards for payment of compensation” following expropriation;‘Comment: Compensation for Expropriation’ (1984) 8 American Journal of International Law 121.
6 M. Sornarajah, Resistance and Change in the International Law on Foreign Investment (Cambridge University Press 2015), ch. 1.
Standing alone, the Convention exhibits glaring gaps, which gave it a still-born quality for much of its first three decades of existence. The Convention’s provisions do not state the substantive law governing the treatment of foreign investors; it was the explosion of BITs and other agreements in the 1990s (Figure 2.3) that would provide that law. As important, in providing pre-consent to ICSID jurisdiction, BITs gave a crucial, if completely “unplanned” and “unexpected” boost to the Centre’s mission.

Activity and Outcomes

Figure 3 charts the annual and cumulative number of known ISA cases covered by treaties. In the 1965-1994 period, investors registered an average of fewer than one case per year. Filings increase dramatically in the 2000s, as the mass of investment agreements adopted in the 1990s started to bite. Through 2015, one counts 696 known cases of ISA involving 107 different respondent states, of which 60% are classified by UNCTAD as “developing.” With regard to basis of consent, BITs cover the vast bulk of cases, while the Energy Charter has generated 87 cases (12.5%), followed by NAFTA with 56 (8% of the total).

ICSID has administered 82% (497) of all known disputes through 2013, 90% of which under ICSID Convention Rules, the remainder processed mostly under the Additional Facility. Figure 4 plots the number of new cases registered at ICSID, by period. In its first two decades (1972-1991), ICSID processed only 26 cases. In 2015 alone, the ICSID administered a record 243 cases, registered 52 new ones, and concluded 53 arbitrations. The Permanent Court of International Arbitration, the International Chamber of Commerce, the Stockholm Chamber of Commerce, and the Singapore centre also administer disputes, both treaty and contract based.

In contrast to the situation in ICA, where confidentiality of awards remains the norm, virtually all major awards on the merits (or extracts thereof) are eventually made public. One is therefore able to compile and analyse relatively comprehensive data on proceedings and outcomes. Through 2015, the known number of concluded cases is 444. States “won” in 36% of these cases: either jurisdiction was denied, or investors’ claims for compensation were rejected in final awards. Investors “won” in 27% of the cases, that is, a tribunal issued a final award ordering the respondent state to compensate the investor. Of the remaining cases, 26% were settled: 9% were “discontinued”; and in the remaining 2%, “liability [was] found but no damages [were] awarded.”

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8 ICSID Convention, Article 54(1): “Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State.” The ICSID enforcement system is independent of the 1958 New York Convention, which applies to non-ICSID awards issued pursuant to ISA.
10 The count excludes contractually-based investment disputes processed through ICA.
Arbitrators

Virtually all treaty-based ISA is conducted within 3-member tribunals which are constituted when 2 party-appointed “co-arbitrators” nominate a “president.” At ICSID, the secretary-general supervises the process, and has authority to appoint the president (from a so-called “panel of arbitrators,” a list of arbitrators named by states and ICSID officials), if the co-arbitrators fail to do so. The market for arbitrators in ISA is highly structured; the core repeat-arbitrators are easily identified; and many in this group are among the list of top arbitrators in ICA.

Publication also makes statistical analysis of appointments possible. In the most comprehensive study to date, Sergio Puig analyzed 1,412 appointments involving 419 different arbitrators,14 Puig found that 10% of the appointment pool comprised 50% of all appointments, and identified the 25 “top arbitrators” that lead the field. Our data set contains information on 166 finals awards on liability (the merits). The top 10 co-arbitrators15 – those appointed by parties at least 4 times – were found on 76 (46%) of the tribunals. With respect to the presiding arbitrator, individuals on our top-10 list (those presiding over at least 4 tribunals) comprise 38% (n=63) of all presidents. Twenty arbitrators have chaired at least 3 tribunals, meaning that experienced, repeat players drafted the majority of all final awards on the merits (54%, n=90). As in ICA, elite arbitrators compete on the basis of their reputations, which are built through serial appointments, work as counsel, and scholarly publications. As a result, a relatively small college of elite arbitrators play an outsized role in the system, giving the field more coherence then it might otherwise have. The fact that fewer than 20 presiding arbitrators have produced a majority of final awards — and thus are responsible for injecting reason-based justifications of awards into the system — favors the development of a more consistent arbitral case law, for example.

Although some arbitrators specialize in either ICA or ISA, we found significant overlap among elites. All of the “elite 25” in ICA16 have experience arbitrating investor-state disputes; a majority have served as counsel for states or investor in ISA proceedings; and seven of the “top 25” arbitrators identified by Puig are also members of the “elite-25” in ICA.

Legitimacy Debates

As ISA has taken off, the regime has steadily revealed its capacity for creative lawmaking, intensifying debates on its political legitimacy. The fact that state treasuries are exposed to the rulings of foreign arbitrators, upon review of the lawfulness of domestic regulations presumptively enacted in the public interest, gives legitimacy questions salience. In the conclusion, I briefly address normative debates in light of the project’s findings. At this point, it is enough to highlight four summary points.

First, no one knows the extent to which international investment agreements have actually increased FDI in capital-poor states. Some major recipients of FDI – Brazil being the most prominent – have not ratified BITs and are not signatories of the ICSID Convention. Of course, one cannot know if such countries would have received even more FDI had they joined the system. A review of the scholarly

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15 The number is actually 11, as there was a three-way tie for the 10th spot.
literature in this regard suggests, at most, that BITs do increase investment for some (but not all) countries, in certain sectors of the economy, probably in tandem with other propitious domestic factors.\textsuperscript{17}

Second, the politicization of ISA is in full swing. Until a decade ago, ISA was a relatively insulated realm of law. Only specialists in certain national ministries, elite law firms and business associations, and a handful of legal academics paid much attention to the work, often opaque and technical, of tribunals. Today, politicians, trade unions, NGOs, international organizations, and scholars have joined tendentious debates on the question of whether the ISA regime should be preserved and reinforced, radically reformed, or scrapped altogether. The fact that the regime continues to expand, with new investment agreements being initiated and signed each year, sustains controversy. Most dramatically, Bolivia, Ecuador, and Venezuela have denounced the ICSID Convention, and terminated some BITs, in protest of what they consider to be systemic, pro-investor bias.\textsuperscript{18} Indonesia and South Africa have withdrawn from some BITs.\textsuperscript{19} In 2014, UNCTAD – which has called for a recalibration of the relationship between states, investors, and arbitrators – counted more than 50 states actively revising their “model” BITs. These efforts are important, in that model treaties serve as codified expressions of state interests, as well as the basis for negotiating new treaties. This group includes both capital rich and poor states, on every continent. It is of critical importance that major capital-exporting states, including the U.S., Canada, and members of the EU, are increasingly recipients of new FDI, and are thus more exposed to the system, as respondents.

Third, the structure of treaty provisions has given advantages to arbitrators as lawmakers. The vast majority of investment agreements contain similar provisions, resulting from the fact that states broadly copied provisions from past treaties into new ones, relying heavily on relatively vague substantive standards to protect foreign investment. Put differently, states negotiated incomplete contracts, on the basis of a common template, thereby conferring on tribunals implied lawmaking powers. The contracting states, for example, gave no interpretive guidance as to the meaning or scope of the fair and equitable treatment [FET] standard. Yet one finds an FET provision in virtually every investment agreement; investors systematically raise FET claims; and ISA tribunals have found more violations of FET than they have of any other substantive provision of investment law (see part 3). For their part, arbitrators have generated an expansive, self-sustaining jurisprudence on FET, treating it as an integrative norm of investment law, in the aggregate. As a result, every state-as-respondent finds itself being subjected to a system in which tribunals tend to treat investment treaties in the aggregate, as tightly networked in law.

Fourth, in ISA, every case involves an action brought by an investor (the claimant) against a state (the respondent). The tribunal’s task is to review the lawfulness of state acts under the terms of a BIT or other agreement which, viewed functionally, supplants the judicial review functions of national courts. For these reasons, some scholars conceptualize the system as a type of “global public law,” with ISA operating as a new form of administrative or constitutional judicial review. Proponents of this perspective tend to distinguish ICA from ISA on the basis of the latter’s more “public” nature, which leads them to

\textsuperscript{17} Citations to scholarship omitted.
argue that tribunals should be more deferential to states.\textsuperscript{20} Nonetheless, ISA tribunals – unlike domestic administrative or constitutional courts – do not possess the authority to annul or quash state acts, or to compel the state to take a general or particular measure. If state liability under the treaty is found, the remedy on offer is compensation for losses. In this sense, ICA and ISA are more like than unlike one another.

\textbf{II Precedent and the Demand for Appeal}

It is today indisputable\textsuperscript{21} that “a \textit{de facto} doctrine of precedent”\textsuperscript{22} is basic to arbitrating investment disputes. The parties intensively plead and dispute the relevance and application of prior awards, which most arbitrators treat as a wellspring of legal reasons to justify decisions, dispositions that, significantly, ICSID officials overtly encourage. As scholars and arbitrators have noted, the system has developed more or less as the common law does, if without mechanisms of coordination associated with appeal. This outcome was in no way pre-ordained. Indeed, there were good reasons to think that precedent-based argumentation and justification would not readily emerge in ISA, even in the more structured ICSID setting.

Tribunals are typically under a formal duty to apply the substantive law laid down by a treaty, each of which comprises a discrete inter-state contract, with its own particular “object and purpose,”\textsuperscript{23} negotiating history, and so on. It is true that most investment agreements, such as BITs and NAFTA, share certain common features, including norms that establish state liability for violations of rules on direct and indirect expropriation, the FET standard, a Most Favored Nation clause, and others. There is, however, no obvious reason why thousands of specific treaties should be bundled together and interpreted in the aggregate unless systemic coherence is a goal of a significant number of users, arbitrators, and officials.

Moreover, the interpreters of investment treaties do not sit as a permanent college, analogous to a judiciary, but rather combine in kaleidoscopic, \textit{ad hoc} arrangements. Arbitrators are of varying backgrounds, competence and reputation, and preferences and prospects for appointments to future tribunals. In three-member tribunals, they engage in strategic interactions with one another and, as a collective body, with the parties. There are several necessary conditions for precedent to emerge in such a context. Some tribunals must see it in their interest to develop the law, in ways that will serve to coordinate across treaty instruments, tribunals, and time. A rising number of counsel and arbitrators in future cases must credit legal interpretation and reasons-given in past awards with at least some persuasive authority. And a substantial number of these actors must invest in a sustainable, collective process that works to permit “the survival of good awards,” while filtering out poorly reasoned ones.\textsuperscript{24}


\textsuperscript{21} “That a special jurisprudence is developing from the leading awards in the domain of investment arbitration can only be denied by those determined to close their eyes,” Jan Paulsson, ‘International Arbitration and the Generation of Legal Norms: Treaty Arbitration and International Law’ (2007) unpublished paper, widely cited and distributed and on file with the author, 17.


\textsuperscript{24} Commission (n 22),156.
Formal law also constrains the evolution of at least certain notions of precedent. While ICSID arbitrators are under an express fiduciary duty to give reasons,\(^{25}\) they are not obligated to give good reasons, or to take into account the past reason-giving of their peers. Further, Article 53 of the ICSID Convention states: “The award shall be binding on the parties.” The phrasing echoes, in part, Article 59 of the Statute of the International Court of Justice: “The decision of the Court has no binding force except between the parties and in respect of that particular case.” These provisions are typically understood to occlude precedent conceived in *stare decisis* terms. Nonetheless, it is today widely recognized that international courts—including arbitral tribunals—can (and should) produce case law, the persuasive authority of which will depend on its longevity, coherence, and relevance to stakeholders beyond the parties.\(^{26}\)

Last, state power and international politics are a further potential restriction. One might predict that the more arbitrators commit to the construction of investment treaty provisions in common, the more likely it will be that States (as their principals) will react, to the extent that tribunals, through their lawmaking, displace states as drivers of the regime’s evolution.

The regime has surmounted these obstacles. Turning the argument on its head points towards a first-order explanation. It is precisely due to (a) the fragmentation of the sources, (b) the indeterminacy of key provisions shared by the treaties; (c) the one-shot nature of arbitration, (d) the transient composition of tribunals, and (e) the absence of formal mechanisms of horizontal coordination between arbitrators, that the system begs for precedent. The empirical record, in fact, strongly supports a functional argument of this type. As the number of high-stakes cases flowing into the system mounted, so did the demand for precedent (and for skilled, repeat arbitrators), which the system eventually supplied. As a result, ICSID officials,\(^{27}\) tribunals, arbitrators, counsel, and scholars intensified efforts to legitimize arbitral lawmaking, using the same types of arguments long deployed to legitimize the lawmaking of courts.\(^{28}\) Arbitral jurisprudence, the claim goes, serves the overlapping values of legal certainty and systemic coherence, of transparency and legitimacy, and of rule-of-law and justice.

Noting the emergence and consolidation of precedent-based practices in the regime tells us nothing about how precedent will evolve or operates. In fact, the community has generated differing notions of precedent. A first, decidedly minimalist, perspective scripts arbitrators as faithful agents of the contracting parties, rendering them strictly bound by state preferences. A tribunal applying treaty X has no business looking into how another tribunal has interpreted treaty Y, even when the applicable provisions are identical or similar, and even in a “like” case. It might, however, consider how past

\(^{25}\) Article 48(3) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1967) 575 UNTS 159 [‘ICSID Convention’].


\(^{27}\) ICSID Convention – A Commentary, para. 128: “The availability of the Centre’s case law should improve the predictability and quality of future decisions. It is much easier to advise parties about their chances to prevail in a potential or existing dispute on the basis of well-documented cases. The arbitration process will be more rational if the tribunals as well as the parties can build on the experience and wisdom of past decisions. While it is clear that there is no doctrine of binding precedent in ICSID arbitration, reference to earlier decisions is a useful tool in all systems of adjudication. The application of the Convention, the attendant Rules and Regulations as well as the substantive law relating to investments by a series of individually composed tribunals makes the development of a consistent case law particularly important.”

\(^{28}\) This has also led to counter-arguments, the most sophisticated of which have been mounted by Ten Cate—see The Costs of Consistency (n 3).
tribunals have interpreted and applied relevant provisions of treaty X to settle similar disputes arising under treaty X.\(^{29}\)

A much more prevalent view holds that tribunals should consider well-reasoned, prior decisions to be sources of persuasive authority. It emerged in an explicit form in the early 2000s,\(^{30}\) not least, in response to heavy reliance on past awards by parties’ in their submissions. By 2005, the AES v. Argentine tribunal could articulate it as follows:

> Each tribunal remains sovereign and may retain, as it is confirmed by ICSID practice, a different solution for resolving the same problem; but decisions … dealing with the same or very similar issues may at least indicate some lines of reasoning of real interest; this Tribunal may consider them in order to compare its own position with those already adopted by its predecessors and, if it shares the views already expressed by one or more of these tribunals on a specific point of law, it is free to adopt the same solution.\(^{31}\)

*Dicta* of this type is today so commonplace that one can say that it comprises a basic, first-order understanding of precedent in ISA.

An even more robust perspective asserts a positive arbitral duty to directly engage *la jurisprudence constante* – settled case law – when on point. Consider *Saipem Spa v. Bangladesh* (2007):

> The Tribunal considers that it is not bound by previous decisions. At the same time, it is of the opinion that it must pay due consideration to earlier decisions of international tribunals. It believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law and thereby meet the legitimate expectations of the community of States and investors towards certainty of the rule of law.\(^{32}\)

Under this notion of precedent, multiple forms of delegation and agency are nested within one another; and the duty to pursue doctrinal coherence is owed to the regime itself, not just to the contracting states and the disputing parties. Further, the Tribunal’s task is to render justice in a formal sense. In the absence of “compelling grounds,” the tribunal is constrained to decide “like” cases in “like” fashion. These obligations flow from an unwritten, but increasingly irresistible, command to the effect that arbitrators are to maximize the stability and coherence of their jurisprudence in the name of the “community.”

**Data**

I defined precedent (above) as those accreted materials, issuing from prior awards, that counsel and arbitrators use as building blocks to construct frameworks for argumentation and justification. Legum conceptualizes arbitral precedent in a congruent way: (a) for counsel – “a precedent is any decisional authority that is likely to affect the decision in the case at hand”; and (b) for arbitrators – “a

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\(^{29}\) A view expressed, for example, by the tribunal in *Glamis Gold Ltd. v. USA* (NAFTA/UNCITRAL Rules), Award of 8 June 2009, paras 3-9.

\(^{30}\) Commission (n 22), 132-133: At this time, tribunals had ceased “to disguise their outright reliance” on important “cases” and “precedents”.

\(^{31}\) *AES Corporation v. The Argentine Republic* (ICSID Case No ARB/02/17), Award of 26 April 2005, para 30.

\(^{32}\) *Saipem S.p.A. v. The People’s Republic of Bangladesh* (ICSID Case No ARB/05/07), Decision on Jurisdiction and Recommendations on Provisional Measures of 21 March 2007, para 67. See also *Victor Pey Casado et Fondation “Presidente Allende” c. République du Chili* (Affaire CIRDI No. ARB/98/2), Sentence arbitrale du 8 mai 2008, para 119 – the tribunal repeated the formula in French.
precedent is any decisional authority that is likely to justify the award to the principal audience for that award."

To help assess the evolution of precedent, we compiled comprehensive information on citation to prior awards and judicial decisions in all final ISA awards on the merits (liability). We counted every instance in which a tribunal had cited to decisions on which it positively relied, on which it expressly disagreed, and on which it engaged in order to distinguish the present from a prior case. We counted citations contained in summaries of counsels’ pleadings only if the tribunal later addressed the relevant arguments in its own assessment. If the tribunal did not make it clear that a cited case informed its interpretation of the law, we did not count it. Finally, within any single award, we counted multiple citations to the same case, on the same proposition, only once; multiple citations to the same award would be counted more than once only where a tribunal had invoked the award with regard to two or more independent propositions. Thus, the data analyzed represent only those materials actually used by tribunals in the interpretation and application of the law in final awards on the merits. They are therefore a robust, relatively direct, indicator of the influence of precedent on decision-making.

Here I present descriptive statistics on citations to case law upon which tribunals explicitly relied to support their reasoning. Tribunals have injected reasons into the ISA regime at a strikingly consistent rate, with the average number of citations per decision more than doubling since 2000 (figures 5 and 6). As awards have accumulated, the number of precedents in the system has grown exponentially. Indeed, 97% (n=2,108) of all citations added to the system between 1977 and 2014 have been produced since 2000, 84% (n=1827) since 2005, and 45% (n=971) in the 2010-14 period. The upshot is that, today, one can expect counsel to support every important pleading, and tribunals to defend virtually every important decision, with reference to case law.

