THE INCONSISTENCIES OF THE INVESTOR-STATE SOLUTION IN THE INTERNATIONAL PROTECTION OF THE FOREIGN INVESTOR: AN ANALYSIS OF THE MAIN SUBSTANTIVE CLAUSES FROM THE PERSPECTIVE OF HOST STATES

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Abstract

*International investment law is historically structured by the unilateral protection of the foreign investor. The dissemination of the Bilateral Investment Treaty [“**BIT**”] model dates back to the second half of the twentieth century, and its expansion occurred only after the 1980s. BITs consist of an international agreement comprising substantive and procedural rules, defining the protection of foreign investment and investors in a territory other than their nationality and establishing a dispute resolution model, with the adoption of the Investor-State solution system via ad hoc arbitration. In the 21st century, after decades of the prevalence of BITs, there have been numerous criticisms of this model characterized by subjective and controversial decisions, incongruous interpretations, and, above all, by blocking the legitimate exercise of the State to dispose of its public interest, such as environmental protection, health and economic measures. The article analyses these substantive clauses from* ad hoc *arbitration cases: (i) National Treatment; (ii) Most-Favoured-Nation Treatment; (iii) Minimum Standard of Treatment principle; (iv) Fair and Equitable Treatment; (v) Full Protection and Security; (vi) Direct and Indirect Expropriations and Compensation; and (vii) Umbrella Clause. Finally, the article concludes that the arbitral awards are inconsistent and inflict serious damage to the exercise of the States, especially to host States, which is evidenced by the recent amendments of the BITs by more restrictive models of international investment protection.*

Keywords: Bilateral Investment Agreement; Investor-State Arbitration; Foreign Investment; Public Interest; Host States.

I. INTRODUCTION[1]

A set of rules is applied to international investment protection commonly provided for in

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bilateral and regional agreements. Essentially, these are rules to protect investors against acts of the host state, guarantees of non-discrimination against national and third-country investors, prohibition of arbitrary and discriminatory acts, rules for compensation in the event of expropriation, and mainly, the definition of the dispute settlement system through conciliation or mediation, domestic jurisdiction and state-state or investor-state arbitration. This plurality of legal alternatives often leads to practices such as *forum shopping* and *forum treaty*, to circumvent legal systems that are not advantageous to foreign investors.

The historical understanding of International Investment Law allows us to recognize the recurrent use of rules arising from capital-exporting nations, then perceived as international, with the purpose of avoiding the domestic jurisdiction of capital-importing countries, mostly developing ones.

In this sense, it is possible to identify in the contemporary international investment law the main substantive rules in BITs and FTAs that will be analysed in this article: (i) National Treatment ["**NT**"]; (ii) Most-Favoured-Nation Treatment ["**MFN**"]; (iii) Minimum Standard of Treatment ["**MST**"] principle; (iv) Fair and Equitable Treatment ["**FET**"]; (v) Full Protection and Security ["**FPS**"]; (vi) Direct and Indirect Expropriations and Compensation; and (vii) Umbrella Clause.[2]

These clauses are important to understand the international protection system and its relationship with host states, especially those that are in the condition of emerging or developing countries, whose impacts of an arbitration award are significant. At the end of this analysis, a summary of the main cases examined is provided, divided according to the

[2] The list of the main clauses applied in BITs and FTAs is based on the doctrine that focuses its analysis on these institutes. See: Andrew Bjorklund, *Practical and legal avenues to make the substantive rules and disciplines of international investment agreements converge*, in ROBERTO ECHANDI, PIERRE SAUVÉ (eds.) PROSPECTS IN INTERNATIONAL INVESTMENT LAW AND POLICY ' 182-185 (Cambridge University Press 2013); RUDOLF DOLZER, CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 178-179, 182-183, 186-187 (Cambridge University Press 2008); RUDOLF DOLZER ET AL., PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 3 254-255 (Oxford University Press 2022); MATTHIAS HERDEGEN, PRINCIPLES OF INTERNATIONAL ECONOMIC LAW 67, 69, 85, 413, 459-460 (Oxford University Press 2016); M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 4 131, 242, 410-413 (Cambridge University Press 2017); JOSE E. ALVAREZ, THE PUBLIC INTERNATIONAL LAW REGIME GOVERNING INTERNATIONAL INVESTMENT, The Hague Academy of International Law 177 (The Hague: AIL-Pocket, 2011); Locknie HSU, *Rule of Law and Foreign Investment*, Rule of Law Symposium 2014, The importance of the rule of law in promoting development, Research Collection School Of Law, Singapore Management University (2015), 139; Stephan W. Schill, Vladslav Djanic, *International Investment Law and Community Interests*, in E. BENVENISTI, SCHILL, G (eds.), COMMUNITY INTERESTS ACROSS INTERNATIONAL LAW 2-3 (Oxford University Press, 2018); Katia Yannaca-Small, *Improving the System of Investor-State Dispute Settlement*, OECD Working Papers on International Investment, 2006/01 (OECD Publishing, 2006); Stephan W. Schill, *Derecho internacional de inversiones y derecho público comparado en una perspectiva latino-americana*, in Attila Tanzi, Alessandra Asteriti, Rodrigo Polanco Lazo, Paolo Turrini, (eds.), INTERNATIONAL INVESTMENT LAW IN LATIN AMERICA / DERECHO INTERNACIONAL DE LAS INVERSIONES EN AMéRICA LATINA 30-32 (Brill Nijhoff 2016); ANDREW NEWCOMBE AND LLUÍS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES 448, 453-454, 467-468 (Kluwer Law International 2009).

interpretative lines that have been identified.

This paper shows the inconsistency of arbitral awards with the main standard clauses upheld in BIT models. As a result, both developing and emerging countries, as well as developed countries, are moving away from international investment protection, focusing on national jurisdiction or the adoption of more restrictive agreements.

The movement away from the traditional model of investment agreements can be seen, in concrete terms, in the adoption of balanced bilateral agreements, including exceptions to the application of foreign protection rules when it involves the public interest of the host State. In addition, regional agreements with specific chapters on investment have been adopted. In the latter case, these regional agreements, known as mega agreements, are very careful in adopting international arbitration solutions, clearly outlining the limits of their scope and providing a wider range of guarantees for the host state's public interest.

II. NATIONAL TREATMENT

National treatment indicates that the foreigner should be given treatment no less favourable than that accorded to the national of the state. Thus, the institute was constructed to ensure equality of conditions between nationals and foreigners. The NT is a principle of non-discrimination (as is the MFN), which differs from the MST, FET and FPS and compensation for expropriation, which are part of investment protection rules.