The ISA regime has strengthened its relative autonomy, as a legal system in its own right, through reason-giving and precedent. In the pre-2000 period, tribunals tended to cite more to the International Court of Justice and other courts; thereafter, citations to their peers on ISA tribunals dominate counts (figure 7). Since 2005, about 90% of all awards cite to prior arbitral awards, in particular, to case law produced under the auspices of ICSID. Further, tribunals routinely site across treaty instruments. ICSID tribunals freely cite to NAFTA tribunals operating under UNCITRAL rules, for example, and vice-versa. The evidence strongly supports the claim that treaties are networked through arbitral case law.

We also compiled data at the domain level, that is, with regard to pleadings and interpretations in specific substantive areas of treaty law. Table 1 reports data for all legal domains generating at least 3% of total citations found in awards on the merits. In part 3, I examine in detail the construction of doctrine in the major substantive areas of investment law, including indirect expropriation and the FET. As I show, in many important cases, questions falling under categories such as Arbitrary or Discriminatory Treatment, Protection and Security, Denial of Justice, and an Umbrella Clause will overlap with, or be subsumed by, FET and Expropriation claims. What is clear is that formally autonomous legal domains have been steadily brought into closer relationship to one another as the case law has evolved, creating a system of interdependent norms.

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33 Legum, ‘The Definitions of ‘Precedent’ in International Arbitration’ (n 4).
34 Since 2000, ten awards have contained no counted citations, four of which have been rendered since 2004.
We also examined the extent to which the arbitrators’ approaches to important, recurrent questions have tended either (a) to converge around a leading case, or line of consistent precedents, or (b) to diverge, generating 2 or more lines of case law. We found important trends toward convergence in most areas (both case studies presented here). In some domains, a single case served to generate a high degree of consistency, where before there was no widely-accepted rule, interpretation of principle, or test. The Santa Elena v. Costa Rica award (2000), for example, initiated a powerful shift towards awarding compound interest, rather than simple interest, when calculating damages following a finding of state liability. And the Salini test is widely used to address the problem of determining what types of assets held by the investor are protected as an “investment.”

The drive toward jurisprudential coherence is facilitated by the fact that at least one member of a relatively small group of elite arbitrators is usually present on any tribunal, and repeat arbitrators that specialize in chairing tribunals dominate the production of awards (part 1). Still, there is no equivalent of the WTO Appellate Body in the regime, meaning that the process of building precedent depends on persuasion and some modicum of professional commitment of arbitrators to the value of consistency across cases, treaty instruments, and time. We therefore expect the impact of precedent on future awards to be uneven. Opposed positions on important questions remain, including, famously, on whether a breach of contractual commitments made to an investor on its own suffices to generate a breach of an “umbrella clause,” triggering liability under the treaty.

Our data also allow us to consider how arbitrators engage with the jurisprudence of international courts, a central preoccupation of the pluralist-constitutional model. In 78 different awards, tribunals cite to international courts 204 times. The count understates the impact of international case law. Some of the most highly-cited ISA awards have been those that invoke the authority of international courts when making major doctrinal moves. The most highly cited ISA award, Tecmed v. Mexico (2003), relied on the jurisprudence of the European Court of Human Rights to introduce the proportionality principle into ISA, and to bring the doctrine of “legitimate expectations” into the FET. Saluka v. Czech Republic (2006), a hugely influential and widely cited case standing for the proposition that the “legitimate expectations” of investors are to be balanced against the state’s “legitimate regulatory interests,” does not cite to international courts, but relies heavily on Tecmed and other ISA awards instead (part 3). Thus, a tribunal may rely on the rulings of international courts to help them craft a principle, which arbitrators will subsequently treat as a native fixture of investment law.

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35 Santa Elena v. Costa Rica (ICSID Case No ARB/96/1), Award of 17 February 2000, paras 97-10.
37 A typical example of an umbrella clause is Article X(2) of the Switzerland-Philippines BIT, which provides that “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.”
38 Of 13 awards (on the merits) invoking case law on this question, nine cite SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan (ICSID Case No ARB/01/13), Decision on Jurisdiction of 6 August 2003, para 172 (answering in the affirmative) and ten cite SGS Société Générale de Surveillance S.A. v. Republic of the Philippines (ICSID Case No ARB/02/6), Decision on Jurisdiction of 29 January 2004, para 129 (responding in the negative). Six explicitly address both awards, and most tribunals engaged the arguments they would reject in favor of the alternative.
39 Técnicas Medioambientales Tecmed S.A. v. United Mexican States (ICSID Case No ARB(AF)/00/2) [hereafter Tecmed], Award of 29 May 2003 has been cited 87 times overall and 48 times with respect to FET.
40 Saluka Investments B.V. v. Czech Republic (UNCITRAL) Partial Award of 17 March 2006. This is the eighth most cited award in the data set (n=57), and the fourth most cited case in the domain of FET (n=31).
41 Ibid, para 306.
It would be a serious mistake, however, to treat ISA tribunals as passive receptors of international law. Indeed, they are actively engaging in the construction of the law. Since 1990, the ISA regime has rendered more rulings on the merits involving property rights and the necessity defense under the law of state responsibility than the courts of any other international regime.

The Annulment Procedure

Given that virtually all ISA awards are published, that the parties routinely argue from the reasons given in past awards, and that tribunals have embraced the persuasive authority of their own precedents, it is no surprise that the issue of appeal has steadily moved onto the agenda. In the 2000s, a spate of inconsistent awards raised the political stakes for ICSID and stakeholders, generating intensive debate on the question of whether ISA needs an appellate mechanism. In 2004, in order “to foster coherence and consistency in the case law,” ICSID officials floated the creation of an appellate facility, an agenda item then quietly shelved as opposition emerged. Still, at least two dozen major trading nations, including the U.S. and the EU, have at times taken positions in favor of establishing some type of appellate body for the review of ISA awards, and proposals have proliferated. The collective action problems facing reform are formidable, perhaps irresoluble. Revising the ICSID Convention, or creating an appellate court for the regime as a whole, would depend upon state consensus on design details; indeed, unanimity would be required. Further, such efforts would inevitably pose the question of formalizing substantive investment law. Would a new treaty be necessary, or would states allow an appellate body to interpret the substantive law as an aggregate construction of BITs, regional arrangements, and general principles of law, as many tribunals now do?

At ICSID, demand for appeal has been processed through Article 52 of the Convention, under which either party “may request annulment” within 120 days of an award being “rendered.” The parties activate the procedure, but otherwise have no control over it. The President of the World Bank, typically in consultation with ICSID officials, appoints three “persons” to an ad hoc Annulment Committee [AC], which proceeds under pre-determined rules. An annulled award may revive the original dispute: either party may request a new tribunal, upon which the process will begin anew. Article 52(1) lists five headings under which claims can be brought, only two of which are relevant here: “(b) that the Tribunal has manifestly exceeded its powers”; and “(e) that the award fails to state the reasons on which it is based.”

All participants at ICSID – the Centre’s officials, tribunals and counsel, and members of ACs – fully understand the conceptual and legal distinctions between the annulment procedure and a system of appeal. By design, Article 52 does not delegate to ACs the authority to annul awards on grounds of a tribunal’s “errors-in-law,” a point forcefully stressed in a 2012 ICSID white paper. But participants unhappy with an award also have an interest in blurring boundaries. Does a tribunal “manifestly exceed

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42 Citations to scholarship omitted.
44 As suggested in numerous model BITs and Section 2103(b)(3)(G)(iv) of the 2002 Trade Promotion Act.
46 Articles 52(3) and 52(4) of the ICSID Convention.
its powers” if it manifestly applies the wrong law? Can giving the wrong reasons mean a failure “to state the reasons” altogether? When an AC answers “yes” to such questions, it effectively converts itself into an *ad hoc* appellate jurisdiction. It is significant that ACs have been doing so since the very first annulment decisions, while provoking deep controversy. ⁴⁸

We investigated the impact of the annulment procedure, adapting a framework for empirical analysis developed by Aronson. ⁴⁹ For each decision, an AC could proceed according to one of three approaches. Under Approach 1, the AC adopts a narrow construction of Article 52, and resists engaging in a substantive review of the legal reasoning of the tribunal. Under Approach 2, the AC engages in an “in-depth critique” of the reasoning, but chooses not to annul the award. Under Approach 3, the tribunal annuls the award based on the errors-in-law it contains, thereby obliterating the distinction between annulment and appeal. We also examined every AC decision in order to discern whether a party pleaded faulty legal reasoning under one of the headings in Article 52, a relatively pure measure of demand for appeal in the system.

Through 2015, ICSID *ad hoc* Committees had rendered 44 decisions: 32 rejected requests; 6 annulled an award in full; and 6 annulled in part. Strikingly, we found that in *every* annulment application leading to a final decision, applicants expressly pleaded errors in law, often across multiple domains of law. ⁵⁰ In 33 decisions, ACs adopted Approach 1, ⁵¹ although one AC took pains to agree with the reasoning of the award under review, after an intensive discussion of the international law of nationality requirements. ⁵² Four ACs adopted Approach 2, that is, they refused to annul while engaging in a substantive critique of the tribunal’s reasoning. The decision in *Togo Electricité and GDF-Suez Energie v. Togo*, for example, attacks the “confusing,” “awkward,” and “ambiguous” reasoning of the award. ⁵³ In *Iberdrola Energía v. Guatemala*, the AC rejected the tribunal’s legal analysis, while refusing to annul since coherent (if wrong) reasons were, in fact, given. ⁵⁴ The most important AC decision in this category is *CMS Gas Transmission v. Argentina*, which devoted some 50 paragraphs ⁵⁵ to just one egregious “manifest error-in-law.” ⁵⁶ The *CMS* AC refused annulment on jurisdictional grounds: an AC is not, after all, a “court of appeal” empowered “to substitute its own view of the law … for those of the Tribunal.” ⁵⁷ Nonetheless, the *CMS* AC’s decision exerted enormous precedential impact on subsequent awards, as discussed in the case study to follow. Seven ACs adopted Approach 3, engaging in appellate review in all but name. Each of these invoked grounds under either Article 52(1)(b) and/or Article

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⁴⁹ Aronson (n 48).


⁵¹ Citations to these cases omitted.

⁵² *Hussein Nuaman Soufraki v. United Arab Emirates* (ICSID Case No ARB/02/7), Decision of the ad hoc Committee on the Application for Annulment of Mr Soufraki of 5 June 2007.

⁵³ *Togo Electricité and GDF-Suez Energie Services v. Republic of Togo* (ICSID Case No ARB/06/7), Decision of the ad hoc Committee on the Application for Annulment of Togo Electricité and GDF-Suez Energie Services of 6 September 2011, para 191.


⁵⁶ Ibid, paras 130, 146 and 158.

⁵⁷ Ibid, para 135.
52(1)(e), annulling on the basis of errors in law.\textsuperscript{58} Thus, 27\% of AC decisions (n=12) have resulted in annulment, 16\% on errors-in-law (n=7).

I now turn to qualitative analysis of the “Argentina cases,” focusing on how tribunals and Annulment Committees (ACs) interpreted the “necessity” defense provided by Article XI of the U.S. – Argentina BIT. These awards are among the most controversial ever rendered, in that they initially produced inconsistent doctrinal approaches to key questions bearing on state liability in a set of high profile, “like” cases. Nonetheless, the system succeeded in eliminating certain politically-fraught interpretations of the necessity clause while leaving other issues open, with ACs operating, in effect, as appellate bodies.

The Argentina Cases: Arbitrating the “Necessity” Defense

The cases generated by the Argentina crisis of 1999–2002 have attracted more attention than any in ICSID’s history.\textsuperscript{59} Their salience is due to sheer numbers, the high value of the compensation being claimed, and the spectacular context – an economic meltdown of cataclysmic proportions – that generated them. To add to the drama, for disputes brought under the U.S.-Argentina BIT (1991), Article XI makes available to the Contracting States a derogation clause covering acts deemed “necessary” to meet the crisis. Argentina has systematically pleaded Article XI, and will presumably continue to do so in numerous future proceedings, testing ICSID’s capacity to generate consistent outcomes absent a doctrine of \textit{stare decisis} and appellate review. Our concern is on how the various tribunals and ACs responded to the Argentina’s pleading of the necessity defense, in the awards and decisions produced to date. As we show, the annulment process generated precedential materials that destroyed certain approaches to interpreting Article XI, while leaving other questions open.

\textit{The Orrego Vicuña Approach}

The cases examined here are based on the same facts, which can be briefly summarized. After overcoming military dictatorship (1973–85), Argentina sought to democratize and to build an open, market-based economy. In the 1990s, it signed BITs with 56 countries,\textsuperscript{60} ratified the ICSID Convention, and began privatizing state-run companies and utilities, with foreign participation. To encourage investment further, Argentina pegged its currency to the U.S. dollar, promised that capital could move freely in and out of the country, and gave investors in some utilities rights to participate in administrative decisions that would affect revenue streams. These arrangements unraveled during the 1999–2002 period, when the country experienced an exploding budget deficit, a balance of payments crisis, and


\textsuperscript{59} The literature on this line of cases is voluminous, having attracted more scholarly commentary than any other set of awards. Citations omitted.

mounting foreign debt. In 2001, Argentina made deep budget cuts and renegotiated its debt obligations (which did not stave off default). It eventually permitted a devalued peso to float on the markets, restricted withdrawals from bank accounts, and forced conversion of dollar deposits into pesos – so-called “Pesification.” It would probably be impossible to unravel the precise causal relationships that connected (a) the onset and deepening of the economic crisis; (b) mounting political instability, and (c) the increasingly desperate steps the Argentine State took to stave off collapse of its currency and banking system. Each of these processes fed into the other two, leading the situation to spiral out of control at a breathtaking pace. These questions of fact and causation were among the most difficult arbitrators faced.

What is undeniable is that Argentina’s response to the crisis destroyed the regulatory environment that foreign investors had relied *ex ante*. Dozens turned to arbitration at ICSID claiming, among other things, that Argentina violated the FET requirement, not least, by reneging on explicit promises. Article 2(a) of the U.S.-Argentina BIT states: “Investment shall at all times be accorded fair and equitable treatment . . .,” but the FET is otherwise left unqualified.61 There is virtually no disagreement that Argentina’s responses to the crisis, but for Article XI BIT, would constitute a violation of FET standards in the cases brought. Article XI of the U.S.-Argentina BIT stipulates that:

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.62

Article XI thus provides a “carve-out” exemption from BIT obligations for state acts designed to achieve certain, specified state purposes, while presenting an obvious, first-order interpretive problem. Assuming that a derogation claim is not self-judging, how should a tribunal evaluate a measure’s “necessity”?

To date, ICSID tribunals have issued six final awards on such claims: CMS (May 2005); LG&E (October 2006); Enron (May 2007); Sempra (September 2007); Continental Casualty (September 2008); and El Paso (October 2011).63 Each tribunal found that Argentina had violated the FET standard, and, cumulatively, they ordered Argentina to pay nearly $650 million plus interest in damages, on original requests totaling about $2 billion. In addition, ACs have rendered final decisions on five of these awards (the parties in Sempra withdrew from the annulment process). Each of these Committees discussed at length the tribunals’ various approaches to Argentina’s necessity defense, adding to the corpus of reasons available for use by future parties and tribunals. In these ten rulings, we directly observe the evolution and enforcement of precedent as it emerges and congeals.

They also raise intriguing questions about the system’s porosity, and capacity to adapt, to jurisprudential developments taking place in other international regimes. To anyone familiar with how WTO, EU, and ECHR judges have interpreted derogation clauses, Article XI might seem a prime

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62 Ibid, Article XI.
candidate for the application of the proportionality framework, at least on its face. Further, no language in the U.S.-Argentina BIT would preclude the development of such an approach, including the application of a less-restrictive means (LRM) test, a narrow tailoring requirement in American parlance. Under a proportionality-based approach, arbitrators would first decide if the crisis was severe enough to fall under one of the headings that make the necessity defense available. As a matter of comparative law (especially in the French and Spanish traditions), the notion of “public order” is a broad concept, encompassing core public policy concerns that state officials, including national judges, are under a duty to protect. Yet even if the parties to the BIT meant “the maintenance of public order” to apply only to threats to public security, it arguably covers the Argentina crisis. December 2001 saw rioting in the streets, a run on the banks, hyper-inflation, and political turmoil. Five presidents were appointed in a ten-day period beginning on December 20, 2001, in the shadow of credible threats of preparation for a military coup. By the end of 2002, one-quarter of all urban workers were unemployed, and a majority of the population lived under the official poverty line. Argentina could also claim that the situation posed a threat to its “essential security interests.”

If a tribunal did find that at least one of these headings covered the crisis, it would then probe the means-ends nexus which is at the heart of proportionality. In a first phase of analysis, the tribunal ensures that the measure was, in fact, taken to ameliorate the crisis. If so, the arbitrators would turn to a necessity test, which involves LRM testing – did the measure harm investors more than was necessary to meet the crisis? Necessity analysis may include, or be followed by, an overall balancing of interests. If Argentina fails any of these tests, the defense would be rejected.

In the first four awards rendered, each on privatized gas concessions, no ICSID tribunal embraced proportionality. The CMS, Enron, and Sempra tribunals found that Argentina had breached its obligations, while rejecting Argentina’s necessity claim. These tribunals were all chaired by Francisco Orrego Vicuña, a Chilean professor of public international law, who took a similar approach to Article XI in each case. Thus, subsequent awards cut and pasted holdings from prior ones, in particular, that of CMS.

What I am calling the “Orrego Vicuña approach” looks to customary international law (CIL) for interpretive guidance to the necessity defense, which led the CMS, Enron, and Sempra tribunals to deny that Article XI was an autonomous source of law. Under this approach, the CIL defense of necessity subsumes Article XI. It is widely agreed that Article 25 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts (2001), produced by the International Law Commission (ILC), best expresses the CIL of necessity. Article 25 ILC reads:

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 wrongdoing if: (a) the international obligation in question excludes the possibility of invoking necessity; or (b) the State has contributed to the situation of necessity.

65 The state would lose, therefore, if the measures were taken for an improper purpose (e.g., to punish an investor), or if means bore scant relationship to the purported ends.
66 In all of the rulings discussed here, all parties and arbitrators agreed that Article 25 ILC was authoritative.
Article XI BIT and Article 25 ILC are differently formulated. Article 25 is more restrictive: necessity may be invoked to excuse an act that violates international law when it is the “only way” a state can “safeguard an essential interest,” in the context of a “grave and imminent peril.” Article XI BIT expressly permits state measures under headings that cover a broader range of contexts, thereby precluding a finding of violation of the treaty in the first place. Whereas Article 25 ILC appears to favor an “only way” test for necessity, Article XI BIT looks tailor-made for a LRM test, at least to anyone versed in proportionality.

Grounding the analysis in Article 25 ILC, the CMS, Enron, and Sempra tribunals rejected Argentina’s necessity defense on three grounds. First, as the Enron and Sempra awards stated in identical terms, the economic crisis did not implicate an “essential interest of the State,” since it did not threaten the “very existence of the State and its independence.” The CMS tribunal emphasized that “the Argentine crisis … did not result in total economic and social collapse,” while indicating that it would take into account the state’s travails in the damages phase. Second, the CMS Tribunal interpreted the “only means” requirement under Article 25 to be fatal to the necessity plea, if any means other than those chosen had been available to Argentina. Since the record showed that experts and others disagreed on what mix of measures Argentina could have taken, the means chosen could not qualify as the “only means.” Third, the CMS Tribunal held that Argentina’s efforts to mitigate the crisis had actually contributed to it.