As to the NT wording, it should analyze the term "*in like circumstances*" or "*in like situations*" foreseen mainly in NAFTA (art. 1102(1)), in the current USMCA (art. 14.4), and the ECT (art. 10(3)),[3] to allow a comparison between domestic and foreign companies to establish whether there would be discrimination based on the nationality of the legal entity. This issue is evidenced in *S.D. Myers v. Canada.*[4]

The term "*in like situations*" has been replaced in recent years by "*in like circumstances*", as noted in the United States BIT models of 2004 and 2012, both in art. 3. In NAFTA (art. 1102), USMCA (art. 14.4) and CETA (art. 8.6) they also apply this formulation. The expression "*in like situations*" is commonly used for same-sector comparisons, and "*in like circumstances*"

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[3] North American Free Trade Agreement, art. 1102, 1994, <http://www.sice.oas.org/trade/nafta/chap-111.asp#A1102>). Note that NAFTA was changed in 2020 and renamed as United States-Mexico-Canada Agreement - USMCA ('United States-Mexico-Canada Agreement'. Chapter 14. July 7, 2020, <https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/14-Investment.pdf>). About the Energy Charter Treaty (ECT), see: 'Energy Charter Treaty', <https://www.energycharter.org/fileadmin/DocumentsMedia/Legal/ECTC-en.pdf>.

[4] *S.D. Myers, Inc. v. Government of Canada*, Partial Award, ¶ 248 (Nov. 13, 2000).

to different economic sectors.[5]

In *Occidental v. Ecuador*, the court understood the application of national treatment broadly even allowing the comparison between different economic sectors, such as oil, flowers and marine products.[6]

The specificities of oil production go well beyond the comparison of treatment with other goods, such as flowers, bananas and palm oil, not having enough legal basis. However, the Occidental case has been used extensively in other disputes involving NT.

The inconsistency of the arbitral awards is seen when comparing the Occidental case with *Pope & Talbot v. Canada*, where this arbitral tribunal held that the claim of discrimination regarding national treatment should be analyzed only within a single economic sector ("*in like situations*").[7] The same in *Marvin Feldman v. Mexico,*[8] *S.D. Myers v. Canada*[9] and *United Parcel Service of America Inc. v. Canada*[10]

Regarding the application of WTO case law in BIT arbitration disputes, *S.D Meyers v. Canada,*[11] *Pope & Talbot v. Canada,*[12] *Feldman v. Mexico,*[13] *Corn Products v. Mexico,*[14] and *Cargill v. Poland*[15] indicated the relevance of WTO precedents on national treatments for investment. *Occidental v. Ecuador* was the first to address the issue in 2004, rejecting the possibility of relying on the WTO's understanding of national treatment. The term used by the WTO was "*like products*", while the BIT used "*like situations*".[16]

Despite the opposition, *Methanex v. United States* compared the WTO and NAFTA nomenclature on NT, noting the existence of two different terms: "*like goods*" for the WTO, and "*like circumstances*" for NAFTA. Although a certain similarity between the wording was recognized, NAFTA rules should be interpreted autonomously in relation to the WTO[17] The

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[5] RUDOLF DOLZER ET AL. , PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 254-255 (3 ed. Oxford University Press 2022).
[6] *Occidental Exploration and Production Company v. The Republic of Ecuador*, Final Award, ¶ 168 (July 1, 2004).
[7] *Pope & Talbot Inc. v. Government of Canada*, Award on the Merits of Phase 2, ¶ 78 (Apr. 10, 2001).
[8] *S.D. Myers, Inc. v. Government of Canada*, Partial Award, ¶ 250 (Nov. 13th, 2000).
[9] *Marvin Roy Feldman Karpa v. United Mexican States*, Award, ¶ 171 (Dec. 16, 2002).
[10] *United Parcel Service of America Inc. v. Government of Canada*, Award on the Merits, ¶¶ 119, 120 (May 24th, 2007).
[11] *S.D. Myers, Inc. v. Government of Canada*, Partial Award, ¶ 244 (Nov. 13th, 2000).
[12] *Pope & Talbot Inc. v. Government of Canada*, Award on the Merits of Phase 2, ¶¶ 45, 56 (Apr. 10, 2001).
[13] *Marvin Roy Feldman Karpa v. United Mexican States*, Award, ¶¶ 165, 166 (Dec. 16, 2002).
[14] *Corn Products International, Inc. v. United Mexican States*, Decision on Responsibility, ¶ 121-123 (Jan. 15, 2008).
[15] *Cargill, Incorporated v. Republic of Poland,* Final Award, ¶ 311 (Feb. 29, 2008).
[16] *Occidental Exploration and Production Company v. The Republic of Ecuador*, Final Award, ¶ 153, 155, 174 (July 1, 2004).
[17] *Methanex Corporation v. United States of America***,** Final Award of the Tribunal on Jurisdiction and Merits, ¶¶ 25, 37 (Aug. 3, 2005).

same in *Bayindir v. Pakistan,*[18] *Cargill v. Mexico,*[19] *Merrill & Ring v. Canada*[20] and *Clayton/Bilcon v. Canada.*[21] The majority position is for the autonomous interpretation of "*like circumstances*" or "*like situations*".

In *Nykomb v. Latvia*, the claim of an NT violation must be between companies subject to the same set of rules and regulations, but the court dismissed the claim for lack of evidence.[22] The same in *Consortium RFCC v. Morocco*[23] and *ADF v. United States.*[24]

In *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Pakistan*, although the arbitral tribunal understood that they were companies of the same economic sector, there were singularities that differentiated them, in financial terms.[25]

In *Ronald Lauder v. Czech Republic*, the domestic legislation determined differentiated treatment only in the telecommunications sector, being an exception to the application of the NT.[26]

In *Thunderbird v. Mexico*, the foreigner was barred from engaging in illegal activity (gambling). Even though it was aware of the illegal activity, it claimed NT violation under NAFTA.[27]

Furthermore, it is necessary to verify whether the claim of NT violation may occur in the hypothesis that the host State applies a rule according to its public interest, like in *Oscar Chinn's Case* (*United Kingdom v. Belgium*).[28]

In *Siemens v. Argentina*, the company alleged arbitrary and discretionary conduct as due to application of emergency domestic legislation during the 2001 crisis. The Argentine government, in turn, claimed that the governmental measure was intended to protect its citizens and was not discretionary[29] to this foreign company.[30] The same in *Genin v. Estonia*[31]