Meanwhile, the LG&E tribunal, which weighed in after the CMS, but before the termination of the Enron and Sempra, proceedings, also found breaches of the FET standard, but it accepted the necessity defense under both Article XI BIT and Article 25 ILC, separately. The Tribunal excused Argentina of liability, but only for measures taken during a specific period of “crisis” (December 2001–April 2003). The approach conflicts with that of Orrego Vicuña. In CMS, the Tribunal had stated that “the plea of state of necessity may preclude the wrongfulness of an act, but it does not exclude the duty to compensate the owner of the right … sacrificed,” a holding later echoed in the Enron and Sempra awards. The level of damages assessed by the LG&E Tribunal ($57.4 million on claims of $268 million), was far below the compensation ordered by the Orrego Vicuña tribunals in CMS ($133 million on claims of $261.1 million), Enron ($106 million on claims ranging between $388 and $543 million), and Sempra ($128 million on claims of $209.4 million). Finally, the Tribunal invoked proportionality, but only to indicate that Argentina had not violated the principle; the award otherwise shows no indication that arbitrators engaged in serious proportionality analysis.

The Impact of the Annulment Procedure

I turn now to the decisions of the ACs in CMS, Sempra, and Enron, which eviscerated the Orrego Vicuña approach. As discussed above, although ACs are not empowered to annul awards on grounds of

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68 Enron Corp (n 63), para 306; Sempra Energy (n 63), para 348.
69 CMS Transmission (n 63), paras 354-56.
70 Ibid, para 388.
71 Enron Corp (n 163), para 345; Sempra Energy (n 63), para. 394.
72 LG&E Energy Corp (n 63), para 195: “… the State has the right to adopt measures having a social or general welfare purpose. In such a case, the measure must be accepted without any imposition of liability, except in cases where the State’s action is obviously disproportionate to the need being addressed.”
“errors-in-law,” they routinely address such errors in *dicta,* and some have annulled awards for faulty reasoning under other available headings, in particular, “failure to state the reasons,” and “manifest excess of powers.” Although the AC chose not to annul the CMS award, it devoted a long section of its decision to a pointed criticism of the Orrego Vicuña approach. Less modestly, the ACs in *Enron* and *Sempra* annulled the tribunals’ awards, on the basis of deficient analysis of Article XI BIT, citing as authority the *AC-CMS* ruling.

ICSID officials, it would appear, sought to hard-wire the doctrinal authority of the AC in *CMS* in advance, appointing two members of the International Court of Justice, including the then-President of that Court, Gilbert Guillaume, and James Crawford who, as the ILC’s Special Rapporteur on State Responsibility, oversaw the drafting of Article 25 ILC. In its decision, the *AC-CMS* stressed that it did not have the authority to act as an appellate court; in particular, it could not quash an award on the basis of errors in law, no matter how serious. Guillaume then painstakingly detailed the “manifest” errors of interpretation committed by the CMS tribunal, the most important being the conflation of Article XI BIT and Article 25 ILC. In the AC’s estimation, the CMS tribunal should have analyzed pleadings under the two norms separately, given their different functions. CIL makes available the necessity defense for a breach of international law, once such a breach has been admitted or found. In contrast, the plea under Article XI (BIT), if accepted, precludes the finding of a treaty violation in the first place. In blunt *dicta,* Guillaume then went on to state:

> [The] errors made by the Tribunal could have had a decisive impact on the operative part of the Award. … In fact, it did not examine whether the conditions laid down by Article XI were fulfilled and whether, as a consequence, the measures taken by Argentina were capable of constituting, even *prima facie,* a breach of the BIT. If the Committee was acting as a court of appeal, it would have to reconsider the Award on this ground.74

These and other findings immediately impacted the work of tribunals and ACs, already underway.

A second AC annulled the *Sempra* award on like terms, citing extensively to the *AC-CMS* decision. Echoing the latter’s views, the *Sempra-AC* noted that while “it may be appropriate to look to customary law as a guide to the interpretation of terms used in the BIT,” “[i]t does not follow … that [Article 25 ILC] establishes a ‘peremptory definition of necessity and the conditions for its operation.’”75 The Committee then went on to hold that the Tribunal’s failure to separately analyze and apply Article XI BIT constituted a “total” failure to apply the law, and thus a “manifest excess of powers” warranting annulment.76 Under this view, the Tribunal should have determined, first, whether Article XI BIT (the “primary” law governing the issue) covered the measures under review; only if Article XI did not apply should the Tribunal have moved to consider if breaches of the BIT were excused under CIL (the secondary law governing the issue). In contrast, the Tribunal had proceeded as if Article 25 ILC simply “trumped” Article XI BIT.77

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74 CMS Transmission, Annulment Proceedings (n 73), para 135.
75 Sempra Energy, Annulment Proceedings (n 73), para 197.
76 Ibid, paras 213-14.
The AC-Enron took a different tack, directing attention to the Tribunal’s deployment of an “only means” test. Among other problems, that AC found that the Tribunal had failed to give reasons for how it interpreted the “only way” clause of Article 25 ILC. The AC opined that necessity analysis under Article 25 could just as well accommodate a LRM test, or an assessment of the effectiveness of the state measure under review in light of its harm to investors, both of which are congruent with the proportionality principle. The Enron Tribunal had (apparently) relied solely on the expertise of one economist to justify its rejection of Argentina’s defense – it failed an “only way” test – without considering it in any other way. The AC-Enron refused to indicate whether it agreed with the Tribunal’s conflation of Article XI BIT and the CIL defense. It saw no point in doing so, in part, because it had found that the Tribunal’s rejection of the necessity defense under both Article XI and Article 25 ILC were thoroughly “tainted by annulable error.”

In sum, the annulment committees destroyed the Orrego Vicuña approach, expressing strong disagreement with each of its core components.

### Necessity and Proportionality

In the fifth award, Continental Casualty v. Argentina – chaired by a former member of the WTO-Appellate Body, Giorgio Sacerdoti – the Tribunal gave proportionality pride of place, just as another Tribunal (also chaired by Sacerdoti) would do for purposes of FET analysis in Total v. Argentina (below). Continental Casualty, a provider of employment compensation insurance in Argentina, maintained a portfolio of low-risk capital investments in Argentine financial institutions. Much of the value of this portfolio was lost with pesification and the rescheduling of payments on various debt instruments held by the company. The company asked for $114 million in compensation. Citing to the AC-CMS decision, Sacerdoti focused on Argentina’s necessity plea under Article XI BIT, relegating CIL to virtual irrelevance. He then confronted the crucial issue left open by the CMS-AC: what methodology should arbitrators use when they assess an Article XI BIT defense?

In response, Sacerdoti adapted the WTO-AB’s approach to adjudicating “necessity” in the derogation clauses found in Article XX of the GATT 1947. He justified the move as follows:

Since the text of Art. XI derives from the parallel model clause of the U.S. Friendship, Commerce, and Navigation treaties, and these treaties in turn reflect the formulation of Art. XX of GATT 1947, the Tribunal finds it more appropriate to refer to the GATT and WTO case law which has extensively dealt with the concept and requirements of necessity in the context of economic measures derogating to the obligations contained in GATT, rather than to refer to the requirement of necessity under customary international law.

The award also notes that the investor had pleaded the case law of the WTO AB on Article XX GATT in the hearings.

The Tribunal found that the economic crisis fell within the coverage of Article XI, under both the “maintenance of public order” and “essential security interests” headings. It then recognized, citing to the case law of the ECHR, that the state possessed, *ex ante*, “a significant margin of appreciation” in the

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78 Enron Corp., Annulment Proceedings (n 73), paras 369–71.
79 Ibid, para 405.
80 Investors have brought new proceedings in both the Sempra and Enron cases, and the LG&E Energy annulment application was withdrawn by the parties.
81 Cont’l Cas. Co. (n 63).
82 Ibid, para 192.
83 Ibid.
determination of how to meet the crisis, thus setting the stage for necessity analysis. Sacerdoti then meticulously laid out the approach developed by the WTO-AB, extensively quoting from the leading cases. The necessity of a measure would, accordingly, be determined through “a process of weighing and balancing of factors,” including the relative importance of interests furthered by the challenged measures, the contribution of the measure to the realization of the ends pursued, and the restrictive impact of the measure on international exchange. The Tribunal then assessed the state measures under review with regard to a list of alternatives that, the claimant had argued, were just as effective and reasonably available, but which would have done less harm to the investor. With one minor exception (worth a scant $2.8 million), the Tribunal rejected these arguments, finding that Article XI BIT indeed covered Argentina’s measures.

The award survived annulment. The AC-Continental Casualty stressed its agreement with the reasoning of the AC-CMS and AC-Sempra on the distinction between Article XI BIT and the CIL defense of necessity. With regard to the Tribunal’s use of proportionality, the AC-Continental Casualty rejected the company’s claims to the effect that the Tribunal had “erred in its analysis” of WTO jurisprudence. “The Tribunal was clearly not purporting to apply that body of law,” the AC held, “but merely took it into account as relevant to determining the correct interpretation and application of Article XI of the BIT.”

The most recent award is El Paso, also involving an international energy company that invested heavily in the oil and natural gas sector. Much of the investment was lost by the time it sold its holdings, in the midst of a crisis in full bloom. The Tribunal, relying heavily on Sacerdoti’s Continental Casualty award and the ruling of the AC-CMS, focused on Article XI BIT, treating Article 25 ILC as “secondary law” (to be applied “only” once Article XI is found not to apply). Contrary to the LG&E and Continental Casualty tribunals, however, the El Paso Tribunal rejected Argentina’s necessity defense, on a finding that the state’s measures under review had “contributed to the crisis to a substantial extent, so that Article XI cannot come to its rescue.” Expressing a dissenting opinion within the award itself, Brigitte Stern (one of the most active repeat arbitrators, typically appointed by states) declared that she would have taken the position of Continental Casualty on the necessity of Argentina’s measures. In Stern’s view, the complexity of the situation made it all but impossible for any tribunal to unravel the precise causes of the crisis so as to impute them to acts by Argentina. At annulment, Argentina raised these and other arguments, which the AC rejected: the tribunal alone possessed the competence to determine the facts bearing on the necessity plea.

An Assessment

In the Argentina case, annulment proceedings operated as a mechanism for generating precedent. While each successive tribunal engaged with existing awards on the books, the AC-CMS functioned as a focal point for ongoing coordination among tribunals and ACs. The process steadily reduced the range of defensible decisions available to tribunals.

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84 Ibid., paras 193-194 (citing to the decisions of the WTO Appellate Body in Korea-Beef and EC-Tyres).
85 The Tribunal found a breach of the FET standard on only one claim. Its acceptance of Argentina’s plea of necessity under Article XI of the BIT meant rejecting the others.
87 Ibid, para 133.
88 El Paso (n 63). The Tribunal also agreed that “the protection offered by the BIT to the Claimant’s investment is suspended to the extent that Article XI is applicable.” – see ibid, para 649.
89 Ibid, para 665; see also ibid, para 624 (finding that necessity cannot be invoked if the party has substantially contributed to it).
90 Ibid, paras 666-70.
91 Under the Kompetenz-Kompetenz principles and ICSID Rule 34(1).
92 El Paso, Annulment Proceedings (n 73), paras 168, 193-203.
The arbitral process has firmly settled the following legal question, a remarkable result given the small number of awards. First, Article XI BIT is the primary law; where it applies, the customary law of necessity, as expressed by Article 25 ILC, is largely “superfluous.” Second, Article XI can cover measures that are necessary to respond to an economic crisis of the kind experienced by Argentina in the 1999–2002 period. Third, the successful invocation of the necessity defense renders “inapplicable” the BIT’s “protections,” thereby precluding compensation. Fourth, it is not appropriate to apply an “only means” test to assess the necessity of Argentine measures under Article XI BIT. Indeed, arbitrating the necessity defense has produced viable alternatives to the “only means” test, namely, the LRM tests suggested by the AC-Enron (in the context of Article 25 ILC), and by Sacerdoti (in the context of the U.S.-Argentina BIT) in Continental Casualty.

Not everyone agrees. Jose Alvarez and his collaborators have taken diametrically opposed positions on each of these four issues. In a first paper, Alvarez and Khamsi argued that the CMS, Enron, and Sempra Tribunals got it right in virtually all important respects, and that the AC in CMS got it wrong. In a follow-up paper devoted to criticizing Continental Casualty, Alvarez and Brinks aggressively advocate the basics of CMS, supported mainly by analysis of the historical origins of Article XI BIT (but exclusively from the US point of view). They sum up their view as follows: “Article XI was essentially an attempt to preserve existing customary defenses and not to derogate from them.”

In the face of progressive arbitral lawmaking, an appeal to the original intent of US treaty-makers is perhaps the only lawyerly way to defend the Orrego Vicuña approach that remains. But it also a rear-guard effort designed to revive propositions that have been defeated through networked decision-making. It is a blunt fact that none of the five ACs that have weighed in thus far provide any support for the view put forth by Alvarez and Khamsi and Alvarez and Brinks. Recall that the AC-CMS characterized the conflation of Article XI BIT and Article 25 ILC as “a manifest error in law.” The AC-Sempra put it this way: “It is apparent … that Article 25 does not offer a guide to interpretation of the terms used in Article XI. The most that can be said is that certain words or expressions are the same or similar.” Moreover, faulty necessity analysis – of exactly the same kind as that endorsed by Alvarez and his co-authors – led to annulment of the Enron and Sempra awards. Even if one were to accept their arguments as defensible, in theory, the present state of the jurisprudence on Article XI BIT renders them, at best, academic. In any event, I assign more weight to the positions taken by the President of the ICJ, a second Justice of the ICJ, and the ILC’s Special Rapporteur on State Responsibility (the composition of the CMS Annullment Committee) than to Alvarez. Arbitrators with responsibilities to make the authoritative choices in law have done so as well.

It has since come to light that Orrego Vicuña was dismissed in 2013 from an ICSID tribunal for lacking impartiality with regard to his views on the necessity defense, namely, that an “essential security” clause of the kind found in Article XI BIT “should be interpreted so as to conform to the ‘state of

93 Cont’l Cas. Co. (n 63), para 162; El Paso Energy (n 63), para 552 (quoting Continental Casualty).
94 Cont’l Cas. Co. (n 63), para 164.
97 CMS Transmission, Annulment Proceedings (n 73), para 146.
98 Sempra Energy, Annulment Proceedings (n 73), para 199.
necessity’ test under CIL.” The disqualification\textsuperscript{100} was decided by the Voce-President of the International Court of Justice, Peter Tomka. In the words of a commentator with access to the full decision, Tomka stressed that:

Prof. Orrego Vicuña has stuck to this view through three arbitral awards, but also in an academic [paper] defending this view in the aftermath of the partial or total annulment of the … arbitral awards in question. … Indeed, Judge Tomka laid particular weight upon Prof. Orrego Vicuña’s 2011 [contribution to a Festschrift in honor of Michael Reisman],\textsuperscript{101} where he discloses that he has reviewed the reasoning of the various ICSID ACs, but hewed to the same view as earlier.”\textsuperscript{102}

Prior to the decisions of the ACs in CMS, Enron, and Sempra, Professor Orrego Vicuña had served as president of more ICSID tribunals than any other arbitrator. After these decisions, he has been exclusively nominated for appointment by investors. In this line of case, the regime evolved and enforced a relatively hard version of precedent.

III Balancing and the Public Interest

In ISA, tribunals routinely review official acts that states seek to defend in light of sovereign prerogatives and the duty to act in the name of the public interest. In this section, I address four overlapping questions. First, what types of state measures do tribunals review? Second, how do tribunals arbitrate claims in which states plead the general interest? Third, how do tribunals consider investors’ entitlements in relation to the state’s regulatory prerogatives? I am interested not only in who wins and loses, but in the extent to which tribunals take into consideration a state’s “right to regulate.” Fourth, have states used their treaty-making authority to constrain arbitrators going forward?

Review of State Measures: An Overview

In a first step toward addressing these questions, we gathered information on the types of measures attacked by investors as violations of a host state’s treaty obligations, as recorded in the cases contained in our data set on final awards on the merits. We were able to obtain such information on 139 awards, the largest number of such decisions yet analyzed. We paid particular attention to the distinction between general measures – a state act that regulates activity, or applies to all persons active, in a particular policy domain\textsuperscript{103} – and individual acts that apply to a specific investment. When tribunals engage in the review of general measures, states will routinely plead public interests. The distinction will blur insofar as the tribunal finds it impossible to review an individual measure without examining a general measure to which it is connected. In all cases, we analyzed the pleadings of the parties, focusing on claims brought under the expropriation and FET headings. We then examined each tribunal’s decision, paying particular attention to how arbitrators dealt with situations in which the state pleaded its regulatory prerogatives or a public interest.

\textsuperscript{100} Orrego Vicuña was nominated by the investor-claimant. Two more challenges were filed against him in separate cases, one unsuccessfully (Repsol S.A. and Repsol Butano S.A. v. Argentine Republic (ICSID Case No ARB/12/38)) and the other successfully (Burlington Resources Inc. v. Republic of Ecuador (ICSID Case No ARB/08/5)).
\textsuperscript{102} Peterson (n 99). Judge Tomka’s comments apply fully to Alvarez et al.’s defence of these same views.
\textsuperscript{103} Statutes are presumptively general measures, while some administrative decisions would also meet the criteria, e.g., a revision of the tax code through ministerial decree.
The Review of “General” Measures

Investors claimed that at least one general measure was a source of an investment treaty violation in 40 awards (29%). Some of these rulings concern the same set of measures. The “Argentina cases,” disputes based on the effects of a set of emergency measures adopted to meet that state’s economic crisis of 1999-2002, comprise the largest such cluster, generating 14 awards. In each of these cases, claimants attacked pesification and bank controls, among other measures, prevailing in 12. In three NAFTA awards – ADM, Cargill, and Corn Products – a Mexican tax on corn sweeteners used in soda drinks, a measure designed as a trade counter-measure, favoring Mexican sugar producers, produced three violations.\(^{104}\) The third cluster, of three awards, involves Ecuador’s Law 42 (2006) and a further implementing regulation. In 2006, Ecuador adopted a statute imposing a 50% windfall profits tax on foreign oil companies which, 18 months later, it raised to 99%. Tribunals found state liability in all three cases, Law 42 and the amending decree being the direct source of two such violations. Tribunals found general measures to be the source of a violation in seven other, discrete cases; and they rejected such claims in the remaining 16. Table 2 summarizes these data.

----- Table 2 here -----

The Argentina cases are the most politically and legally significant group of awards that review general measures of host states, and they gave a series of tribunals the opportunity to take a position on similar pleadings (part 2).\(^{105}\) Tribunals dealt with public interest arguments, including the necessity defense, in diverse ways, but none failed to take into account these interests at the liability or damages stage. In the Mexican cases at NAFTA, arbitrators engaged the rulings of a WTO panel and the Appellate Body (which had found that the same law violated WTO rules). All three tribunals found that Mexico had intentionally adopted the law to harm foreign interests based on facts left virtually unchallenged by Mexico. In the disputes raised under Ecuador’s Law No. 42, two tribunals – in Occidental (2012) and Perenco (2014) – found that these measures violated FET standards. While arbitrators acknowledged that “there cannot be any doubt that a sovereign State has the undisputable sovereign authority to enact laws in order to raise revenue for the public welfare,” such a “right” is also subject to “rule of law.”\(^{106}\) Both tribunals also found, and Ecuador did not dispute,\(^{107}\) that officials had taken these measures in order to coerce oil companies to renegotiate their participation contracts with the state. As the Perenco tribunal put it: “Law 42 at 99% unilaterally converted the Participation Contracts into de facto service contracts while the State developed a new model of such contracts which it demanded the contractor to sign.”\(^{108}\) In the third case (Burlington), the tribunal rejected the tax claim but found a violation for the physical seizure of the investor’s oil field (which we coded as an individual measure).

The number of non-Argentina cases in which a pleading against a general measure is registered is 26, most of which (n=18) involve discriminatory taxes, subsidies, or export controls. In most of these

\(^{104}\) Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States (ICSID Case No ARB (AF)/04/5), Award of 21 November 2007; Cargill, Incorporated v. United Mexican States (ICSID Case No ARB (AF)/05/2), Award of 19 September 2009; Corn Products International, Inc. v. United Mexican States (ICSID Case No ARB (AF)/04/1), Award of 18 August 2009.

\(^{105}\) For an overview of the cases from the perspective of public interests, see Giorgio Sacerdoti, ‘General Interests of Host States in the Application of the Fair and Equitable Treatment Standard’ in Giorgio Sacerdoti (ed), General Interests of Host States in International Investment Law (Cambridge University Press, Cambridge 2014) 3-25.

\(^{106}\) Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador (ICSID Case No ARB/06/11), Award of 5 October 2012, para 529.

\(^{107}\) Perenco Ecuador Ltd. v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador) (ICSID Case No ARB/08/6), Decision on the Remaining Issues of Jurisdiction and on Liability of 12 September 2014, para 409.

\(^{108}\) Ibid, para 409.
case (n=15), claimants target changes in taxation. The remaining cases concern a variety of specific statutes or regulations allegedly tailored to harass the investor, or to unravel specific commitments the host state had made to induce the investment in the first place. Of the non-Argentina cases in this group (n=26), 16 (62%) rejected investors’ claims. As discussed below, many tribunals, first, expressly recognized a state’s “police power” prerogatives under CIL, also called the “regulatory power exception,”109 or the state’s “right to regulate,”110 and then, in effect, defer to the state’s discretion to change the law in light of changing circumstances.111

The Review of “Individual” Measures

In more than 70% of the awards in our data set (n=99), investors do not attack general measures. In virtually all of these cases, investors alleged that state officials took specific decisions or legal actions designed to harass them,112 to interfere with their operations,113 or to alter unilaterally investor-state contracts or agreements.114 Claimants typically allege that these acts violate standards of due process, failing requirements of transparency, notice, the right to be consulted and heard, and reason-giving, often in breach of that state’s own public law requirements when it comes to domestic governance.115 Arbitrators developed the FET, in part, to cover these latter pleadings. As Table 2 reports, claimants prevailed in their pleadings against an individual measure about 53% of the time (n=58).

Assessment

To what extent have tribunals failed to take seriously the public interest when pleaded by the state? Have they, in effect, placed a thumb on the scales in favor of investors? Of course, even the most

109 Saluka v. Czech Republic (n 40), para 471.
110 Total S.A. v. The Argentine Republic (ICSID Case No ARB/04/01), Award of 8 December 2010 [“Total v. Argentina”] para 123; El Paso (n 63), paras 72-76.
111 In Chemtura Corporation v. Government of Canada (UNCITRAL), Award of 2 August 2010, the claimant challenged measures that would phase out use of a certain pesticide it produced, a tribunal composed of three elite arbitrators (Gabrielle Kaufman-Kohler, Charles Brower and James Crawford) deferred to the scientific expertise of Canadian regulators and noted Canada’s “margin of appreciation”: paras 123, 134-138. It then engaged in comparative analysis of the environmental regulation in other states, and of relevant international instruments, in the style of the WTO and ECHR courts (at para 135).
112 Recent awards in which violations were found for harassment include: Joseph Charles Lemire v. Ukraine (ICSID Case No. ARB/06/18), Award of 28 March 2011; Gemplus S.A., SLP S.A.; Gemplus Industrial S.A. de C.V. v. The United Mexican States (ICSID Case No ARB(AF)/04/3), Award of 16 June 2010; Mr. Franck Charles Arif v. Republic of Moldova (ICSID Case No ARB/11/23), Award of 8 April 2013.
113 Recent awards in which violations were found for interference include: Alpha Projektholding GmbH v. Ukraine (ICSID Case No ARB/07/16), Award of 8 November 2010; Hulley Enterprises Limited (Cyprus) v. The Russian Federation (UNCITRAL, PCA Case No AA 226), Award of 18 July 2014; Mobil Corporation, Venezuela Holdings, B.V., Mobil Cerro Negro Holding, Ltd., Mobil Venezolana de Petróleos Holdings, Inc., Mobil Cerro Negro, Ltd., and Mobil Venezolana de Petróleos, Inc. v. Bolivarian Republic of Venezuela (ICSID Case No ARB/07/27), Award of 9 October 2014.
114 Recent awards in which violations were found with regard to contractual obligations undertaken include: AES Summit Generation Limited and AES-Tisza Erőmű Kft v. The Republic of Hungary (ICSID Case No ARB/07/22), Award of 23 September 2010; Railroad Development Corporation v. Republic of Guatemala (ICSID Case No ARB/07/23), Award of 29 June 2012; Gold Reserve Inc. v. Bolivarian Republic of Venezuela (ICSID Case No ARB(AF)/09/1), Award of 2 September 2014.
115 Recent awards finding violations for failures to provide due process, as provided for by domestic law, include The Rompetrol Group N.V. v. Romania (ICSID Case No ARB/06/3), Award of 6 May 2013; Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation v. Romania (ICSID Case No ARB/10/13), Award of 2 March 2015; William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bileon of Delaware Inc. v. Government of Canada (UNCITRAL, PCA Case No 2009-04), Award of 17 March 2015.)
informed observers may disagree on the proper response to these questions, indeed, they have given rise to a great deal of controversy. My approach here is to address them empirically, as systematically as possible, considering every case in the data set in light of these issues.

Three findings deserve emphasis. First, I found no influential award post-Saluka (2006, discussed below) that I would classify as an obvious failure on the part of the tribunal (a) to deliberate the scope of the state’s sovereign prerogatives, or (b) to consider carefully the public interest. In virtually all cases in which tribunals reviewed general measures and found against states (n=22), they gave defensible reasons, including for how they had balanced. As we will see in the case study below, most tribunals stressed that they were not sitting in judgment of statutes or other general measures but, rather, considering the application of these measures to the investor in context, hence the importance of the FET and principles related to due process. The Argentina awards in this set of cases (n=12, the first of which dates from 2005) involved general measures upon which the investor had relied, and which the host state had explicitly promised would be maintained. Observers will differ in how they assess the quality of the reasons given by tribunals when they review state measures and balance, but I found no glaring examples of negligence. In the vast majority of awards, tribunals made good faith efforts to take seriously the state’s “right to regulate.” Second, I found no evidence for the view that FET doctrine biases tribunals against states in any structural sense. As I report in the next section, the success rate for arbitrating FET claims (and claims targeting individual measures, more generally), hovers around 50%. This figure is akin to what one finds in the free movement of goods domain in the EU,116 and it conforms to certain well-known theories of adjudication, including Priest-Klein, which predicts a “tendency toward 50 percent plaintiff victories among litigated cases,” under conditions of uncertainty.117 In balancing situations, it is the factual context, not the law per se, that varies across cases, which is a strong condition of uncertainty. Third, we found no evidence for the view that arbitrating the FET has led to regulatory freeze or paralysis, and we know of no empirical scholarship demonstrating the contrary.

Readers should consider these conclusions in light of the evolution of the FET standard, to which we now turn.

Constructing the Fair and Equitable Treatment Standard

The evolution of the FET is a stunning example of expansive arbitral lawmaking. ICSID tribunals have developed the FET as a type of “master norm,” an overarching, quasi-“constitutional” principle.118 The result is that, today, it is settled case law that the FET is comprised of a wealth of relatively elastic sub-principles,119 including: good faith; due process, the reason-giving requirement, and access to justice; regulatory consistency and transparency; reasonableness, non-arbitrariness, and non-discrimination; and the proportionality principle. A succession of tribunals gradually assembled these norms under a covering principle, the “legitimate expectations” of the investor [LE]. The move enables the assessment of virtually every aspect of the relationship between the investor and the host state in what is, today, a relatively stable doctrinal structure.120

118 Roland Kräger, Fair and Equitable Treatment in International Investment Law (Cambridge University Press, Cambridge 2011), 308-316: see for a discussion on the view that the FET comprises a “master norm”, as well as a mechanism of “constitutionalisation”.
119 For an analysis of developments in these areas, see Giacinto della Cananea, Due Process of Law Beyond the State: Requirements of Administrative Procedure (Oxford University Press 2016), Chapters 3 and 4.
Inserting the FET into investment treaties reduced states’ contracting costs *ex ante*, while delegating massive interpretive authority to arbitrators *ex post*. Tribunals embraced the FET for its flexibility, enabling them to tailor their rulings to the facts under the rubric of principles. Today, a jurisprudence of general principles comprises the core of the law and politics of ISA, including debates about if and how to curtail arbitral lawmaking power.

The FET is a paradigmatic example of an open-ended, incomplete norm, combining expansive functional logics, indeterminacy, and breadth. Different formulations of the standard could lead arbitrators to wide variance in outcomes. Consider the following examples, taken from agreements that entered into force in the 1990s, which we reproduce in their entirety:

- **NAFTA (e.i.f, 1995):** “Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.”

- **U.S.-Argentina BIT (e.i.f, 1994):** “Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law.”

- **The France-Mexico BIT (e.i.f., 1998):** “Each Contracting Party shall extend and ensure fair and equitable treatment in accordance with the principles of International Law to investments made by investors of the other Contracting Party in its territory or in its maritime area, and ensure that the exercise of the right thus recognized shall not be hindered by law or in practice.”

- **The European Energy Charter (e.i.f., 1998):** “Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment.”

The NAFTA provision – Article 1105 – is included under the heading, “Minimum Standard of Treatment” thereby invoking the customary international law (CIL) standard owed to aliens, which predates the emergence of the FET. The FET found in the U.S.-Argentina BIT closes with reference to international law, as a floor below which treatment may not fall, whereas the France-Mexico BIT version connects the FET to “the principles” of international law, expressly conferring a justiciable “right” on the investor. The Energy Charter announces the FET without mentioning international law at all, which is the case of most BITs.

Two general points deserve emphasis up-front. First, in the great wave of investment agreements signed in the 1990s, states provided virtually no guidance on how the FET was to be interpreted, leaving it to arbitral process. Drafters mostly cut and pasted from a basic template. Second, an FET provision qualified by international law will not necessarily restrict lawmaking; indeed, reference to international law might just as well provoke it. There is no consensus, after all, on the content and scope of the minimal standard of treatment owed to aliens, or on the degree to which other relevant CIL standards might subsume the minimal standard. In deciding whether and how to apply a CIL norm, judges assess the consistency of state practice in light of *opinio juris*, which typically leads them to survey relevant decisions by other courts and officials, as well as doctrinal commentary. CIL evolves over time through state practices (including their treaty-making activities), judicial decisions, and legal scholarship. It

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121 In the important awards interpreting the FET, the tribunals themselves acknowledge the challenges posed by the FET’s incompleteness, e.g., Saluka (n 40) paras 263-265.
would be defensible for an arbitrator to find that the FET has evolved through (a) practice, as evidenced by the explosion of investment treaties that contain it, and (b) arbitral interpretation and enforcement. If so, one could find evidence of emergent CIL norms in the arbitral interpretation of investment treaties.

Where an FET provision references international law without mentioning CIL, arbitrators could appeal to the “general principles of law” to justify a major lawmaking move. General principles are unwritten, judge-made legal norms on which courts have long relied upon to build their own legal systems, ostensibly to “fill” important “gaps.”\(^{122}\) Moreover, general principles comprise an autonomous source of international law,\(^{123}\) fully applicable in arbitrations under the ICSID Convention.\(^{124}\) Tribunals may also mold the FET into a placeholder for a general principle. Looking forward, some tribunals have constructed the FET as an autonomous principle, at times in synergy with an evolving CIL. In doing so, they assert their own primacy over the law’s evolution, which I find neither surprising nor controversial. In any event, all of these bodies of norms – the FET, CIL, and general principles – are incomplete. States can respond to lawmaking they do not like by stating as much, appointing arbitrators presumed to be allies, drafting and publishing new model BITs, renegotiating existing treaties, and considering exit strategies.

**BIT Arbitration: Legitimate Expectations and the Right to Regulate**

The FET has evolved in relation to three other important substantive protections in BITs. First, all investment treaties prohibit expropriations that fail to meet certain legal standards,\(^{125}\) the most common of which are non-discrimination, due process, the showing of an important public purpose, and the payment of prompt, adequate, and effective compensation. Second, virtually all BITs prohibit so-called “indirect” expropriation, that is, measures taken to have an “equivalent effect” to expropriation. These might include regulatory takings, “creeping” incursions on property rights, failure to regulate and other state omissions – interferences that, in effect, would “substantially deprive” the investment of its value. Third, most but not all BITs contain a so-called “umbrella clause,” which covers breaches of specific promises to an investor, most obviously, of contractual commitments entered into by a state entity.\(^{126}\) Umbrella clauses can shift to ISA disputes that, in ICA, would be treated as contractual. Arbitrators have developed the FET in ways that can supplement the purpose of these norms, or even supplant them altogether, which has recast the law and politics of ISA in important ways.

As a strategic matter, a state inclined to expropriate or encroach on an investment in other ways, will have an interest in disguising its intentions, which the indirect expropriation heading means to smoke out and capture. In this cat and mouse game, a state may turn to ever more subtle forms of encroachment. We can expect a tribunal to rely on expropriation norms in a clear and egregious case, but these


\(^{123}\) Article 38, Statute of the International Court of Justice T.S. 993.

\(^{124}\) Article 42, Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1967) 575 UNTS 159. See also Chapter 2.

\(^{125}\) If an expropriation meets these standards, then it is lawful under the treaty. Typically, the investor will then be compensated for the value of the investment at the date of the taking. If the expropriation violates the treaty, the state may be liable for lost profits as well.

\(^{126}\) A standard formulation reads: “Each Contracting Party shall observe any obligation it may have entered into with regard to the treatment of investments of nationals of the other Contracting Party.” Claims made pursuant to an umbrella clause have concerned licensing agreements, contract-based concessions for the provision of public services and tax exemptions and other inducements. Arbitral case law on umbrella clauses is notoriously inconsistent. – see Jarrod Wong, ‘Umbrella Clauses in Bi-Lateral Investment Treaties: Of Breaches of Contract, Treaty Violations, and the Divide Between Developing and Developed Countries in Foreign Investment Disputes’ (2006) 14 George Mason Law Review 135.
provisions are blunt and stigmatizing instruments.\textsuperscript{127} Like the FET, they are also products of incomplete treaty-making. In BITs adopted prior to 2005 (to date, no final award on liability under a BIT adopted after 2003 has yet appeared) states did not provide interpretive guidelines, or criteria, for arbitrating indirect expropriation claims. Simplifying a complicated and somewhat disjointed jurisprudence, arbitrators have mixed and matched several different approaches, all of which express a certain anxiety towards aggressive enforcement.\textsuperscript{128} First, there is broad consensus on the “substantial deprivation” doctrine: the “effects” of state acts on the investment must be comparable to the effects of an express expropriation. Second, in the 2002-2007 period, a series of influential awards held that the regulatory power exception\textsuperscript{129} effectively insulated general state measures from censure if they met standards of due process and non-discrimination, and were taken for some \textit{bona fide} public purpose.\textsuperscript{130} Third, a set of significant awards rendered more recently blends these two approaches in ways that favor adoption of a balancing posture.\textsuperscript{131}

As developed by arbitrators, the FET has proved more flexible, enabling arbitrators to assess every important fact bearing on the dispute, as they accumulate episodically, and then to fashion decisions and remedies that are appropriate to the overall situation. Over the past fifteen years, claimants have routinely pleaded both indirect expropriation and FET on what are essentially the same facts.\textsuperscript{132} The FET may also partly overlap with an umbrella clause, each furnishing materials for evaluating claims in the other domain. In the absence of an umbrella clause, tribunals may deploy the FET to fill the gap. Indeed, tribunals now rely heavily on the covering principle of “legitimate expectations” [LE] to manage situations wherein an investor has relied on express guarantees given by the state to induce the investment in the first place.

Table 3 reports data on pleadings and findings of violation across these domains in all final, publicly available awards on the merits. In 141 treaty-based arbitrations, investors brought 341 separate claims under expropriation, indirect expropriation, umbrella clauses, and the FET. In 103 cases, investors pleaded both indirect expropriation and FET. Of these, tribunals found a violation of both in 16 (16\%); a violation of indirect expropriation but not of the FET in 8 cases (8\%); and a violation of the FET but not of indirect expropriation in 41 (40\%). Although states neither intended nor foresaw this outcome, tribunals have gradually settled on a clear preference for using the FET rather than indirect expropriation as the basis for findings of liability. In cases in which investors plead both provisions, tribunals usually

\begin{itemize}
  \item \textsuperscript{127} In an influential dissent, Thomas Wälde expressed the view openly: “the legitimate expectation principle … provides a more supple way of providing a remedy appropriate to the particular situation as compared to the more drastic determination and remedy inherent in concept of regulatory expropriation. It is probably partly for these reasons that ‘legitimate expectation’ has become for tribunals a preferred way of providing protection to claimants in situations where the tests for a ‘regulatory taking’ appear too difficult, complex and too easily assailable …” – see \textit{International Thunderbird Gaming Corporation v. Mexico} (NAFTA/UNCITRAL), Award of 26 January 2006, Separate Opinion Thomas Wälde, para 37 [hereafter Wälde].
  \item \textsuperscript{129} \textit{Saluka v. Czech Republic} (n 40) para 252: “[I]t is now established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a nondiscriminatory manner \textit{bona fide} regulations that are aimed at the general welfare.”
  \item \textsuperscript{130} Ibid; \textit{Marvin Roy Feldman Karpa v. United Mexican States} (ICSID Case No ARB(AF)/99/1), Award of 16 December 2002; \textit{Methanex Corporation v. United States of America} (UNCITRAL), Award of 3 August 2005.
  \item \textsuperscript{131} \textit{Total v. Argentina} (n 110); \textit{El Paso v. Argentina} (n 63).
  \item \textsuperscript{132} The proposed \textit{Trans-Pacific Partnership} agreement places the principle of legitimate expectations not within FET provisions – phrased as “distinct, reasonable, investor-backed expectations” – but within indirect expropriation. These appear only in Annex 9-B – Expropriation; and Article 9.7.1, footnote 36, which concerns Expropriation and Compensation.
\end{itemize}
assess each claim in turn, generating a great deal of redundant assessment of identical materials. Tellingly, some recent tribunals go directly to FET analysis and, having found a violation, forego assessment of the indirect expropriation claims altogether.\(^\text{133}\) FET claims also have a higher success rate (52\%) compared to indirect expropriation claims (25\%), indeed, the number of FET violations exceeds those found under the other three headings put together.