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[18] *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, Award, ¶ 389 (Aug. 27, 2009).
[19] *Cargill, Incorporated v. United Mexican States*, Award, ¶ 193 (Sept. 18, 2009).
[20] *Merrill and Ring Forestry L.P. v. Canada*, Award, ¶ 86 (Mar. 31, 2010).
[21] *Bilcon of Delaware et al v. Government of Canada*, Award on Jurisdiction and Liability, ¶ 692 (Mar. 17, 2015).
[22] *Nykomb Synergetics Technology Holding AB v. The Republic of Latvia,* Arbitral award, ¶ 34 (Dec. 16, 2003).
[23] *Consortium RFCC v. Royaume du Maroc*, Arbitration Award, ICSID, ¶¶ 74, 75 (Dec. 22, 2003).
[24] *ADF Group Inc. v. United States of America*, Award, ¶ 157 (Jan. 9, 2003).
[25] *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, Award, ICSID, ¶¶ 402, 408, 411 (Aug. 27, 2009).
[26] *Ronald S. Lauder v. The Czech Republic*, Final Award, ¶ 220 (Sept. 3, 2001).
[27] *International Thunderbird Gaming Corporation v. The United Mexican States*, Arbitral Award, ¶¶ 176, 178, 182, 183 (Jan. 26, 2006).
[28] *The Oscar Chinn Case,* Judgement, ICGJ 313 (PCIJ 1932), 78 (Dec. 12, 1934).
[29] Jürgen Kurtz, *On Inter-Disciplinary and Inter-Systemic Approaches to International Investment Law', in Roberto Echandi, Pierre Sauvé (eds.) 'Prospects in International Investment Law and Policy' (Cambridge University Press 2013),* 16(3) JWIT, 563-564 (2015).
[30] *Siemens A.G. v. The Argentine Republic*, Award, ¶ 314 (Jan. 17, 2007).
[31] *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia*, Award, ¶ 370 (June 25, 2001).

and *GAMI v. Mexico*.[32]

In *Methanex v. USA*, the arbitration award ruled out the recognition of NT as an international custom observing the principle of *inclusio unius est exclusio alterius*, because the NT is in a different *locus* in the BIT and could not be interpreted as part of the MST.[33]

I. MOST-FAVOURED-NATION TREATMENT

It prohibits treatment no less favourable to a foreigner than that accorded to a foreigner from a third country. The principle expands the equality of conditions between nationals and foreigners and, as with the NT, the MFN is not a customary international norm.

MFN is used by foreign investors to invoke a rule between the host state and a third country that provides more favourable treatment. It is, therefore, necessary for the MFN clause to be present in the basic agreement.[34]

The limits of application of the MFN should meet the principle of *expressio unius est exclusio alterius*. Part of the doctrine understands that MFN applies exclusively to substantive rules, while another defends the application in any clause, including Investor-State Dispute Settlement ["**ISDS**"] clauses.

This doctrinal division originates from the case *Maffezini v. Spain*, in which an Argentinian company, in order to initiate an ICSID claim against Spain and depart from the rule of prior exhaustion of local remedies,[35] relied on the MFN to use the BIT dispute settlement rule between Chile and Spain, bypassing the requirements applied for Argentine companies. The MFN, therefore, was used for a procedural rule.[36]

The Spanish government, in its defense, indicated that the MFN should refer to a substantive rule, rejecting any extension to procedural or jurisdictional rules. The arbitral tribunal relied on the *Anglo-Iranian Oil Company (United Kingdom v. Iran) of* 1952,[37] and *Ambatielos (Grecce v. United Kingdom)* of 1953.[38] In the first, the ICJ ruled that the MFN should be in the international agreement that would link the UK and Iran in order to respect the canon *res*

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[32] *Gami Investments Inc. v. Mexico*, Final Award, ¶ 114 (Nov. 15, 2004).

[33] *Methanex Corporation v. United States of America*, Final Award of the Tribunal on Jurisdiction and Merits, Part IV, Chapter C, 7-8, 11-12 (Aug. 3, 2005). See also: *Pope & Talbot Inc. v. The Government of Canada*, Award on the Merits of Phase 2, ¶ 78 (Apr. 10, 2001).

[34] *Supra* at 5, 264.

[35] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1965 art. 26, http://icsidfiles.worldbank.org/icsid/ICSID/StaticFiles/basicdoc/main-eng.htm

[36] *Emilio Agustín Maffezini v. The Kingdom of Spain*, Decision of the Tribunal on Objections to Jurisdiction, ¶¶ 40-41, 56 (Jan. 25, 2000).

[37] *Anglo-Iranian Oil Co. case (United Kingdom v. Iran),* ICJ, Preliminary Objection (Judgement of July 22, 1952).

[38] *Ambatielos case (Greece v. United Kingdom),* ICJ, Merits: obligation to arbitrate (Judgement May 19, 1953).

inter alios acta, aliis nec nocet nec prodest, which means that something done between two parties can neither harm nor benefit third parties. In the second case, the canon *ejusdem generis*, meaning of the same nature or class, determines that the MFN clause only allows it to be applied in matters of the same category. The *Ambatielos* case interpreted extensively the MFN.

The arbitral award in the Maffezini case presented a subjective judgment that international arbitral remedies were better suited to protect the interests and rights of foreign investors *vis-à-vis* the domestic jurisdiction. In addition, the tribunal invoked the principle of *Kompetenz-Kompetenz*. Therefore, by ruling that MFN was possible in procedural matters, the court created a precedent of great proportions.[39]

As a way to mitigate the effects of the MFN, subsequent BITs after that decision have become more stringent about substantive rules, while other BITs excluded MFN. For example, in the Brazilian Agreement on Cooperation and Facilitation of Investments [“**ACFI**”] between Brazil and India in 2020, the MFN standard is not included.[40] The 2015 Indian BIT model also doesn’t mention MFN protection.[41] In the case of restricting the application of MFN, the 2015 BIT between China and Turkey stipulates that NT and MFN do not apply to dispute settlement.[42] On the other hand, the 2008 UK model BIT maintained the traditional model by applying MFN in the substantive and procedural clauses (art. 1 to 12).[43]

In *Plama v. Bulgaria*, the arbitral tribunal held that MFN could not be used without the consent of the parties. In this decision, the tribunal was explicit in indicating that *Maffezini v. Spain* was an exception and therefore should not be treated as a broad interpretation. The tribunal cautioned that rather, the reasoning to be adopted would be that MFN should not be applied for procedural and dispute settlement rules unless the agreement expressly provides otherwise.[44]

It is possible to observe two quite different thoughts of MFN: (i) a position which assumes that MFN applies to all cases, except if the BIT has been specific in restricting its use

[39] *Emilio Agustín Maffezini v. The Kingdom of Spain*, Decision of the Tribunal on Objections to Jurisdiction, ¶¶ 55, 64 (Jan. 25, 2000).

[40] Brazil - India Investment Cooperation and Facilitation Agreement, UNCTAD, Investment Policy Hub.

[41] India BIT Model 2015, UNCTAD, Investment Policy Hub.

[42] China-Turkey BIT 2015, UNCTAD, Investment Policy Hub.

[43] United Kingdom 2008 BIT Model: art. 3(3) “*For the avoidance of doubt it is confirmed that the treatment provided for in paragraphs (1) and (2) above shall apply to the provisions of Articles 1 to 12 of this Agreement*” (‘United Kingdom 2008 BIT Model’, UNCTAD, Investment Policy Hub). See also: OECD, *Most-Favoured-Nation Treatment in International Investment Law*, OECD WORKING PAPERS ON INTERNATIONAL INVESTMENT, 2004/02 4.

[44] *Plama Consortium Limited v. Republic of Bulgaria*, Decision on Jurisdiction, ¶¶ 198, 207, 212, 223-224 (Sept. 6, 2005).