----- Table 3 here -----

In the domain of the FET, ICSID tribunals have overcome the various obstacles to building stable doctrinal frameworks (chapter 4). Indeed, a powerful feedback loop has been forged. A steady stream of FET claims has led tribunals to develop an increasingly dense and articulated arbitral jurisprudence, which, in turn, has structured new rounds of pleadings. As Schill puts it, “arbitral jurisprudence” in this domain is itself a “source of expectations” for investors and states.\(^\text{134}\)

Beginning in 2006, some arbitrators began to take great pains to survey the development of the FET. They carefully traced its evolution from a handful of very important BIT and NAFTA awards,\(^\text{135}\) as well as from general principles recognized by domestic and international courts, in a clear effort to standardize the domain’s logics and content going forward.\(^\text{136}\) Within five years, a series of prominent awards were on the books. Written by renowned jurists and former judges of major international courts, they featured sophisticated commentary on the LE as a general principle of law, and laborious LE-FET analysis. Four notable examples\(^\text{137}\) – Saluka (2006), the dissent in Thunderbird (2006),\(^\text{138}\) Total (2010), and El Paso (2011) – share common traits. Each is the product of a self-conscious effort to rationalize FET-LE doctrine in the face of inconsistencies,\(^\text{139}\) through elucidating the source, content and scope of application of the legitimate expectations doctrine, and its relationship to other substantive protections found in BITs. Further, each contains intensive engagement with past awards, approving, distinguishing, or rejecting existing lines of case law. Read together, one finds consensus on the basic materials that subsequent tribunals can easily assemble into a general framework for FET analysis. This same period saw a stream of scholarly articles designed to synthesize the case law, including Vandevelde’s treatise-like reconstruction, portentously entitled, “A Unified Theory of Fair and Equitable Treatment.”\(^\text{140}\)

\(^{133}\) Ioan Micula and others v Romania (ICSID Case No ARB/05/20), Award of 11 December 2013.

\(^{134}\) Stephan Schill, ‘Fair and Equitable Treatment, the Rule of Law, and Comparative Public Law’ in Stephan Schill (ed), International Investment Law and Comparative Public Law (Oxford University Press, Oxford 2010) 156-57.

\(^{135}\) S.D. Myers Inc. v. Canada (UNCITRAL/NAFTA) 40 ILM 1408, First Partial Award of 13 November 2000; Pope and Talbot v. Canada (UNCITRAL/NAFTA), Award on the Merits of Phase 2 of 10 April 2001; Mondev International Ltd v. United States (ICSID Case No ARB (AF)/99/2), Award of 11 October 2002 [‘Mondev v USA’]; Técnicas Medioambientales Tecmed, S.A. v. Mexico (ICSID Case No ARB (AF)/00/2) 43 ILM, Award of 29 May 2003, (2004).

\(^{136}\) Wälde (n 127); Saluka v. Czech Republic (n 40); Total v. Argentina (n 63); El Paso v. Argentina (n 63).

\(^{137}\) Wälde (n 127), paras 9-58; Saluka (n 40), paras 282-309; Total (n 110), paras 105-134; El Paso (n 63), paras 328-379.

\(^{138}\) Though Thunderbird is a NAFTA case, Wälde, in his separate opinion (n 127), focuses on the FET as a common principle at the heart of investment law, irrespective of the treaty instrument or source.

\(^{139}\) The El Paso tribunal worried, for instance, that “ICSID case-law has developed in a way that generates some confusion and overlap between these different standards of protection found in most BITs.” – see El Paso v. Argentina (note 63) para 226. The tribunal then goes on to lay out its views on the distinction between (a) FET and (b) other substantive protections more generally, including indirect expropriation (paras. 226-31) before applying these views to the facts (paras 380-519).

From the point of view of arbitral governance, the most important outcome of this process concerns the development of a coherent balancing framework within the FET. Under this framework, the tribunal balances (a) the investor’s “legitimate” (or “basic”) “expectations,” which are generated, for example, when the investor relies on specific commitments proffered by the host state, against (b) the state’s sovereign prerogatives to regulate in the public interest. An investor’s LE may include an entitlement to some minimal level of stability in the regulatory environment, and more if expressly promised by the state to induce the investment in the first place. But entitlements associated with the FET and LE are not absolute. As tribunals from Saluka forward have made clear, investors cannot legitimately expect regulatory arrangements to be frozen in place. In effect, the state possesses a “right to regulate,” which the Saluka tribunal referred to as the state’s “legitimate regulatory interests” to pursue important public purposes, even if changes to arrangements would harm the investor. When used for the purposes of balancing, tribunals regularly treat the doctrine as subsuming other FET-derived norms, such as due process, non-discrimination, and transparency. Balancing permits arbitrators to consider a wider range of elements than would be plausible under the standards developed for expropriation or indirect expropriation. And, to repeat, it enables tribunals to assess virtually all relevant facts and arguments under one flexible standard.

It is crucial to stress that tribunals, in the absence of any express state consent, purposefully read into the FET both the doctrine of “legitimate expectations,” and the state’s “right to regulate.” Arbitrators did not camouflage their lawmaking. Instead, they adopted the posture of a judge whose task it is to identify and apply general principles of law. Where tribunals have interpreted the LE-FET in light of CIL, they typically arrive at the same conclusions as tribunals that engage more explicitly in a jurisprudence of general principles. This common disposition networks treaties and tribunals, while creating a dynamic through which the FET and CIL evolve synergistically.

The 2003 award in Tecmed v. Mexico first announced the LE doctrine, in the context of Article 4(1) of the Spain-Mexico BIT stipulating that states shall “guarantee” the FET to investors “according to International Law.” The Tecmed award is the most cited in the history of ISA, notably for the proposition that LE constitutes a “bona fide principle recognized in international law,” derivable from an even broader principle, that of “good faith”:

The Arbitral Tribunal considers that [Art. 4(1)], in light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investment to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently …, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations.

This passage immediately attracted the attention of the arbitral community. It also generated strong criticism from those who worried that the construction would produce a pro-investor bias, in so far is it

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141 The process has not been a linear one, and not all leading arbitrators have invested in it.
142 Saluka (n 40), para 306.
143 El Paso (n 63), para 335: As the El Paso tribunal affirmed, seeking to determine if the FET-as-principle constrains states more than the FET within CIL would be a “somewhat futile” exercise since “the scope and content of the minimum standard of international law is as little defined as the BITs’ FET standard. The issue is not one of comparing two undefined or weakly defined standards; it is to ascertain the content and define the BIT standard of fair and equitable treatment.”
144 Tecmed v. Mexico (n 39), para 153.
145 Ibid., para 154.
would hold states to a standard of “perfect regulation in a perfect world.” The paragraph actually closes on a softer line, stressing that the FET-LE captures clearly “arbitrary” “state action” that “shocks … a sense of judicial propriety,” not all measures that fail to meet the ideal just expressed.

The Tecmed tribunal only impliedly recognized a state’s “right to regulate” in the domain concerned – that of environmental protection.

Upon making its investment, the fair expectations of the Claimant were that the Mexican laws applicable to such investment, as well as the supervision, control, prevention and punitive powers granted to the authorities in charge of managing such a system, would be used for the purpose of assuring compliance with environmental protection, human health and ecological balance goals underlying such laws.

The tribunal found that the Mexican federal government had abused its regulatory prerogatives, closing down the investor's waste disposal operations through a series of unilateral decisions targeting the investor, using various forms of coercion along the way. Federal officials did so in response to intensifying local opposition to the landfill site, after elections at the municipal and state levels. The tribunals also found, unanimously, that the company had not “endangered public health economic balance or the environment.” In fact, the company had proposed the development of an alternative site, bearing the costs of its own relocation, the permit for which the authorities refused.

Explicit recognition of a “right to regulate,” conceived as a necessary corollary to LE, emerged in Thomas Wälde’s dissent in Thunderbird v. Mexico (2006), a NAFTA case. Wälde considers the development of LE – as a general principle of international law tied to the good faith principle – in light of the case law of the EU, the ECHR, the WTO Appellate Body, and national administrative law courts, in addition to the relevant scholarship of comparative public law. For present purposes, two aspects of the dissent are important. First, the opinion emphasizes that LE analysis inevitably drives the arbitrator into a balancing posture, wherein the tribunal takes into account both the “needs for flexible public policy and the legitimate reliance on particular investment-backed expectations.” Second, Wälde defends an approach to the FET that highlights, rather than disguises, the role of judges in progressively constructing the law as a set of “objective,” “authoritative,” and “universal” principles of “modern national and international economic law.”

Tribunals are not only under an obligation to apply such general principles; their jurisprudence on general principles ought to knit together the various sources of international law into a coherent whole:

While individual arbitral awards by themselves do not as yet constitute … binding precedent, a consistent line of reasoning developing a principle and a particular interpretation of specific treaty obligations should be respected; if an authoritative jurisprudence evolves, it will acquire the character of customary international law and must be respected. A deviation from well and firmly established jurisprudence requires an extensively reasoned justification. This approach will help to avoid the wide divergences that characterise some investment arbitral awards … But it is also mandated by the reference to applicable rules of international Law (Art. 1131 NAFTA) and thereby Art. 38 of the Statute of the ICJ: An increasingly continuous, uncontested and consistent modern arbitral jurisprudence is part of the authoritative source of international law embodied in

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147 Tecmed v. Mexico (n 39) para 154.
149 Ibid, para 162.
150 Wälde (n 127), para 25.
151 Ibid, para 30.
152 Ibid.
“judicial decisions” [ICJ Statute, Art. 38 (1)(d)] and will develop, with an even greater legally binding effect, into “international custom” (ICJ Statute, Art. 38 (1)(b)], in particular as an arbitral jurisprudence defines in a contemporary treaty and factual context the “general principles of law” [ICJ Statute, Art. 38 (1)(d)].

Wälde’s preferred approach forcefully invokes duties associated with a strong version of arbitral precedent, conceived in terms of persuasive authority.

In this case, the Thunderbird corporation, faced with a Mexican statute that prohibited gambling in the context of “luck-related” games, had asked the relevant regulatory authority if it would permit a skill-oriented game, “where chance and wagering or betting is not involved.” Officials replied that they would permit games based on skill, but not on luck. This response, the corporation would later claim, created a LE. In fact, Thunderbird ran slot machines. By the company’s own admission, the “skill” needed to win entailed aligning “different symbols on the [machines’] screen” through a player’s act of “pushing buttons.” The tribunal found for Mexico, holding that the investor’s own conduct helped to create a situation in which authorities shut down its operations. As Valenti has stressed, tribunals in previous FET-LE cases, including in Tecmed, had examined the investor’s conduct as a factor in its overall decision. In Thunderbird, the investor’s disingenuous representations, among other actions, proved to be fatal to its claim. At the same time, the Thunderbird tribunal accepted at face value the government’s public interest arguments.

Two months later, the tribunal in Saluka v. the Czech Republic, citing to Tecmed as well as to subsequent BIT and NAFTA awards, asserted that LE was the “dominant element” of the FET. Yet it pointedly denied that investors possessed a presumptive entitlement to regulatory “stability” which, if “taken too literally … would impose upon host States’ obligations [that] would be inappropriate and unrealistic.” Instead, arbitrators should balance:

No investor may reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged. In order to determine whether frustration of the foreign investor’s expectations was justified and reasonable, the host State’s legitimate right subsequently to regulate domestic matters in the public interest must be taken into consideration as well … The determination of a breach of [the FET] therefore requires a weighing of the Claimant’s legitimate and reasonable expectations on the other … having due regard [for] all relevant circumstances.

Saluka concerned the recent privatization of an important Czech bank (IPB) that had experienced severe debt problems when the global financial crisis hit in 1998. As the crisis progressed, the government

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153 Ibid, para. 16.
154 International Thunderbird Gaming Corporation v. Mexico (NAFTA/UNCITRAL), Award of 26 January 2006, para 50.
156 Wälde (n 127), paras 94-95: Wälde sides with the investor. State officials had formally given the investor a response to a formal question from which, they knew, the investor would draw “comfort” and confidence.
157 Saluka v. Czech Republic (n 40), paras 302-303.
158 Ibid, para 302. See also ibid, paras 307-08.
159 Including Occidental Exploration and Production Company v. The Republic of Ecuador (LCIA Case No UN3467), Award of 1 July 2004: “The stability of the legal and business framework is thus an essential element of fair and equitable treatment.” See also Saluka v. Czech Republic (n 40), para 183.
160 Saluka v. Czech Republic (n 40), para 304.
intervened ever more intrusively into IPB’s affairs, eventually placing the bank under forced administration (after dispatching armed police to remove managers). Not only were other large Czech banks in comparable situations spared this treatment, but:

the Forced Administrator was not left with his usual discretion to find the most appropriate solution for IPB’s future based on an objective and unbiased assessment of all relevant factors. Instead, he was instructed by the Government to implement immediately the transfer of IPB’s business to CSOB and he was even provided a financial incentive to follow exclusively the Government’s instruction.

After examining a long list of related claims under the rubric of LE-FET, the tribunal found that Czech authorities had engaged in discriminatory treatment, while breaching due process and transparency norms. It also rejected several claims, including an alleged “failure” on the part of the state “to ensure a predictable and transparent framework for Saluka’s investment.”

In 2010-11, two awards – Total v. Argentina and El Paso v. Argentina – consolidated what is now the standard approach to LE, and thus to the FET writ large. Presiding arbitrators, who were perfectly at home with such a balancing construct, produced the awards. Giorgio Sacerdoti, a former WTO Appellate Body judge, drafted the Total award; and Lucius Caflisch, a former justice on the European Court of Human Rights, drafted El Paso. Both tribunals invoked Saluka, noting the importance of an investors’ LE, while firmly rejecting any view to the effect that the FET guarantees “the stability of the legal and business framework.” As the El Paso tribunal put it: “Economic and legal life is by nature evolutionary, and in any event:

[I]t is inconceivable that any State would accept that, because it has entered into BITs, it [could] no longer modify pieces of legislation which might have a negative impact on foreign investors, in order to deal with modified economic conditions and must guarantee absolute legal stability. In the Tribunal’s understanding, [the] FET cannot be designed to ensure the immutability of the legal order, the economic world and the social universe, and [to play the role assumed by stabilisation clauses specifically granted to foreign investors with whom the State has signed investment agreements.

The Total tribunal began an extensive doctrinal construction of the LE by addressing states directly:

On the one hand, stability, predictability and consistency of legislation and regulation are important for investors in order to plan their investments, especially if their business plans extend

162 The Saluka tribunal declared that it was not “second-guessing” the “Government’s privatization policies”, which it characterised as “perfectly legitimate”. Nonetheless, “[o]nce it had decided to bind itself by the Treaty to accord “fair and equitable treatment” to investors of the other Contracting Party, [the Czech Republic] was bound to implement its policies, including its privatisation strategies, in a way that did not lead to unjustified differential treatment unlawful under the Treaty.”
164 Ibid, para 302: “The standard of ‘FET’ is … closely tied to the notion of legitimate expectations which is the dominant element of that standard.”
165 El Paso v. Argentina (n 63), para 348: “There is an overwhelming trend to consider the touchstone of FET to be found in the legitimate and reasonable expectations of the Parties, which derive from the obligation of good faith.”
166 Ibid, para. 352.
167 Ibid.
168 Ibid, paras 367-68.
169 Total v. Argentina (n 110), para 124: This award also puts investors on alert, stating that BITs “‘are not insurance policies against bad business judgments’ and that the investor has its own duty to investigate the host State’s applicable law.”
over a number of years. Competent authorities of States entering into BITs in order to promote foreign investment in their economy should be aware of the importance for the investors that a legal environment favourable to the carrying out of their business activities be maintained. On the other hand, signatories of such treaties do not thereby relinquish their regulatory powers nor limit their responsibility to amend their legislation in order to adapt it to change and the emerging needs and requests of their people in the normal exercise of their prerogatives and duties. Such limitations upon a government should not lightly be read into a treaty which does not spell them out clearly nor should they be presumed.\textsuperscript{170}

Having positioned themselves as balancing tribunals, the crucial questions concerned what and how to balance.

Both the \textit{El Paso} and the \textit{Total} tribunals emphasized the importance of context – the general political and economic circumstances surrounding the investment – to the various ways that LE and the right to regulate reciprocally limit one another. The investor can never expect “economic stability,”\textsuperscript{171} and the FET is not a general stabilisation clause.\textsuperscript{172} Nonetheless, the LE-FET protects investors in at least two, often overlapping, situations. First, a state triggers liability by re-regulating, or applying existing regulations, in ways that breach core FET norms (due process, non-discrimination, and so on), which are captured, in balancing, by the principle of proportionality. Second, liability ensues when a state reneges on a “specific commitment directly made to the investor, on which the latter has relied.”\textsuperscript{173} Such commitments “limit the right of the host State to adapt the legal framework to changing circumstances,”\textsuperscript{174} at least without paying compensation. In either case, the next step is to balance. The \textit{Total} tribunal, borrowing an approach to balancing from WTO jurisprudence, put it this way:

The circumstances and reasons (importance and urgency of the public need pursued) for carrying out a change impacting negatively on a foreign investor’s operations on the one hand, and the seriousness of the prejudice caused on the other hand, compared in the light of a standard of reasonableness and proportionality are relevant. The determination of a breach of the standard requires, therefore, ‘a weighing of the Claimant’s reasonable and legitimate expectations on the one hand and the Respondent’s legitimate’ [citing to \textit{Saluka}]. Thus an evaluation of the fairness of the conduct of the host country towards an investor cannot be made in isolation, considering only their bilateral relations. The context of the evolution of the host economy, the reasonableness of the normative changes challenged and their appropriateness in the light of a criterion of proportionality also have to be taken into account.\textsuperscript{175}

\textsuperscript{170} Ibid, paras 114-115. The \textit{Continental Casualty v. Argentina} (n 63) opined that “it would be unconscionable for a country to promise not to change its legislation as time and needs change, or even more to tie its hands by such a kind of stipulation in case a crisis of any type or origin arose. Such an implication as to stability in the BIT’s Preamble would be contrary to an effective interpretation of the Treaty; reliance on such an implication by a foreign investor would be misplaced and, indeed, unreasonable”. Both the \textit{Total} and the \textit{Continental Casualty} tribunals were presided by the same arbitrator, Giorgio Sacerdoti.

\textsuperscript{171} \textit{El Paso v. Argentina} (n 63), para 366.

\textsuperscript{172} \textit{Total v. Argentina} (n 110), para 120: “A general stabilization requirement would go beyond what the investor can legitimately expect. See also ibid, para 117; \textit{El Paso v. Argentina} (n 96), para 368: “In the Tribunal’s understanding, FET cannot be designed to ensure the immutability of the legal order, the economic world and the social universe and play the role assumed by stabilisation clauses specifically granted to foreign investors with whom the State has signed investment agreements.” See also \textit{Parkerings-Compagniet AS v. Republic of Lithuania}, (ICSID Case No ARB/05/8), Award of 11 September 2007, para 332.

\textsuperscript{173} \textit{El Paso v. Argentina} (n 63), para. 375. See also \textit{Continental Casualty v. Argentina} (n 160), para 261: “Representations made by the host State are enforceable and justify the investor’s reliance only when they are specifically addressed to a particular investor.” See also \textit{Total v. Argentina} (n 95), paras 119, 309.

\textsuperscript{174} \textit{Total v. Argentina} (n 110), paras 119, 309.

\textsuperscript{175} \textit{Total v. Argentina} (n 110), para 123.
As the _El Paso_ tribunal put it, the FET is “a standard entailing reasonableness and proportionality” and “a means to guarantee justice to foreign investors.”\(^\text{176}\)

_Total_ and _El Paso_ concerned Argentina’s response to its economic meltdown of the early 2000s, which generated a series of findings of violations of the FET, notably in the energy sector (see chapter 4). The _Total_ tribunal dismissed most of the oil company’s claims, holding that the measures did not violate the principles of non-discrimination and proportionality. In the tribunal’s view, the enormity of the crisis justified, even required, the taking of onerous state measures, even though they could not but harm investors. The _Total_ tribunal found a breach of the LE-FET only with regard to the government’s abandonment of certain agreed-upon procedures to adjust tariffs on a regular basis with the participation of the investor. For its part, the _El Paso_ tribunal stressed that the measures under examination, considered individually in light of the public interests pursued, would not violate the energy company’s LE. It nonetheless held that “the cumulative effect of the measures was a total alteration of the entire legal [framework] for foreign investments,” thus comprising a type of “creeping violation of the FET.”\(^\text{177}\)

Although there remain important disagreements concerning the content and scope of the LE-FET, it is indisputable that the arbitral process has largely determined its basic parameters, as the dominant argumentation and justification framework in this domain of law.\(^\text{178}\)

**NAFTA: the Struggle for Authority**

In BIT arbitration, tribunals disaggregate the LE into component principles that they will then balance, selectively, against the state’s right to regulate. The most important awards characterize the FET as an autonomous provision of BITs linked to a cluster of related general principles. In BITs that tie the FET to CIL, the most influential tribunals have held that the customary standard – nominally a “minimum standard of treatment” owed to foreigners – contains virtually the same list of general principles covered by the doctrine of LE (e.g., _El Paso_). As a number of tribunals have pointed out,\(^\text{179}\) methodological

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\(^\text{176}\) *El Paso v. Argentina* (n 63), para. 373.

\(^\text{177}\) Ibid, paras 517-518.

\(^\text{178}\) This claim should be evaluated in light of counter-evidence. Sacerdoti, for example, was not able to achieve consensus within the _Total_ tribunal on the interpretation of the FET. The claimant-appointed member of the tribunal, Henri Alvarez, filed a separate opinion, citing to _Tecmed_, asserting that Argentina had failed to meet an obligation to maintain the stability of the legal framework promised. The state-appointed arbitrator, Luis Herrara Marco, asserted that the doctrine of LE did not guarantee stability and should cover only the most “abusive” and “manifestly unfair” state acts. – reported by Luke Eric Peterson, ‘Co-Arbitrators in Total v. Argentina case take Widely Divergent Views on Argentina’s FET Obligation under Investment Treaty’ (*Investment Arbitration Reporter*, 30 March 2011) <https://www.iareporter.com/articles/co-arbitrators-in-total-v-argentina-case-take-widely-divergent-views-of-argentinan-fair-and-equitable-treatment-obligation-under-investment-treaty/> accessed 10 May 2016. It is important to stress that this debate has taken place within the LE-FET construct, defending propositions on the margins of the LE and the right to regulate respectively. In the _Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic_, ICSID Case No. ARB/03/19, Separate Opinion of Arbitrator Pedro Nikken of 30 July 2010, paras 3-27, decided before _Total v. Argentina_ (n 96) and _El Paso v. Argentina_ (n 96), the state-appointed arbitrator, Pedro Nikken, dissented, arguing that the doctrine of LE was purely a construction of arbitral case law and lacked legitimacy, given the absence of explicit state consent. Ibid paras 31 and 33: Nikken, nonetheless, cites approvingly _Saluka v. Czech Republic_ (n 40) and Sacerdoti’s _Continental Casualty v. Argentina_ (n 63) award (in which Sacerdoti took a similar stance to that of _Total v. Argentina_ (n 110); see Chapter 4) for the proposition that states presumptively possess what we are calling a “right to regulate”.

\(^\text{179}\) _Azurix Corp. v. The Argentine Republic_ (ICSID Case No ARB/01/12), Award of 14 July 2006 [*Azurix*], para 361: The relevant standard “has evolved and the Tribunal considers that its content is _substantially similar_ whether the terms are interpreted in their ordinary meaning, as required by the Vienna Convention, or in accordance with customary international law”.

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differences between these two approaches are more superficial than real. Tribunals typically consider the ubiquity of FET provisions in investment treaties as evidence that CIL has evolved in light of state practice; and they assess state practice in synergy with the arbitral case law on the FET, the latter being a repository of general principles. In BIT arbitration, tribunals interpreting the FET in terms of CIL routinely invoke the jurisprudence of general principles, and tribunals that begin in the realm of general principles typically consult the case law rooted in CIL analysis.

In NAFTA arbitration, these dynamics have generated an ongoing war of authority between states and arbitrators. Chapter 11 of NAFTA (establishing the ISA of the regime), announces the FET in Article 1105:

Minimum Standard of Treatment
1. Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.

In 2001, the state parties (Canada, Mexico, and the U.S.) jointly issued an interpretive statement to the effect that CIL – as the contracting parties interpret that law, not arbitrators – is the exclusive source of norms governing treatment owed to investors by host states under the NAFTA. They did so to stunt the development of the LE doctrine.

State parties acted in response to three NAFTA awards rendered in 2000 and 2001, that is, prior to Tecmed in the BIT context. These awards strongly support the proposition that NAFTA tribunals, on their own, would have developed an approach closely resembling that which BIT tribunals evolved thereafter. In one of these cases, the Pope and Talbot v. Canada arbitration, the investor argued that the FET should be established under “all the sources of international law found in Article 38 of Statute of the ICJ,” which would include general principles, CIL, and judicial opinions (as a subsidiary source). Canada, joined by the U.S. as a third party, insisted that the customary standard effectively subsumed the FET. In Canada’s view, CIL covered only “egregious misconduct” of the state resulting in a “shocking denial of fairness.” The position implied that the standard had not evolved since the inter-War years, as expressed by the so-called Neer test (1926). To violate that test, the state’s treatment of an alien must “amount to an outrage, to bad faith, to willful 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.”

The Pope and Talbot tribunal rejected Canada’s argument, as seconded by the U.S., intervening as a third party. It held, instead, that the “fairness” elements in Article 1105 were “additive to the requirements of CIL,” and that the network of existing treaties was their source.

180 El Paso v. Argentina (n 63), para 335. The El Paso tribunal, addressing the question as to whether the FET imposes a higher standard when conceived (a) as a general principle or an autonomous provision of investment treaties or (b) in terms of CIL, stated that it “consider[ed] this discussion to be somewhat futile, as the scope and content of the minimum standard of international law is as little defined as the BITs’ FET standard, and as the true question is to decide what substantive protection is granted to foreign investors through the FET.”

181 The awards are Metalclad Corporation v. United Mexican States (ICSID Case No ARB(AF)/97/1/NAFTA), Award of 30 August 2000; S.D. Myers Inc. v. Canada (UNCITRAL/NAFTA), First Partial Award of 13 November 2000; Pope and Talbot v. Canada (UNCITRAL/NAFTA), Award on the Merits of Phase 2 of 10 April 2001 [‘Pope and Talbot v. Canada’].

182 Pope and Talbot v. Canada (n 181), paras 107-115.

183 LFH and Pauline Neer (United States v. Mexico) (1926) 4 RIAA 60: The case concerned the killing of an American citizen (Paul Neer) in Mexico.

184 Pope & Talbot Inc. v. Canada (n 181), paras 57-60: “Canada considers that the principles of customary international law were frozen in amber at the time of the Neer decision. It was on this basis that it urged the Tribunal
the tribunal, “very strong reasons for interpreting the language of Article 1105 consistently with the language in the BITs,”185 and thus for the rejection of older standards such as those embodied in the Neer test.186 In its interim award on liability of April 2001, the Pope and Talbot tribunal then went on to dismiss four of the investor’s claims, while accepting two of them (violations of the principles of non-discriminatory treatment, due process and transparency). It then scheduled further hearings between the parties on damages.

Acting in the guise of the NAFTA Free Trade Commission [FTC],187 state parties to NAFTA issued the following Note of Interpretation:

1. Article 1105 prescribes the CIL minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments … .
2. The concepts of ‘FET’ and ‘full protection and security” do not require treatment in addition to … that which is required by the CIL minimum standard of treatment of aliens.
3. A determination that there has been a breach of … a separate international agreement, does not establish that there has been a breach of Article 1105.188

State parties presumed their own capacity to control outcomes. Article 2000 NAFTA, after all, confers on the FTC authority “to supervise the implementation” of the treaty, “oversee its further elaboration,” and to “resolve disputes that may arise regarding its interpretation or application.” Under Article 1131 NAFTA, “an interpretation by the Commission of a provision of this Agreement shall be binding” on tribunals.

In response, the Pope and Talbot tribunal obtained disclosure by Canada of the travaux préparatoires of NAFTA, to help it determine whether the FTC had sought to “amend,” rather than merely “interpret,” Article 1105. In yet another interim award (of May 2002), the arbitrators held that the FTC had sought to revise the treaty, but through the wrong procedure:

[The documents] show that no reference was ever made to CIL, and, of course, one must accept that the negotiators of NAFTA, as sophisticated representatives of their governments, would have known that, as is made clear in Article 38 of the Statute of the ICJ, international law is a broader concept than CIL, which is only one of its components. … Canada has argued to this Tribunal that CIL is limited to what was required by the cases of the Neer era of the 1920s’, whereas international law in its entirety would bring into play a large variety of subsequent developments. For these reasons, were the Tribunal required to make a determination whether the Commission’s action is an interpretation or an amendment, it would choose the latter.189

The tribunal asserted, nonetheless, that its interpretation of the “fairness” duties owed by States under Article 1105 was compatible with the FTC’s Note, at least as the arbitrators interpreted it. “Canada’s views” it suggested, “were perhaps shaped by its erroneous belief that only some 70 bilateral investment treaties [had] been negotiated; however, the true number, now acknowledged by Canada, is in excess of

to award damages only if its conduct was found to be an "egregious" act or failure to meet internationally required standards.”

185 Ibid., para 115.
186 Ibid, para 118: “[T]he Tribunal interprets Article 1105 to require that covered investors and investments receive the benefits of the fairness elements … without any threshold limitation that the conduct complained of be “egregious”, “outrageous” or “shocking”, or otherwise extraordinary. For this reason, the Tribunal will test Canadian implementation of the SLA against the fairness elements without applying that kind of threshold.”

187 Pursuant to Article 2001, NAFTA.
189 Pope & Talbot (n 181), paras 46-47.
1800. Therefore, applying the ordinary rules for determining the content of custom in international law, one must conclude that the practice of states is now represented by those treaties.\textsuperscript{190}

We now know that state parties to NAFTA failed to constrain doctrinal developments. To be sure, since the FTC issued its \textit{Note}, every NAFTA tribunal has engaged in the analysis of CIL in order to determine the scope of the FET. One tribunal adopted a restrictive approach, holding that the \textit{Neer} test remained relevant, once adapted to new circumstances.\textsuperscript{191} The rest have held that the “minimum standard of treatment” has evolved a good deal beyond \textit{Neer}, in favor of investors.\textsuperscript{192}

In \textit{Mondev v. the U.S.}, a case decided immediately after \textit{Pope and Talbot}, proceedings focused heavily on the FTC \textit{Note}. The investor, “profess[ing] to be ‘somewhat bewildered,’” complained that:

\begin{quote}
state parties “saw fit ‘to change the meaning of a NAFTA provision in the middle of the case in which that provision plays a major part,’ and questioned whether it could do so in good faith. … \par
In the view of the Claimant, the [\textit{Note}] added to the text of Article 1105 … the word, “customary”, while treating the terms “fair and equitable treatment” and “full protection and security” as surplusage.\textsuperscript{193}
\end{quote}

Canada claimed that the \textit{Neer} standard remained the controlling law. The tribunal, which included Ninian Steven (former justice of the High Court of Australia), James Crawford (then an influential member of the International Law Commission, and now a justice on the ICJ), and Stephen Schwebel (former justice of the ICJ), disagreed unanimously,\textsuperscript{194} in terms that have been widely cited by subsequent tribunals:

\begin{quote}
[Since \textit{Neer} was decided,] both the substantive and procedural rights of the individual … have undergone considerable development. In the light of these developments, it is unconvincing to confine the meaning of “FET” and “full protection and security” of foreign investments to what those terms … might have meant in the 1920s … To the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious. In particular, a State may treat foreign
\end{quote}

\begin{footnotes}
\textsuperscript{190} Ibid, para 62.
\textsuperscript{191} \textit{Cargill v. Mexico} (ICSID Case No ARB(AF)/05/2, NAFTA), Award of 18 September 2009, para 284: “The Tribunal observes a trend in previous NAFTA awards, not so much to make the holding of the \textit{Neer} arbitration more exacting, but rather to adapt the principle underlying the holding of the \textit{Neer} arbitration to the more complicated and varied economic positions held by foreign nationals today. Key to this adaptation is that, even as more situations are addressed, the required severity of the conduct as held in \textit{Neer} is maintained.”
\textsuperscript{192} \textit{Glamis Gold, Ltd. v. The United States of America} (UNCITRAL), Award of 8 June 2009, para 627: The \textit{Glamis Gold} tribunal appears to have taken a hybrid position. That tribunal found that the “claimant has not met its burden of proving that something other than the fundamentals of the \textit{Neer} standard apply.” However, it also held that: “[s]uch a breach may be exhibited by a “gross denial of justice or manifest arbitrariness falling below acceptable international standards, or the creation by the State of objective expectations \textit{in order to induce} investment and the subsequent repudiation of those expectations \textit{emphasis in original}”. The LE principles, of course, cover the latter situation, which would render the \textit{Neer} standard obsolete. The tribunal addressed this tension as follows: “although the standard for finding a breach of the CIL minimum standard of treatment therefore remains as stringent as it was under \textit{Neer}; it is entirely possible that, as an international community, we may be shocked by State actions now that did not offend us previously.” – see ibid, para 27. See also ibid: In any event, the tribunal engaged in LE analysis (paras 812-830), explicitly using the language of “legitimate expectations” (para 813) and “reasonable expectations” (para 812).
\textsuperscript{193} \textit{Mondev International Ltd v. United States} (ICSID Case No ARB (AF)/99/2), Award of 11 October 2002 [\textit{Mondev v USA}];, para 102.
\textsuperscript{194} Parts of the arbitral community also criticised the \textit{Note} as a thinly-disguised attack on arbitral independence, given that the \textit{Note} has appeared before the conclusion of the \textit{Pope & Talbot v. Canada} proceedings. – see Gabrielle Kaufmann-Kohler, ‘Interpretive Powers of the Free Trade Commission and the Rule of Law’ in Emmanuel Gaillard and Frédéric Bachand (eds), \textit{Fifteen Years of NAFTA Chapter 11 Arbitration} (Juris Publishing, New York 2011) 175.
\end{footnotes}
investment unfairly and inequitably without necessarily acting in bad faith. [Moreover,] the vast number of bilateral and regional investment treaties … almost uniformly provide for [the FET], and largely provide for full security and protection … Investment treaties run between North and South, and East and West, and between States in these spheres inter se. On a remarkably widespread basis, States have repeatedly obliged themselves to accord foreign investment such treatment. In the Tribunal’s view, such a body of concordant practice will necessarily have influenced the content of rules governing the treatment of foreign investment in current international law. It would be surprising if this practice and the vast number of provisions it reflects were to be interpreted as meaning no more than the Neer Tribunal (in a very different context) meant …

The Mondev tribunal then engaged in full-fledged FET analysis, only to dismiss the investor’s claims.

Most NAFTA tribunals have followed the path cleared by Pope and Talbot and Mondev. They have held, or strongly implied, that CIL protects investors beyond the minimum standard expressed in Neer, citing to one another, drawing evidence from BITs, and even invoking FET jurisprudence beyond NAFTA.196 Pushing further, the tribunal in Waste Management v. Mexico (2004) engaged in LE analysis in all but name:

In applying [the FET] it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.”197

The Waste Management tribunal, too, dismissed all of the investor’s claims. Along with Tecmed and Saluka, the NAFTA awards in Mondev and Waste Management are among the five most cited cases in the FET domain, and tribunals in non-NAFTA proceedings regularly cite to the latter.

A case decided in 2010, Merrill & Ring v. Canada, brought the LE issue to a head. The investor, referencing Saluka, argued that the tribunal should interpret Article 1105 in light of all sources of international law, not just CIL.198 In its view, given the absence of a substantive difference between the FET standard as expressed in (a) stand-alone BIT provisions, and (b) CIL,199 the NAFTA version must also contain the principle of LE.200 Canada reiterated the terms of the FTC Note, which it insisted would exclude good faith and legitimate expectations altogether.201 On this point, the arbitrators sided with the investor,202 agreeing that the BIT and CIL standard had converged:

[G]eneral principles of law … have a role to play in this discussion. Even if the Tribunal were to accept Canada’s argument to the effect that good faith, the prohibition of arbitrariness, discrimination and other questions raised in this case are not stand-alone obligations under Article

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195 Mondev v USA (n 193), paras 116-117.
196 ADF Group Inc v. United States (ICSID Case No ARB(AF)/00/1, NAFTA), Award of 9 January 2003; Waste Management v. Mexico (ICSID Case No ARB(AF)/00/3, NAFTA), Award of 30 April 2004, 43 ILM 967; Merrill & Ring Forestry L.P. v. Canada (UNCITRAL/NAFTA), Award of 31 March 2010; William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Government of Canada (UNCITRAL, PCA Case No. 2009-04), Award on Jurisdiction and Liability of 17 March 2015.
197 Waste Management Inc. v. United Mexican States (ICSID Case No ARB(AF)/00/3), Award of 30 April 2004, para 98 (emphasis added).
199 Ibid, para 161.
200 Ibid, para 167.
201 Ibid, paras 168-170.
202 Ibid, paras 184-186.
While the tribunal acknowledged the “binding” nature of the FTC Note, it declared, Pope and Talbot style, that CIL could not be considered “frozen in amber” or incapable of evolution. In the tribunal’s assessment, the CIL standard was “now broader than that defined [by] Neer and its progeny,” providing “for the FET of … investors within the confines of reasonableness.”