(*Maffezini v. Spain*); and (ii) a position which assumes that MFN applies only to substantive rules, except if the BIT specifically describes that its use extends to procedural and investment dispute settlement rules (*Plama v. Bulgaria*).

Siemens v. Argentina,[45] *Grid v. Argentina,*[46] *Salini v. Jordan,*[47] *Gas Natural SDG v. Argentina,*[48] *Suez, Vivendi v. Argentina,*[49] *Camuzzi v. Argentina*[50] and *Impregilo v. Argentina*[51] followed *Maffezini*'s *position*.[52] Otherwise, *Telenor v. Hungary,*[53] *Tecmed v. México* and *Wintershall v. Argentina*[54] followed *Plama*'s position.[55]

Finally, in *Parkerings-Compagniet AS v. Lithuania*, the arbitral tribunal denied the Norwegian company's claim of MFN violation in Lithuania as the act was not discriminatory in nature but rather was born out of historical, archaeological and environmental protection.[56]

II. MINIMUM STANDARD OF TREATMENT

The MST is a traditional rule of BIT, originating from the 1926 *Neer* case, which developed the idea of a minimum right for aliens in foreign territory. This understanding was built in terms of reasonable and proportional protection by public authorities, including the right of access to justice. This institute aimed to guarantee a minimum protection equal to the enjoyment of existing rights for citizens of the host State.[57] As an example, the Brazilian Constitution guarantees equal treatment between foreigners residing in that country and its nationals (art. 5).[58]

In this sense, it is necessary to establish what would be the concept of international minimum protection, since there is not a definition of protection in *stricto sensu*. In turn, the search for an international concept inevitably falls within historically established limits of the traditional

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[45] *Siemens A.G. v. The Argentine Republic*, Decision on Jurisdiction, ¶¶ 103, 109 (Aug. 3, 2004).
[46] *National Grid plc v. The Argentine Republic*, Decision on Jurisdiction, ¶¶ 92-93 (June 20, 2006).
[47] *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*, Decision on Jurisdiction, ¶¶ 102,105 (Nov. 9, 2004).
[48] *Gas Natural SDG, S.A. v. The Argentine Republic*, Decision of the Tribunal on Preliminary Questions on Jurisdiction, ¶ 30 (June 17, 2005).
[49] *Suez, Sociedad General de Aguas de Barcelona, S.A.and Vivendi Universal, S.A. v. Argentine Republic*, Decision on Jurisdiction, ¶ 66 (Aug. 3, 2006).
[50] *Camuzzi International S.A. v. The Argentine Republic*, Decision on Objection to Jurisdiction, ¶ 120 (May 11, 2005).
[51] *Impregilo S.p.A. v. Argentine Republic*, Award, ¶ 103 (June 21, 2011).
[52] *National Grid plc v. The Argentine Republic*, Decision on Jurisdiction, ¶¶ 92, 93 (June 20, 2006).
[53] *Telenor Mobile Communications A.S. v. The Republic of Hungary*, Award, ¶¶ 20, 95 (Sept. 13, 2006).
[54] *Wintershall Aktiengesellschaft v. Argentine Republic*, Award, ¶ 162 (Dec. 8, 2008).
[55] *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, Award, ¶ 69 (May 29, 2003).
[56] *Parkerings-Compagniet AS v. Republic of Lithuania*, Award, ¶ 396 (Sept. 11, 2007).
[57] *L. F. H. Neer and Pauline Neer (U.S.A.) v. United Mexican States,* Reports of International Arbitral Awards (Oct. 15, 1926) https://legal.un.org/riaa/cases/vol_IV/60-66.pdf.
[58] 'Constituição Federal [C.F.] [Constitution] art. 5 (Braz.),' https://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm.

capital-exporting nations. The minimum protection has evolved in International Investment Law into two other institutes: FET and FPS.

In *Pope & Talbot v. Canada*, there is express mention of the *Neer* case as the foundation of the MST's understanding as a customary principle of international law.[59] The same is true in *UPS v. Canada*[60] and *ADF v. USA*,[61] in which the court established both the MST and the FET and FPS as customary norms.

Merrill & Ring v. Canada, on the other hand, held that the minimum treatment is defined according to international customary law, being a broader treatment than in the *Neer* case.[62]

In *Loewen v. USA*, the tribunal refused jurisdiction on the grounds that he plaintiff had not exhausted local remedies, i.e., had not appealed to the Supreme Court of the United States not recognizing the allegation of the foreign company that was a violation of the MST. Specifically, the court held that it could not qualify as a sort of court of appeal from the domestic jurisdiction.[63] The same in *Mondev v. USA*.[64]

In *Thunderbird v. Mexico*, the tribunal held that the irregular administrative procedures did not constitute sufficient harm to cause MST violation.[65]

In *Metalclad v. Mexico*, the foreign company alleged a lack of due process in denying a construction permit. Despite the counterarguments presented by Mexico, referring to the need for environmental protection and the local communities, the arbitral tribunal held that the denial of the permit was improper. In particular, the arbitral tribunal held that the administrative act denying the permit for the construction of the landfill violated the transparent and predictable business environment, as well as the investor's expectations to be treated fairly and equitably, also alleging a violation of the MST.[66]

III. FAIR AND EQUITABLE TREATMENT

FET is the most widely used standard of investor protection in arbitration cases, comprising very extensive interpretations. The European Parliament criticized the use of vague language

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[59] *Pope & Talbot Inc. v. The Government of Canada*, Award in Respect of Damages, ¶ 57 (May 31, 2002).
[60] *United Parcel Service of America Inc. v. Government of Canada*, Award on Jurisdiction, ¶¶ 77, 78 (Nov. 22, 200).
[61] *ADF Group Inc. v. United States of America*, Award, ¶ 181 (Jan. 9, 2003).
[62] *Merrill and Ring Forestry L.P. v. Canada*, Award, ¶ 213 (Mar. 31, 2010).
[63] *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, Award, ¶¶ 134, 138 (June 26, 2003).
[64] *Mondev International Ltd. v. United States of America*, Award, ¶ 136 (Oct. 11, 2002).
[65] *International Thunderbird Gaming Corporation v. The United Mexican States*, Arbitral Award, ¶ 200 (Jan. 26, 2006).
[66] *Metalclad Corporation v. The United Mexican States*, Award, ¶¶ 91-93, 99-101 (Aug. 30, 2000).

in the 2011 Resolution.[67]

The history of FET dates back to the FCN treaties and failed attempts at multilateral agreements of the 20th century, highlighting its origin among traditional capital-exporting countries that projected this exclusive protection of their investors as an international practice. The term was initially conceived as a non-binding rule, to promote equal treatment between the parties, as noted in the 1954 FCN between West Germany and the United States.[68]

As for the BITs until the 2000s, FET was an institute that appeared in the preamble and was not considered a standard clause.[69] This reality of FET as a substantive clause was incorporated only in the first decade of the 21st century, which demonstrates the absence of a consistent practice, in the sense of forcing its inclusion as a mandatory clause, reversing its nature as a programmatic rule.

The 2012 U.S. BIT Model (art. 5) treats FET (and FPS) as international customary rules. The BIT between France and Argentina of 1991 treats the FET as a principle of international law (art. 3). The BIT between the United States and Argentina of 1991 defines it as an international minimum treatment (art. II(2)). In regional agreements, the FET is a party to NAFTA (1105(1)), the current USMCA (14.6(1)) and the ECT (art. 10 (1)). In the FTAs involving the EU, with Canada (art. 8.10(2) of CETA), Singapore, Vietnam and Mexico, the FET is defined in a restricted way.

The variation of the term FET in different decisions, such as *fair and equitable, just and equitable, just and fair, equitable and reasonable*, are understood as synonyms in *Parkerings v. Lithuania,*[70] *Total v. Argentina,*[71] *OKO Pankki v. Estonia*[72] and *Bosca v. Lithuania.*[73] The FET is related to the non-legal terms of fairness and equity, but should not be confused with the decision *ex aequo et bono.*[74]

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[67] "*G. whereas after the first dispute settlement cases of the 1990s, and in spite of generally positive experiences, a number of problems became clear because of the use of vague language in agreements being left open for interpretation, particularly concerning the possibility of conflict between private interests and the regulatory tasks of public authorities, for example in cases where the adoption of legitimate legislation led to a state being condemned by international arbitrators for a breach of the principle of 'fair and equitable treatment'.*" ('European Parliament resolution of 6 April 2011 on the future European international investment policy', 2010/2203(INI)). On the other hand, part of the doctrine understands that the lack of precision in FET would be more a virtue than a harm, as it allows flexibility (*Supra* at 5, 187).

[68] "Article I. Each Party shall at all times accord fair and equitable treatment to the nationals and companies of the other Party, and to their property, enterprises and other interests." (Treaty of Friendship, Commerce and Navigation, UN Treaties (Oct 29, 1954). *Supra* at 5, 188-189.

[69] *Supra* at 5, 189.

[70] *Parkerings-Compagniet AS v. Republic of Lithuania*, Award, ¶¶ 277-278 (Sept. 11, 2007).

[71] *Total S.A. v. The Argentine Republic,* Decision on Liability, ¶ 106 (Dec. 27, 2010).

[72] *Oko Pankki Oyj, VTB Bank (Deutschland) AG and Sampo Bank Plc v. The Republic of Estonia*, Award, ¶ 215 (Nov. 19, 2007).

[73] *Luigiterzo Bosca v. Lithuania*, Award, ¶ 196 (May 17, 2013).

[74] *Supra* at 5, 187.

FET presents two divergent positions. The first understands that its dimension is identical to an international minimum treatment and therefore, adhering to the concept of equality between foreigners and nationals. This is the interpretation of NAFTA. The second advocates a broader concept of protection, by differentiating the MST clause and applying additional treatment for the foreign investor versus the national investor.[75]

In *Saluka v. Czech Republic*, the arbitral tribunal was not convinced that the FET falls within the usual international standard of MST.[76] There is no definition of whether the FET should fall within the framework of an international customary standard, equating to the MST, or whether its protection would be superior and autonomous MST.[77]

The NAFTA Free Trade Commission, on June 31, 2001, established a narrow concept of FET and FPS, equating them with international minimum protection as the customary standard. It expressly ensured that FET and FPS do not involve additional treatment. The post-2001 model BITs of the United States (2004 and 2012) and Canada have followed the committee's understanding, as noted in the US-Chile BIT (2003 FTA, art. 10.4) and 2004 US-Uruguay BIT (art. 5). In 2020, in the amendment to the USMCA, the new agreement adopted exactly the 2001 wording in its art. 14.6(2).

CETA (art. 8.9, 8.10, 28.3, and 28.6) and the CPTTP (art. 9.6(4)) followed the FET approach in NAFTA, indicating that contemporary international law is moving towards the progressive adoption of *stricto sensu* concepts, reversing the previous period of expansion of universal investor protection.[78]

In *Chemtura v. Canada*, the mere quantitative existence of BITs with the FET clause would indicate international customary developments. However, the arbitral tribunal neglects the reality that almost all BITs derive from the models of traditional capital exporters. The signatory countries, mostly developing countries, are not able to discuss or modify the clauses since the BITs are characterized as pre-formulated agreements.[79]

In *Thunderbird v. Mexico*, the arbitral tribunal held that the investor was aware that the operation of certain gambling conducts was considered illegal in Mexico and that there were no legitimate expectations.[80]

In *Metalclad v. Mexico*, the arbitral tribunal decided that the legitimate expectation should be

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[75] *Supra* at 29, 44-45.
[76] *Saluka Investments B.V. v. The Czech Republic*, Partial Award, ¶¶ 291-292 (Mar. 17, 2006).
[77] *Id*. See *Supra* at 5, 189.
[78] *Supra* at 5, 230.
[79] *Chemtura Corporation v. Government of Canada*, Award, ¶ 236 (Aug. 2, 2010).
[80] *International Thunderbird Gaming Corporation v. The United Mexican States,* Arbitral Award, ¶¶ 164,166 (Jan. 26, 2006).

specific, not ambiguous or repetitive, in view of the inconsistency between approval at the international level and refusal at the local level. However, a municipality has the competence to define rules for land use and occupation, independent of the federal government, which the tribunal did not consider. The same in *MTD v. Chile.*[81]

In *Tecmed v. México*, the tribunal held that legitimate expectations had been violated by denying the renewal of the license upon opposition from the local community.[82] The same in *Pope & Talbot v. Canada*[83] and *LG&E v. Argentina*[84]

In *Generation v. Ukraine*, legitimate expectations must be understood according to the risk analysis of the host state by the investor prior to the commencement of his investment. When investing in a state that has a higher return on capital, the foreign investor is aware of the reality of higher risks to the business.[85]

In *GAMI v. Mexico*, the arbitral tribunal held that the authorities' encouragement comments were not legitimate expectations.[86] In *Eastern Sugar v. Czech Republic*, the arbitral tribunal found a violation of FET, without providing reasons for that decision.[87]

Therefore, it is possible to have a generic understanding of the FET institute, in which certain decisions relate it as synonymous with the MST, as in *S.D. Myers v. Canada*,[88] *Occidental v. Ecuador*,[89] *CMS Gas v. Argentina*,[90] and *Mondev v. USA*[91] while others qualify it as an autonomous institute, as in *Pope & Talbot v. Canada*.[92]