Turning to the dispute, the Merrill and Ring tribunal found no violation of the FET.

The most recent and, arguably, the most controversial, NAFTA award is Bilcon v. Canada (2015). The Bilcon tribunal, citing at length to Merrill and Ring with regard to CIL, and to Waste Management with respect to LE, stated bluntly that:

[T]he international minimum standard exists and has evolved in the direction of increased investor protection precisely because sovereign states – the same ones constrained by the standard – have chosen to accept it. States have concluded that the standard protects their own nationals in other countries and encourages the inflow of visitors and investment.

The tribunal then went on to apply a version of LE-FET analysis, finding that an environmental assessment undertaken by a provincial government had violated a Canadian federal statute, on which the investor had relied. In Bilcon, for the first time in a NAFTA proceeding, LE analysis had real bite.

Assessment

Tribunals have self-consciously treated innovative awards as focal points for horizontal coordination with one another, across treaty instruments and time. The result has been the steady construction of FET doctrine that provides a stable framework for argumentation and justification. Tribunals that have resisted these dynamics, as they have gathered force, have been marginalized, their awards ignored in subsequent proceeding.

Through their own lawmaking, arbitrators have taken on a duty to balance the LE of investors against a host state’s regulatory prerogatives. Consider this outcome in light of the balancing postures adopted by the most powerful international courts, when they enforce international economic law. The WTO-AB, the Court of Justice of the European Union, and the European Court of Human Rights all adjudicate derogation clauses, carve-outs that permit states to pursue important public policy purposes notwithstanding treaty obligations. When states plead these provisions in defense, the regimes’ courts review the reasons that states give to justify the proposed derogation. The judges do so in light of the principle of proportionality, a relatively intrusive standard of review that has replaced (or strengthened) “reasonableness” tests and other standards across the world. Each of these courts has eschewed the development of express deference doctrines. Instead, under the banner of effectiveness, each embraced a

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203 Ibid, para 187.
204 Ibid, para 192.
205 Ibid, para 213.
206 Ibid, para 435.
207 Ibid, para 442-444: The tribunal relied on Waste Management (n 197) for the proposition that the FET covers “reasonably relied-on representations by a host state, and a recognition that injustice in either procedures or outcomes can constitute a breach.”
208 Alec Stone Sweet and Jud Mathews (n 64).
version of the proportionality framework to ensure that states do not use derogation clauses to subvert treaty objectives.  

It is remarkable that the most influential ISA tribunals reached a comparable position, through a jurisprudence of general principles. Arbitrators did so, on their own, without express treaty authorization. Proportionality entered into ISA through *Tecmed*, citing to the case law of the ECHR with regard to indirect expropriation; *Saluka* insisted that tribunals should balance LE against the right to regulate; and a host of tribunals have since balanced with reference to the proportionality principle. The tribunals in *Continental Casualty v. Argentina* and *Total v. Argentina* (both presided by Sacerdoti) embraced approaches developed in the WTO.

**IV State Responses to Arbitral Lawmaking**

Considered in light of delegation theory, states are principals who have conferred juridical authority on arbitrators – their agents. States delegate directly through treaties. The regime for ISA rests on BITs, regional and sectoral investment treaties, and two multilateral agreements (the ICSID and New York Conventions). To the extent that investment treaties embody incomplete contracts, states also indirectly delegated lawmaking powers. Such powers inhere in arbitral authority, given that tribunals are under a duty to resolve disputes according to the terms of these treaties. As shown, arbitrators have constructed the FET, an incomplete provision *par excellence*, as a site of progressive lawmaking. This lawmaking has transformed the underlying law and politics of the regime.

State officials, arbitrators, and scholars are now intensively debating the extent to which the present regime is experiencing backlash from states.  

One standard argument holds that traditional capital exporting (i.e., advanced industrial) states will seek to curtail arbitral power insofar as they become recipients of FDI emanating from traditional capital-importing states, thereby exposing their own regulatory arrangements to review. A second argument suggests that to the extent that states in the developing world learn, or come to believe, that the current regime is biased against them, the more they will pursue treaties that are tailored to insulate them from liability, while reasserting state autonomy and regulatory prerogatives. To the extent that these hypotheses hold, states of both types would find it in their interest to design new treaties that would effectively insulate regulatory arrangements from arbitral review. I accept the premises of these propositions.

The crucial empirical question concerns how states, as Principals, have responded to the lawmaking of their Agents. States have the power to destroy the system, reform it, or exit. They may select an exit option, and denounce BITs and the ICSID Convention, as a small handful of states have done.  

They may draft and sign new treaties that leave indirect expropriation and the FET out altogether; or they may design such provisions to limit arbitral discretion, or to guide the tribunals’ decisionmaking in other ways. Here I focus on the extent to which states have deployed their treaty-making powers in response to arbitral lawmaking charted in this paper.

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211 See n 18, n 19.
To address this issue, we compiled data on every BIT signed between 2002 and the end of 2015, for which the text is available in English: n=398. Figure 8 charts the cumulative number of (a) new BITs signed during this period, and (b) new BITs that contain substantive criteria for interpreting either indirect expropriation (n=46) or the FET (n=40). One finding deserves emphasis up-front. Of the final awards on the merits contained in our data set (n=141), only four involved the arbitration of any treaty signed after 1999, the latest involving a BIT signed in 2003. Thus, no one will be able to assess the direct impact of new treaties on final awards until new rulings, interpreting a new generation of treaties, appear.

--- Figure 8 here ---

Analysis of the data provides no support for the view that the regime has generated “backlash” in any systemic sense. On the contrary: (a) states continue to negotiate and sign investment treaties; (b) the mix of treaty protections on offer has remained remarkably stable, and (c) what states have mostly done is to consolidate the system in line with how arbitrators have, in fact, developed it in their awards on liability. I do not mean to downplay the importance of states as treaty-makers. New treaties can consolidate the main lines of arbitral case law, once jurisprudence has congealed. When states, in effect, codify certain arbitral approaches to liability, they presumptively reduce the parameters of choice available to future tribunals. States also possess the capacity to destroy influential lines of case law, or to block future developments. To date, however, they have not done so in any significant way. I am aware of only one other completed empirical study that examines these same issues, and that project arrived at similar conclusions.\footnote{Tomer Broude, Yoram Z Haftel, Alexander Thompson, ‘Who Cares about Regulatory Space in BITs? A Comparative International Approach,’ in A Roberts, P-H Verdier, M Versteeg, and P Stephan (eds), \textit{Comparative International Law} (Oxford University Press, forthcoming).}

\textit{Indirect Expropriation}

Only 2 of the 398 new treaties in our data set leave out expropriation provisions.\footnote{BLEU-Qatar (2007) and BLEU-Montenegro (2010).} Within the expropriation domain, a small subset of new treaties (n=46; 12\%) include substantive criteria for determining indirect expropriation. All 46 of these BITs codify the main approach to indirect expropriation, as developed in arbitral case law, including the recognition of “creeping expropriation.” The standard formula reads:

It is understood that indirect expropriation results from a measure or series of measures of a
Contacting Party having an equivalent effect to direct expropriation without formal transfer of title or outright seizure.

With regard to methodology, the most common formulation, included in 33 new BITs, also comforts the basic arbitral approach to indirect expropriation. Article 7 of the Colombia-Turkey BIT of 2014, for example, stipulates that review under this heading requires “a case-by-case, fact-based inquiry” focusing on the following factors:

[T]he scope of the measure or series of measures; the economic impact of the … measures; the level of interference on the reasonable and distinguishable expectations concerning the investment; the character of the measure or series of measures in accordance with the legitimate public objectives searched; [i]n such way that the effect of the … measures is equivalent to the expropriation of the whole investment, a significant part of it, or prevents its use or the reasonable
expected economic benefit from it. The sole fact of a measure or a series of measures having adverse effects on the economic value of an investment does not imply that an indirect expropriation has occurred. [Emphases added.]

The same treaty, joined with minor variation by the other 45 BITs in the subset, goes on to state that:

It is understood that non-discriminatory measures of a Contracting Party that are designed and applied for public purposes or social interest or with objectives such as public health, safety and environment protection, do not constitute indirect expropriation.

The carve-out gives expression to the dominant thrust of the leading arbitral awards in this domain, as discussed above. The vast majority of tribunals, after all, have rejected most expropriation claims that target general measures in precisely these terms.

A second carve out related to public interests provides the clearest example of treaty-making seeking to hinder the development of an approach to liability found in an arbitral award: Santa Elena v. Costa Rica (2000). The dispute involved the taking of a property that was home to a rich mix of flora and fauna situated near a national park. The investor had purchased the property with the aim of developing a tourist resort, which Costa Rica expressly expropriated in order to preserve it, while incorporating it into the park. Costa Rica agreed that it owed compensation. The tribunal’s task therefore reduced to determining the amount to be paid, a question on which the parties disagreed. Along the way, the tribunal stated that:

[T]he purpose of protecting the environment for which the Property was taken does not alter the legal character of the taking for which adequate compensation must be paid. The international source of the obligation to protect the environment makes no difference. Expropriatory environmental measures – no matter how laudable and beneficial to society as a whole – are, in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the state’s obligation to pay compensation remains.

Of the new BITs signed since 2002, 42 (10.5%) declare that general measures taken for purposes of “health, safety and environmental protection” do not, in and of themselves, constitute expropriation. It is doubtful that the public health, safety and environment protection carve-out would apply to an expropriation decree, and Costa Rica did not even plead the matter.

Provisions such as these largely conform to the positions taken by the most cited awards on exactly this issue. In 2006, the Saluka tribunal (one of the most cited ISA awards) had held that:

In the opinion of the Tribunal, the principle that a State does not commit an expropriation and is thus not liable to pay compensation to a dispossessed alien investor when it adopts general regulations that are “commonly accepted as within the police power of States” forms part of customary international law today. There is ample case law in support of this proposition. As the tribunal in Methanex Corp. v. USA said recently in its final award, “[i]t is a principle of CIL that, where economic injury results from a bona fide regulation within the police powers of a State, compensation is not required.”

216 Ibid, paras 71-72.
217 Saluka v. Czech Republic (n 41), para 262.
With the exception of certain awards issuing from the Argentina crisis, no important award dating after *Saluka* announces the contrary. Only 5 of the 42 new BITs containing the "health, safety and environmental protection" carve-out predate *Saluka*, and four of those involve India.\(^{218}\) A formulation common to the China-India (2006) and Canada-Peru (2006) BITs, stipulates that:

> Except in rare circumstances, such as when a measure or series of measures is so severe in the light of its purpose that it cannot be reasonably viewed as having been adopted and applied in good faith, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriation.\(^{219}\)

The provision fits comfortably with the dominant arbitral approach to the same issue. I doubt that many arbitrators would consider it a reining-in of their powers.\(^{220}\)

**The FET**

In the FET domain, critics and proponents agree that arbitral lawmaking has expanded the scope of pleadings and made review more intrusive. In response, states could excise the provision (which would leave the CIL standard in place), or limit its scope, prohibiting coverage of an investors’ LE, for example. Of the 398 BITs in our data set, only 7 (1.8%) do not contain the FET.\(^{221}\) Two of these mandate the “minimal standard of treatment,” respectively, of international law\(^{222}\) or CIL.\(^{223}\) Thus, five BITs, negotiated among only 6 states, contain no provision related to the treatment of an investor by the host state; and only one of these dates from after 2005.\(^{224}\)

Of the new BITs that contain the FET or a standard of treatment owed investors (n=393), states negotiated interpretive guidelines in 40. Within this subset of new BITs (barely 10%), the most important development is the diffusion of the terms of the FTC Note, primarily through new BITs signed by Canada (n=17), Mexico (n=9), Japan (n=5), China (n=5), and the U.S. (n=2). Fully 34 of the 40 treaties in this category (85%) contain both guidelines, stating:

1. “The concepts of ‘FET’ and ‘full protection and security’ do not require treatment in addition to … that which is required by the CIL minimum standard of treatment of aliens”;
2. “A determination that there has been a breach of … a separate international agreement, does not establish that there has been a breach of [the FET].”

\(^{218}\) India-Trinidad and Tobago BIT (2007); India-Jordan BIT (2006); China-India BIT (2006); India-Saudi Arabia BIT (2006).


\(^{220}\) *El Paso v. Argentina* (n 63), paras 240-241: As the *El Paso* tribunal put it: A “general regulation”, such as a statute or regulation that applies to all within a domain of activity, “is a lawful act rather than an expropriation if it is non-discriminatory, made for a public purpose and taken in conformity with due process.” However, when the state enacts “unreasonable, *i.e.* arbitrary, discriminatory, disproportionate or otherwise unfair” measures, they may be “considered as amounting to indirect expropriation if they result in a neutralisation of the foreign investor’s property rights.”

\(^{221}\) Five BITs whose formulations depart slights from the standard FET provision are included in the FET count: two (Dominican Republic-Italy BIT (2006) and Italy-Yemen BIT (2004)) announce a “just and fair treatment” standard; two (Albania-Moldova BIT (2004) and Botswana-Ghana BIT (2003)) call for “equitable treatment”; and one (Italy-Nicaragua BIT (2004)) provides for “fair treatment”.

\(^{222}\) Azerbaijan-Estonia BIT (2010).

\(^{223}\) Guatemala-Trinidad and Tobago BIT (2013).

\(^{224}\) Morocco-Serbia BIT (2013); Turkey-UAE BIT (2005); Libya-Malta BIT (2003); Malta-Turkey BIT (2003); Italy-Malta BIT (2002).
Of these 40 BITs, 1 contains the first guideline only; 4 include only the second guideline; and only 1 leaves both out. Perhaps the migration of the FTC guidelines from NAFTA into BITs will eventually change the basics of FET doctrine, but we are skeptical. Given that the NAFTA FTC failed to constrain NAFTA tribunals, there is little reason to think that tribunals arbitrating these same provisions in BITs will be more inclined to depart from the established case law.

No new BIT, including those signed by NAFTA parties, removed the LE of investors from consideration under the FET. This outcome counts against backlash claims, dispositively in our view. Meanwhile, some of the 40 new BITs that added substantive criteria actually codify elements of FET case law. Some BITs now stipulate that the treatment owed to investors covers explicit promises made to them by host states. Article 5 of the trilateral agreement between China, Japan, and South Korea (2012), for example, announces the FET and then immediately states that:

Each Contracting Party shall observe any written commitments in the form of an agreement or contract it may have entered into with regard to investments of investors of another Contracting Party.

Further, a long list of states – including Belgium and Luxembourg, Canada, Colombia, India, Japan, Mexico, and the U.S. – took pains to establish, within the rubric of the FET, the prohibition of denial of justice, and obligations of due process, transparency, notice and comment. In sum, we observe states working to consolidate the FET as a framework for the development of general principles, while doing virtually nothing to dismantle it.

General Exceptions

States may also generate derogation clauses, in the form of non-precluded measures provisions. An exception might apply only to selected provisions. A derogation clause might also apply generally, to most or all of a treaty, as does Article XX GATT (1947), or Article XIV of the GATS (1994). The most prevalent general exception clause is found, with only slight variation, in every new BIT to which Canada is a party (n=17). The Canadian formulation is also the widest in scope. Modelled on WTO clauses, it creates a carve-out for measures that are “necessary to protect human, animal or plant life or health,” as well as “for the conservation of living or non-living exhaustible natural resources.” It adapts the “chapeau” of Article XX GATT to investment, specifying that the derogation is only available for measures that are not “applied in a manner that constitutes arbitrary or unjustifiable discrimination between investments or between investors,” or constitute “a disguised restriction on international trade or investment.” It stipulates that the BIT does not “prevent a Contracting Party from adopting or maintaining reasonable measures for prudential reasons,” in the banking and finance sector. And it does...

226 China-Uzbekistan BIT (2011); Belarus-Mexico BIT (2008); Colombia-India BIT (2009), China-Japan-South Korea BIT (2012).
228 Japan-Laos BIT (2012); Colombia-Japan (2011).
229 Article 5(2), China-Japan-South Korea (2012).
230 BLEU-Colombia BIT (2009); India-Mexico BIT (2007); Rwanda-USA BIT (2008); Canada-Jordan BIT (2009); China-Japan-South Korea (2012).
231 For the domain of expropriation, see the discussion above. With regards to the FET, we found only two treaties that contained substantive carve-outs. Article 2(4) of the Morocco-Vietnam BIT (2012) prohibits the application of the FET for “measures that have to be taken by either Contracting Party for reasons public security, order or public health or protection of environment provided that such measures are not applied in a manner which would constitute a means of arbitrary or unjustified discrimination.” Under the Australia-Mexico BIT (2005), investors may attack taxation measures under the expropriation (but not the FET) heading.
the same for measures “necessary to protect … essential security interests,” and to “fulfill obligations” when it comes to international security arrangements.  

Canada’s boilerplate exception clauses are likely to push tribunals into exactly the kind of proportionality-based posture that some tribunals have already adopted (e.g., in Total). The same point applies to the other BITs that contain GATT-style derogation provisions, including those of Jordan-Singapore (2004), Colombia-India (2009), Colombia-Japan (2012), Colombia-Turkey (2014), and Japan-Peru (2008).

States reveal their preferences, and weigh-in on the acceptability of current arrangements, through publishing model BITS and floating drafts of new treaties. I examined these texts in light of the P-A issues raised. Two trends merit emphasis (as well as deeper consideration than I can give to them here).

First, when states have considered departures from the standard template for BITs, the more radical proposals have been removed or diluted. The scaling back of reform ambitions has taken place during the drafting process itself, and after the release of a “draft model BIT” for public comment. In the U.S., the business community’s worries about reducing investment protections, including with regard to the FET, prevailed over those who sought to strengthen regulatory prerogatives. In the end, the 2012 U.S. Model BIT made only marginal adjustments to the 2004 Model it replaced. In 2008, the Norwegian Government issued a draft model that contained several revisionist features, including a requirement that investors exhaust local remedies before filing for arbitration. The Government dropped the provision in the 2015 version, after Norwegian business leaders and investors mounted protests.

The Indian Government has produced the most innovative model, which it submitted in draft for comment in April 2015. The draft: required exhaustion of local remedies; insulated from arbitral review “any legal issue” that had been “finally settled by any judicial authority of the Host State”; and prohibited a tribunal from reviewing a host state’s determination that a state act under review was taken in the public interest, and thus deserving substantial deference. It left out the FET, preferring a “treatment of investment” provision prohibiting “fundamental breaches of due process,” and “manifestly abusive treatment, such as coercion, duress and harassment,” presumably to block application of the case law on the “legitimate expectations” of investors to disputes involving India. Most intriguing, the March 2015 model contained a long list of investors’ “duties” (anti-corruption, disclosure, and compliance with environmental and consumer protection law, human rights, and labor regulations, and so on), headings under which a host state could counter-sue the investor. After opposition by Indian business groups, and the publication of a critical commentary by its own Law Commission (composed of judges and representative of the bar), the draft was revised. In its final Model BIT, revealed in December 2015, Indian officials maintained its stance on the “treatment of investment,” and limited the exhaustion of

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232 Expressing a particular Canadian sensitivity, BIT protections also do not apply to measures regulating the “cultural industry” and the media.

233 Brazil, which has signed, but not ratified any BIT, has recently negotiated two new BITs, with Mozambique and Angola. The treaties, whose “ratification prospects … remain dim”, do not provide for the FET or indirect expropriation and arbitration can be initiated only by states (not an investor). – see Clovis Trevino, ‘A Closer Look at Brazil’s Two New Bilateral Investment Treaties’ (Investment Arbitration Reporter, 10 April 2015) http://www.iareporter.com/articles/a-closer-look-at-brazils-two-new-bilateral-investment-treaties/.


remedies requirement to a period of five years, but they excised completely the other initiatives just mentioned.236

The second important trend concerns derogation clauses, the addition of which reflects states’ concern for defending their regulatory prerogatives. The insertion of a “general exceptions” provision, typically modelled on Article XX GATT (1947) or Article XIV GATS (1994), and the creation of carve outs for “essential security interests,” taxation, and other sensitive areas, has clearly gained momentum. Canada initiated the practice, which then spread to a small handful of other states, as evidenced in BITs signed since 2002 (see chapter 5). Virtually all of the new Model BITs and draft treaties we examined contain such general exceptions and carve outs, as well as statements to the effect that “it is inappropriate to encourage investment by weakening or reducing the protections afforded in domestic labor [or environmental] laws.”237 To the extent that these preferences are consolidated in new treaties, they will favor further doctrinal integration of the trade and investment regimes,238 as well as a more structured development of the proportionality principle (see below).

I do not consider these developments to be straightforward indicators of “backlash,” as others might. On the contrary, experienced arbitrators are likely to welcome these moves, insofar as they (a) comfort approaches to the “right to regulate” developed by the most influential tribunals themselves (chapters 4 and 5), and (b) leave tribunals less exposed as primary lawmakers. Significantly, new models and drafts also explicitly assert the host state’s “right to regulate,” including the Draft Model BITs of Norway and India, the draft Comprehensive Economic and Trade Agreement between Canada and the European Union [CETA], and the Trans-Pacific Partnership [TPP],239 signed in February 2016 by 12 Pacific Rim states, including Australia, Canada, Japan, the U.S., and Singapore.

Why have states not pursued a more radical reform agenda? In response, I would highlight three main factors. First, the generic problems of contracting and coordination are acute in international economic law. States have found it difficult to write more complete contracts when it comes to the most highly arbitrated domains of investment law, the provisions on indirect expropriation and the FET illustrate the point. The provisions of most new BITs, revised models, and draft treaties in these areas have consolidated, not repudiated, approaches that had already been mapped in major strains of arbitral jurisprudence. When it comes to broader issues of regime design, the decision-rule governing treaty-revision – consensus – favors inertia. Second, even when states have contemplated proposals to expressly restrict treaty protections for foreign investment, domestic investors and the national bar have pushed back. India has become a major capital exporter, and Indian investors want the same protections that their counterparts from other countries enjoy. Third, it has proven difficult, even for the most skeptical and disgruntled states (and scholars), to demonstrate that the regime is biased in favor of investors in a systemic sense,240 or against developing states.241 While more than 25% of all filings are settled,242 states

237 Article 13(2), U.S. Model Bit (2012). Such statements are also found in dozens of BITs signed since 2002.
240 Susan D Franck, ‘The ICSID Effect? Considering Potential Variations in Arbitration Awards’ (2011) 51/4 Virginia Journal of International Law 825. To our knowledge, the only relatively systematic empirical study that purports to have found pro-investor bias concerns decisions on jurisdiction; Gus Van Harten, ‘Arbitrator Behaviour
prevail in most cases at the merits stage, their winning percentage topping 56%. Further, dominant lines of arbitral doctrine fully recognize their regulatory prerogatives (under a general principle or an updating of police power doctrines). These points add up to a rather banal conclusion: most states, even those that are reform-minded, find the basics of the present regime to be in their interest. Others who have examined these same issues in the light of relatively systematic data collection and analysis have reached the same conclusions.

To be clear – structural reform is in the reach of states. Indeed, if even a handful of powerful states converged on preferences to remake the regime in some fundamental way, they would very likely succeed. They would need only to contract the new arrangements with one another, abandon old agreements, and then insist that their partners in BITs and regional treaties do likewise or be excluded from what would be, in effect, a new regime.

While the most powerful states continue to extend the scope of treaty-based ISA, the potential for structural change has recently opened up in the related areas of appointment and appeal. A potential game-changer comes in the form of the draft of the Canada-EU CETA, which the parties released, “for information purposes,” in February 2016. The text proposes extensive judicialization, in the form of a permanent body of arbitrators and an appellate court, pushed by the European Commission and Germany. The parties envision the creation of a “multilateral investment tribunal and appellate mechanisms,” which would feature a “Tribunal” to be composed of “at least 15 individuals” possessing “expertise” in international trade law. According to an “Ethics” provision, persons named to this roster would be required to “refrain from acting as counsel or as party-appointed expert or witness in any pending or new investment dispute under this or any other international agreement,” and to “comply” with IBA Guidelines. With regard to appointments, the parties, aided by the Chair of the CETA Joint Committee (an administrative official who represents state parties), would select members of arbitral “Panels.” Where parties fail to agree, the Chair of the Joint Committee would organize appointment through the drawing of lots, from three lists of members of the Tribunal provided, respectively, by each party and the Chair herself.
The draft treaty also foresees the creation of an Appellate Tribunal, to be appointed by the Joint Committee. According to draft Article 8.28(1), disputants would be able to “appeal an award ... within 90 days after its issuance.” Appeals would be processed by a 3-member “division,” drawn at random from members of the Appellate Tribunal. Appellate Divisions would be authorized to “uphold, modify or reverse a Tribunal’s award” on grounds of “errors in the application or interpretation of applicable law,” “manifest errors in the appreciation of the facts, including the appreciation of relevant domestic law,” and under the grounds of annulment set out in Article 52(1) of the ICSID Convention (part 2). In draft Article 8.29, the CETA parties declare their commitment to pursuing, along “with other trading partners,” the creation of “a multilateral investment tribunal and appellate mechanism for the resolution of investment disputes.”

The draft CETA, which already has been the subject of sharp criticism by both proponents and opponents of reform, is now being widely-discussed by officials, arbitrators, and scholars. Kaufman-Kohler and Potestà, in their 2016 white paper for UNCITRAL, propose a relatively detailed blueprint for building an appellate regime, on the basis of the usual reasons (to enhance jurisprudential coherence and reduce instances of legal error). Their plan entails the creation of an appellate tribunal by multilateral convention, on which states would confer jurisdiction through an opt-in for parties to existing investment treaties, and through express provision in new treaties. They are fully aware of the risks involved:

First, if appeals were possible, they would soon become the rule, as states and investors who have lost a case could not afford not to file an appeal, be it only for reasons of internal accountability. Second, as ‘ICSID experience with ad hoc annulment committees show, even corrective mechanisms intended to be severely restricted (indeed allowing no appeal even on points of law) have a tendency to duplicate the arbitral process itself in terms of duration, cost, complexity …’

This could prove especially detrimental for States and investors with limited resources.

The authors focus on appeal, and do not advocate important changes in the rules governing proceedings at the “lower” level at which the dispute is settled in the first instance. Because the proposal seeks to minimize adjustment costs, largely eliminating the need for states to renegotiate agreements, and for arbitrators to alter their approach to the law, the proposal may have a chance of succeeding. I support it.

Conclusion

I will conclude with a brief note on current legitimacy debates, focusing on authorization and delegation, and the public-private distinction.

251 Kaufman-Kohler and Potestà, n 249, p. 32.
It is quite obvious that express authorization does not resolve all legitimacy dilemmas, but it does narrow and focus debate. Consider a written constitution, containing a judicially-enforceable charter of rights, enacted through popular referendum. The dominant ideology of rights-based constitutionalism has it that the sovereign People, in legislating a constitution, have delegated to a constitutional court (or to the judiciary as a whole) the responsibility to supervise the rights-regarding decisions of all other public officials. These arrangements fulfill the basic principles of formal legitimacy. Further, the drafters delegate inherent lawmaker powers to judges, to the extent that the rights provisions they write are substantively incomplete. Despite authorization, (seemingly irresolvable) debates on the democratic legitimacy of judicial review rage on. In my view, the more robustly judges perform their duties, the more their political legitimacy will be contested. If so, a quasi-permanent legitimacy crisis is to be expected, wherever constitutional courts are effective.

The major source of legitimation in international law is the treaty, a contract between two or more states. Investments treaties establish arbitral authority and, to the extent that they are incomplete contracts, they confer inherent lawmaking powers on tribunals. As just documented, arbitrators have made much of the substance of international investment law in the domains of the FET and indirect expropriation, the two most important causes of action available to investors. When states, as Principals, have responded, they have mostly acted to codify the main tenets of arbitral case law; efforts to block the development of the jurisprudence have floundered. It may be that recently produced model BITs, new draft treaties, and a wave of signed BITs that include WTO-style “general exceptions,” will combine to alter the development of ISA, a topic discussed further below. At this point, it suffices to restate the point just made with respect to constitutions. States, as treaty-makers, have fully authorized arbitral lawmaking; ISA meets the basic criteria of formal legitimacy; but legitimacy debates have not been extinguished.

As the importance of ISA has grown, so has scholarship that grounds normative reflection in a comparative-institutional analysis of judicial authority. The most important critical research in this vein focuses on ISA as a form of “global administrative law.” In the seminal article, Loughlin and Van Harten stress similarities of function between public law courts and ISA tribunals, while highlighting important differences between ISA and ICA:

Commercial arbitration originates in an agreement between private parties to arbitrate disputes between themselves in a particular manner, and its authority derives from the autonomy of individuals to order their private affairs as they wish. Investment arbitration, by contrast, originates in the authority of the state to use [it] to resolve disputes arising from the exercise of public authority. Investment arbitration is constituted by a sovereign act, as opposed to a private act, of the state and this … makes investment arbitration more closely analogous to domestic juridical review of the regulatory conduct of the state.

Because the judicial review of public acts is inevitably implicated in governance, the political legitimacy of such arrangements should not be presumed but, rather, closely scrutinized.

When one actually does so, they argue, ISA is found lacking. One notices, for example, that the regime has not developed stable standards of review, or appropriate doctrines of deference to public interests, as one expects well-functioning judiciaries to do. In 2006, when their article was published, the process of developing such standards was in its infancy, and remains incomplete today. In the past

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decade, Van Harten\textsuperscript{253} – who advocates formal judicialization, including the creation of an appellate jurisdiction\textsuperscript{254} – and a growing group of scholars have taken up these issues in earnest.\textsuperscript{255}

I embrace the ISA-as-governance formulation – and believe that ICA should be subjected to the same searching questions, at least when mandatory state law is at issue. The fact remains, however, that ISA blends some relatively weak “public law” functions with strong “private law” remedies. Tribunals are charged with reviewing the treaty-conformity of state acts but, unlike a national administrative or constitutional court, they do not possess the power to invalidate such acts judged to be unlawful. Put differently, they exercise no sovereign authority within the legal order of the respondent state. Instead, tribunals award compensation where liability is found. The remedy – damages to successful claimants, rather than invalidation or performance orders – gives to ISA a “private law” complexion, akin to ICA in this respect.

As Anthea Roberts has argued, the choice of analogy by arbitrators and scholars can powerfully frame legal and normative arguments, often driving them to a conclusion.\textsuperscript{256} If the analyst’s point of departure is the available remedy, rather than the nature of the act under review, a different set of analogies, with different normative implications, emerges. ISA instantiates a system of liability assessment for breach whose basic function is to override the “hold-up” problem when it comes to foreign investment. States sign treaties to signal their commitment to investor protections; and they confer authority on arbitrators as a means of securing the credibility of those commitments. It is the basic function of tribunals to assess liability and the level of compensation when states breach their obligations. States may well choose to breach promises made to investors, including for sound public policy reasons. Under this view, the review of state acts is essential to the task of determining how much it will cost the state to breach the property rights of an investor, for any purpose the state may deem important. The view analogizes in the direction of an efficient breach model,\textsuperscript{257} in which a duty to compensate comprises an escape hatch with respect to performance. Liability found, the judge’s role is to determine the appropriate compensation to the successful claimant, not to order performance on the part of the state. Because investors are the vulnerable parties when it comes to non-performance on the part of states, formal arbitral deference to the latter is not presumptively warranted. Rather, tribunals should determine liability and damages on a case-by-case basis, through a process that will include an assessment of the importance of legitimate public interests, which is precisely what most tribunals do most of the time.

* * * * *

Figures and Tables Follow

\textsuperscript{255} Citations to scholarship omitted.
Source: UNCTAD, IIA database.
Note: Preliminary data for 2014.
Figure 2: Cumulative Number of State Ratifications of the ICSID Convention, 1959-2016

Source: List of Member States – ICSID, online at: https://icsid.worldbank.org/apps/ICSIDWEB/icsiddocs/Pages/List-of-Member-States.aspx.
Figure 3: Known Treaty-Based Investor-State Arbitration Cases, 1987-2015
Source: UNCTAD World Investment Reports (annual), online at:

[Graph showing annual number of cases from 1987 to 2015, with bars representing ICSID and Non-ICSID cases.]

Source: ©UNCTAD, ISDS Navigator
Figure 4: New Cases Registered at ICSID: 1972-2015

Source: ICSID Reports (annual), online at: http://www.lcil.cam.ac.uk/publications/icsid-reports.
Figure 5: Average Number of Citations per Award and by Period

Figure 6: Cumulative Number of Awards and Cases Cited, by Period

Series 1: Number of Awards in the Data Set
Series 2: Citations to past awards.

Figure 7: Percentage of Awards Citing to Case Law by Source and Period

Table 1: Citation to Case Law by Legal Domain

<table>
<thead>
<tr>
<th>Domain</th>
<th>Citations</th>
<th>% of All Citations Per Domain</th>
<th>Awards Citing to Case Law Per Domain</th>
<th>% of Awards Citing to Case Law Per Domain</th>
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<tbody>
<tr>
<td>Fair &amp; Equitable Treatment</td>
<td>640</td>
<td>28.5%</td>
<td>87</td>
<td>51.8%</td>
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<tr>
<td>Expropriation</td>
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<td>20.1%</td>
<td>83</td>
<td>49.4%</td>
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<td>Damages</td>
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<td>12.1%</td>
<td>55</td>
<td>32.7%</td>
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<tr>
<td>Protection &amp; Security</td>
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<td>6.1%</td>
<td>27</td>
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<tr>
<td>Interest Assessment</td>
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<td>4.1%</td>
<td>16</td>
<td>9.5%</td>
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<td>4.0%</td>
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<td>Investment</td>
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<td>21</td>
<td>12.5%</td>
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<td>22</td>
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<td>Denial of Justice</td>
<td>60</td>
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<td>15</td>
<td>8.9%</td>
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<td>Umbrella Clause</td>
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<td>Necessity</td>
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<td>Cost/Fees</td>
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<tr>
<td>Other</td>
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<tr>
<td>Total</td>
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Table 2:
Review of State Measures: Pleadings and Outcomes

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<th>Claims</th>
<th>Violations</th>
<th>No Violation</th>
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<tr>
<td>General Measures</td>
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<td>22</td>
<td>18</td>
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<td>Argentina Cases</td>
<td>14</td>
<td>12</td>
<td>2</td>
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<tr>
<td>Non-Argentina Cases</td>
<td>26</td>
<td>10</td>
<td>16</td>
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<tr>
<td>Individual Measures*</td>
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<td>58</td>
<td>51</td>
</tr>
<tr>
<td>Total</td>
<td>139</td>
<td>80</td>
<td>69</td>
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</tbody>
</table>

* This count excludes the 14 Argentina awards, and those 12 awards in which a tribunal found a violation of a general measure. The number of claims (n=149) is higher than the total number of awards (n=139) because we coded awards that rejected a pleading against a general measure, while accepting a claim against an individual measure.

Table 3: Cases, Claims, and Violations Found in Investor-State Arbitration: Expropriation, Umbrella Clauses, and Fair and Equitable Treatment

<table>
<thead>
<tr>
<th>Total</th>
<th>ICSID*</th>
<th>NAFTA</th>
<th>OTHER**</th>
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<tbody>
<tr>
<td>Cases</td>
<td>141</td>
<td>83</td>
<td>22</td>
</tr>
<tr>
<td>Claims:</td>
<td>341</td>
<td>212</td>
<td>39</td>
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<tr>
<td>Direct Expropriation</td>
<td>57</td>
<td>35</td>
<td>2</td>
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<tr>
<td>Indirect Expropriation</td>
<td>117</td>
<td>70</td>
<td>18</td>
</tr>
<tr>
<td>Umbrella Clause</td>
<td>44</td>
<td>35</td>
<td>NA</td>
</tr>
<tr>
<td>FET</td>
<td>123</td>
<td>72</td>
<td>19</td>
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</table>

<table>
<thead>
<tr>
<th>Violations Found</th>
<th>Success Rate</th>
<th>Success Rate</th>
<th>Success Rate</th>
<th>Success Rate</th>
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</thead>
<tbody>
<tr>
<td>Cases</td>
<td>90</td>
<td>64%</td>
<td>55</td>
<td>66%</td>
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<tr>
<td>Claims</td>
<td>113</td>
<td>33%</td>
<td>78</td>
<td>37%</td>
</tr>
<tr>
<td>Direct Expropriation</td>
<td>11</td>
<td>19%</td>
<td>8</td>
<td>23%</td>
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<tr>
<td>Indirect Expropriation</td>
<td>29</td>
<td>25%</td>
<td>19</td>
<td>27%</td>
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<tr>
<td>Umbrella Clause</td>
<td>9</td>
<td>20%</td>
<td>8</td>
<td>23%</td>
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<tr>
<td>FET</td>
<td>64</td>
<td>52%</td>
<td>43</td>
<td>60%</td>
</tr>
</tbody>
</table>

* We include both ICSID Convention and ICSID Additional Facility cases here, excluding NAFTA from the latter category.
** We include UNCITRAL arbitrations here, except NAFTA cases arbitrated under UNCITRAL Rules.

Figure 8:
Cumulative Number of New BITs and New BITs Containing Interpretive Guidelines for Indirect Expropriation and the FET, 2002-2015