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[81] ANDREW NEWCOMBE AND LLUÍS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES 284-285 (Kluwer Law International 2009).
[82] *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, Award, ¶ 154 (May 29, 2003).
[83] *Pope & Talbot Inc. v. The Government of Canada*, Award on the Merits of Phase 2, ¶ 181 (Apr. 10, 2001).
[84] *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc .v. Argentine Republic*, Award, ¶¶ 125, 129, 131 (July 25, 2007).
[85] *Generation Ukraine, Inc. v. Ukraine*, Award, ¶¶ 20, 37 (Sept. 16, 2003).
[86] *Gami Investments Inc. v. Mexico*, Final Award, ¶ 110 (Nov. 15, 2004).
[87] *Eastern Sugar B.V. (Netherlands) v. The Czech Republic*, Partial Award, ¶¶ 199-200 (May 27, 2007).
[88] *S.D. Myers, Inc. v. Government of Canada*, Partial Award, ¶ 262 (Nov. 13, 2000).
[89] *Occidental Exploration and Production Company v. The Republic of Ecuador*, Final Award, ¶¶ 183, 188-190 (July 1, 2004).
[90] *CMS Gas Transmission Company v. The Republic of Argentina*, Award, ¶¶ 270, 273-274, 284 (May 12, 2005).
[91] *Mondev International Ltd. v. United States of America*, Award, ¶ 118 (Oct. 11, 2002).
[92] *Pope & Talbot Inc. v. The Government of Canada*, Award on the Merits of Phase 2, ¶ 110 (Apr. 10, 2001).

IV. FULL PROTECTION AND SECURITY

The origin of FPS dates back to the 19th century, as a form of physical protection for the alien in a territory different from his nationality. The Full Protection and Security (FPS) is found in the ECT (art. 10(1)), NAFTA (art. 1105(1)) and USMCA (art. 14.6(1)).

The understanding of FPS, similar to FET, also presents two opposing positions. The first interpretation is restricted to the host State's obligation to ensure a minimum protection of physical integrity. The second interpretation is extensive, encompassing a legal protection of foreign property.

In the first group, *Saluka v. Czech Republic* is categorical in describing the FPS in narrow terms, limiting it to protection against physical violence or civil unrest. This position means that the FPS cannot be understood as a guarantee of any risk that the foreign investor would be subject to.[93] The same in *Wena Hotels*[94] *v. Egypt, Suez and InterAgua v. Argentina,*[95] *Enron v. Argentina*[96] and *Sempra v. Argentina.*[97]

In *BG Group v. Argentina*, the tribunal presented the concept of FPS as identical to FET, and as minimum protection (MST).[98]

In *AAPL v. Sri Lanka,* the tribunal held that there was government excess in the actions against insurgents that generated losses for foreign investors.[99] In *AMT v. Zaire*, the court held that there was a violation due to a robbery by the armed forces.[100]

In *Tecmed v. Mexico,*[101] *Sempra v. Argentina,*[102] *Azurix v. Argentina,*[103] *Tenaris v. Venezuela, Noble Ventures*[104] *v. Romania,*[105] *Pantechniki v. Albania*[106] and *Eureko v. Poland*,[107] the absence of evidence refuted the claim of a violation of the FPS by the government or its encouragement of social demonstrations.

As for the second group, in *Compañía de Aguas, Vivendi Universal v. Argentina*, the arbitral

[93] *Saluka Investments B.V. v. The Czech Republic*, Partial Award, ¶¶ 483-484 (Mar. 17, 2006).
[94] *Wena Hotels Ltd. v. Arab Republic of Egypt*, Award, ¶ 84 (Dec. 8, 2000).
[95] *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic*, Decision on Liability, ¶¶ 168, 170, 173 (July 30, 2010).
[96] *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, Award, ¶ 287 (Aug. 4, 2004).
[97] *Sempra Energy International v. The Argentine Republic*, Award, ¶ 323 (Sept. 18, 2007).
[98] *BG Group Plc. v. The Republic of Argentina*, Final Award, ¶¶ 290-291, 311-312, 91-92 (Dec. 24, 2007).
[99] *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, Final Award, ¶ 78 (June 27, 1990).
[100] *American Manufacturing & Trading, Inc. v. Republic of Zaire*, Award, ¶ 6.08 (Feb. 21, 1997).
[101] *Noble Ventures, Inc. v. Romania*, Award, ¶ 165 (Oct. 12, 2005).
[102] *Sempra Energy International v. The Argentine Republic*, Award, ¶ 323 (Sept. 18, 2007).
[103] *Azurix Corp. v. The Argentine Republic*, Award, ¶ 408 (September 1, 2009).
[104] *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela*, Award, ¶ 443 (Jan. 29, 2016).
[105] *Noble Ventures, Inc. v. Romania*, Award, ¶ 165 (Oct. 12, 2005).
[106] *Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania*, Award, ¶¶ 83-84 (July 30, 2009).
[107] *Eureko B.V. v. Republic of Poland,* Partial Award, ¶ 236 (Aug. 19, 2005).

tribunal held that the FPS goes beyond protection for physical violence and also encompasses violations of unfair treatment.[108] The same in *Siemens v. Argentina,*[109] *Vivendi v. Argentina*[110] and *Biwater Gaulf v. Tanzania.*[111]

In *CME v. Czech Republic*, the court understood that there was a violation by the State in creating a regulatory rule that undermined the legal security of the investment.[112] Involving the same case, in *Ronald Lauder v. Czech Republic*, the arbitral tribunal decided the opposite, because the FPS focuses on physical protection. The only legal protection guaranteed to the foreign investor by the FPS would be access to justice.[113]

V. DIRECT AND INDIRECT EXPROPRIATIONS AND COMPENSATION

Expropriation is one of the most debated topics in international investment law, being the most severe form of interference in private property. It is a sovereign act of the host State. International customary law adopts certain limits on the exercise of the domestic act of expropriation, like (i) public purpose; (ii) non-discriminatory act; (iii) due process of law; and (iv) compensation.[114] However, the procedure for carrying out the expropriation does not have a consensus in the doctrine. The act itself is not a violation of foreign investment protection. Only the act of expropriation performed in a discriminatory manner and without public purpose is a violation. As it is a sovereign act, it falls to the State to define the regulations and ample defense. Even the compensation or indemnification conditions are configured as a domestic act.

Commonly, expropriation involves two types: direct and indirect, as viewed in BITs and regional agreements like NAFTA or CETA. The first consists of the withdrawal of property from a private party to the public entity. In this process, there is an effective transfer of the asset and compensation for the injured party. In the second case, there is the allegation of recurrent interference with the enjoyment of the property, reducing or even preventing its use, causing financial loss and possibly leading it to cease its operations. This allegation has gained importance in arbitral awards due to the fact that the recognition of an indirect expropriation reduces the host State's regulatory power. In this sense, States become reluctant

[108] *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, Award, § 7.4.15 (Aug. 20, 2007).
[109] *Siemens A.G. v. The Argentine Republic*, Decision on Jurisdiction, ¶ 303 (Aug. 3, 2004).
[110] *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, Award, § 7.4.15 (Aug. 20, 2007).
[111] *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, Award, ¶ 729 (July 24, 2008).
[112] *CME Czech Republic B.V. v. The Czech Republic*, Partial Award, ¶ 613 (Sept. 13, 2001).
[113] *Ronald S. Lauder v. The Czech Republic*, Final Award, ¶ 314 (Sept. 3, 2001).
[114] *Supra* at 5, 183.

to recognize this modality in their BITs or FTAs.

Indirect expropriation is even marked by a shift away from its application in recent bilateral and regional agreements. For example, Annex 14-B of the USMCA agreement. Specifically, in the USMCA, Canada does not figure as a party in investor-state arbitration and, in the investor-state arbitration between Mexico and the United States (Annex 14-D, art. 1(a)(i)(B)), the foreign investor is not allowed to claim indirect expropriation.[115]

The same wording is observed in Annex I of the 2016 BIT concluded between Canada and the Hong Kong Special Administrative Region,[116] in India's 2015 model BIT (art. 5),[117] and in the 2012 United States Model BIT (Annex B).

In *Oscar Chinn*, the investors are not insured against any alteration in the economic conditions of the business, being an investor's risk regarding the variation of expectations of future gains.[118] The same in *Fireman's Fund v. Mexico.*[119]

As for direct expropriation, in *Saluka v. Czech Republic*, the court analyzed whether the Czech government's act of intervention in the foreign investor's property consisted of the exercise of police powers or an expropriatory act.[120]

In *Santa Elena v. Costa Rica*, the expropriation of property for the regulation of an environmental area was considered a breach of the BIT.[121] The arbitral tribunal held that, regardless of the environmental protection grounds, the expropriation had been identified. It should be noted that the constitution of environmental areas is based on the sovereign exercise of the host State. The same in *Metalclad v. Mexico*[122] and *Ampal-American v. Egypt.*[123] In *Methanex v. United States*, the court understood that the changes related to environmental regulation did not constitute a breach of investor expectations.[124]

In *ADC v. Hungary*, the court held that it would be absurd for a foreign investor to submit to any rule of the host state.[125] In *Pope & Talbot v. Canada,* the arbitral tribunal rejected the

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[115] United States-Mexico-Canada Agreement, Chapter 14 (July 7, 2020), <https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/14-Investment.pdf>.

[116] Canada-Hong Kong China Special Administrative Region BIT 2016, UNCTAD, Investment Policy Hub.

[117] India 2015 BIT Model, UNCTAD, Investment Policy Hub.

[118] *The Oscar Chinn Case,* Judgment, ICPJ, 4, 27 (Dec. 12, 1934).

[119] *Fireman's Fund Insurance Company v. The United Mexican States*, Award, ¶ 218 (July 17th, 2006, § 218.

[120] *Saluka Investments B.V. v. The Czech Republic*, Partial Award, ¶¶ 262-265 (March 17th, 2006, §§ 262-265.

[121] *Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, Award, ¶ 72 (February 17th, 2000, para. 72.

[122] *Metalclad Corporation v. The United Mexican States*, Award, ¶¶ 109-112 (Aug. 30, 2000).

[123] *Ampal-American Israel Corporation and others v. Arab Republic of Egypt*, Decision on Liability and Head of Loss, ¶¶ 178-180,242 (Feb. 21, 2017).

[124] *Methanex Corporation v. United States of America*, Final Award on Jurisdiction and Merits, IV, D, § 10 (Aug. 3, 2005).

[125] *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, Award of the Tribunal, ¶¶ 432-433 October 2nd, 2006).

Host State's defense that the regulatory act was a police power.[126]

In *Sempra v. Argentina*, the arbitral tribunal analysed the emergency measures adopted by Argentina, in the midst of the 2001 crisis, and held that Argentina's emergency measures were a legitimate exercise of the State.[127] The same in *CMS v. Argentina.*[128] In *Siemens v. Argentina,*[129] the court understood that the low performance of the host State's certain action did not configure an expropriation, being necessary an official act.[130] In *LG&E v. Argentina*, the court held that only permanent expropriation could be considered.[131]

In *SPP v. Egypt*, it was considered that the rights resulting from an investment contract are also affected by the expropriatory act, not only the property.[132] The same in *Tokios Tokelès v. Ukraine,*[133] *Eureko v. Poland,*[134] *Gold Reserve v. Venezuela*[135] and *Vigotop v. Hungary.* In *Middle East Cement v. Egypt*, the court ruled in the opposite way.[136]

In *Electrabel v. Hungary* and *Burlington v. Ecuador,*[137] the partial expropriation was rejected.[138] In *Wena Hotels v. Egypt*[139] and *Tippetts v. TAMS-AFFA (Iran-US Claims Tribunal),*[140] it was considered.

In *Thunderbird v. Mexico,* the foreign investor implemented an illegal business (gambling) and claimed indirect expropriation for preventing its operation in Mexican territory.[141]

In *CME v. Czech Republic,* the court recognizes the distinction between direct and indirect expropriation but rejects the foreign investor's claims for lack of proof.[142] In *Ronald Lauder v. Czech Republic*, the arbitral tribunal did not consider the claim of indirect expropriation. On the contrary, it held that it was a regulatory measure of the host State.[143]

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[126] *Pope & Talbot Inc. v. The Government of Canada*, Interim Award, ¶ 99 (June 26th, 2000).
[127] *Sempra Energy International v. The Argentine Republic*, Award, ¶ 286 (September 18th, 2007).
[128] *CMS Gas Transmission Company v. The Republic of Argentina*, Award, ¶ 263 (May 12th, 2003).
[129] *Siemens A.G. v. The Argentine Republic*, Award, ¶ 267 (January 17th, 2007).
[130] *Siemens A.G. v. The Argentine Republic*, Award, ¶ 253 (January 17th, 2007).
[131] *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc.v. Argentine Republic*, Decision on Liability, ¶¶ 193-195 (October 3rd, 2006).
[132] *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, Award, ¶¶ 164-165 (May 20th, 1992).
[133] *Tokios Tokelés v. Ukraine*, Decision on Jurisdiction, ¶¶ 92-93 (April 29th, 2004).
[134] *Eureko B.V. v. Republic of Poland*, Partial Award, ¶¶ 239, 242 (Aug. 19, 2005).
[135] *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, Award, ¶¶ 667-668 (Sept. 22, 2014).
[136] *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, Award, ¶¶ 152, 154, 156 (Apr. 12, 2002).
[137] *Burlington Resources Inc. v. Republic of Ecuador*, Decision on Liability, ¶¶ 260, 398, 470. (Dec. 14, 2012)
[138] *Electrabel S.A. v. Republic of Hungary*, Decision on Jurisdiction, Applicable Law and Liability, ¶¶ 6.57-6.58 (Nov. 30, 2012).
[139] *S.D. Myers, Inc. v. Government of Canada*, Partial Award, ¶¶ 283-284 (Nov. 13, 2000).
[140] *Tippetts v. TAMS-AFFA*, Award, 6 Iran-US CTR 219, 225 (June 22, 1984).
[141] *International Thunderbird Gaming Corporation v. The United Mexican States*, Arbitral Award, ¶¶ 147, 164 (Jan. 26, 2006).
[142] *CME Czech Republic B.V. v. The Czech Republic*, Partial Award, ¶¶ 318-319 (Sept. 13, 2001).
[143] *Ronald S. Lauder v. The Czech Republic*, Final Award, ¶ 282 (Sept. 3, 2001).

In *Waste Management v. Mexico II*, the court ruled that failure to make a payment does not constitute an expropriatory act.[144] The same in *SGS v. Philippines*.[145] In *RFCC v. Morocco*, the court differentiates the exercise of a contractual right from an expropriatory act.[146]

In *Biwater Gaulf v. Tanzania*, the court decided that there was indirect expropriation concerning the measures that preceded the cancellation of the contract.[147] In *Suez and InterAgua v. Argentina*, the court understood that it was an administrative contract, not involving Argentine sovereignty and, therefore, not covered in the bilateral agreement.[148]

In both *Biwater Gaulf v. Tanzania* and *Suez and InterAgua v. Argentina* the courts did not consider the intention of the host state based on public interest regulation. In *Alpha v. Ukraine*, the court dismissed the state's defense of differentiating commercial and sovereign acts, ruling for indirect expropriation.[149] In this case, expropriation was defined in broad terms, refuting the State's regulatory power. In contrast, in other cases, like in *Suez and InterAgua v. Argentina*, it was considered that contractual relations of the state should not fall under the institute of expropriation, which requires a sovereign state act.

In *Grand River v. United States*, the court held that government interference in the investment must be necessary in order to constitute expropriation.[150] In *ECE v. Czech Republic*, legitimate expectations must be recognized on objective grounds.[151]

In *Middle East Cement v. Egypt*, the arbitral tribunal considered the expropriation, due to the act performed by administrative means and, therefore, without due legal process.[152]

In *Saint-Gobain v. Venezuela*, the situation of *de facto* expropriation was configured. It was the takeover of the factory by the workers' union, and the act was attributed as ordered by the State.[153]

Moreover, the loss of investment control was considered an important element in the expropriation, as in *El Paso v. Argentina*[154] and *Enkev Beheer v. Poland.*[155]

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[144] *Waste Management, Inc. v. United Mexican States II*, Award, ¶¶ 159-160, 175-176 (Apr. 30, 2004).

[145] *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, Decision of the Tribunal on Objections to Jurisdiction, ¶ 161 (Jan. 29, 2004).

[146] *Consortium RFCC v. Royaume du Maroc*, Arbitration Award, ¶¶ 65, 87, 89 (Dec. 22, 2003).

[147] *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, Award, ¶ 464 (July 24, 2008).

[148] *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic*, Decision on Liability, ¶¶ 125, 128-129 (Dec. 14, 2008).

[149] *Alpha Projektholding GmbH v. Ukraine*, Award, ¶ 412 (Nov. 8, 2010).

[150] *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, Award, ¶¶ 140-141 (Jan 12, 2011).

[151] *ECE Projektmanagement v. The Czech Republic*, Award, ¶¶ 4.8.13-4.8.14 (Sept. 19, 2013).

[152] *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, Award, ¶¶ 139, 142-144 (Apr. 12, 2002).

[153] *Saint-Gobain Performance Plastics Europe v. Bolivarian Republic of Venezuela*, Decision on Liability and the Principles of Quantum, ¶¶ 464, 477 (Dec. 30, 2016).

[154] *El Paso Energy International Company v. The Argentine Republic*, Award, ¶ 248 (Oct. 31, 2011).

In *Tecmed v. México*, the arbitral tribunal distinguished between direct and indirect expropriation. Regarding the latter, it used the term de facto expropriation, characterizing it as the set of actions and laws that make it impossible for the foreign investor to enjoy its property, without allocating such property to third parties or the government.[156]

While in *Tecmed v. Mexico,* the arbitral court held that the effects of host State measures are more important than government intentions, in *Biwater Gaulf v. Tanzania* and *Suez and InterAgua v. Argentina* a contrary understanding prevailed.

In *Telenor v. Hungary,* the court did not recognize the indirect expropriation because it was of minimal value, without significant economic impact.[157] the same in *Electrabel v. Hungary*[158] and *Azurix v. Argentina.*[159]

Indirect expropriation is seen in cases that only recognize the effect (*sole effect doctrine*), while another is the intention (*host States' intentions*)[160] *Chemtura v. Canada,*[161] *Saipem v. Bangladesh,*[162] *Vivendi v. Argentina,*[163] *Rumeli v. Kazakhstan,*[164] *Bayindir v. Pakistan,*[165] *Gemplus v. Mexico*[166] and *E energija v. Latvia*[167] consider only the effects.

VI. THE UMBRELLA CLAUSE

The umbrella clause is a legal fiction, altering previously contractual provisions to elevate them to the same level as an international treaty. In this way, the foreign investor could apply

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[155] *Enkev Beheer B.V. v. Republic of Poland*, First Partial Award, ¶ 346 (Apr. 29, 2014).
[156] *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, Award, ¶ 113 (May 29, 2003).
[157] *Telenor Mobile Communications A.S. v. The Republic of Hungary*, Award, ¶ 79 (Sept. 13, 2006).
[158] *Electrabel S.A. v. Republic of Hungary*, Decision on Jurisdiction, Applicable Law and Liability, ¶¶ 6.62-6.63 (Nov. 30, 2012).
[159] "In *Santa Elena*, that the Respondent found a useful point of reference for the concept of creeping expropriation, the tribunal did not take into account the environmental purpose of the expropriatory measures: "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." The same tribunal was persuaded by the finding in *Tippetts* that "The intent of the government is less important than the effects of the measures on the owner, and the form of the measures of control or interference is less important than the reality of their impact." (*Azurix Corp. v. The Argentine Republic*, Award, ¶ 309 (July 14, 2006)).
[160] *Supra* at 5, 170.
[161] *Chemtura Corporation v. Government of Canada*, Award, ¶ 242 (Aug. 2, 2010).
[162] *Saipem S.p.A. v. The People's Republic of Bangladesh*, Award, ¶ 133 (June 30, 2009).
[163] *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, Resubmitted case, Award, ¶ 7.5.20 (Aug. 20, 2007).
[164] *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, Award, ¶7000 (July 29, 2008).
[165] *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, Award, ¶ 459 (Aug. 27, 2009).
[166] *Gemplus S.A., SLP S.A., Gemplus Industrial S.A. de C.V. v. The United Mexican States*, Award, Part IV, § 8.23 (June 16, 2010).
[167] *UAB E energija (Lithuania) v. Republic of Latvia*, Award, ¶ 1079 (Dec. 22, 2017).

the BIT's clauses in any administrative contract, completely bypassing the domestic system, which, as a rule, would be the applicable law.

Despite its presence in BITs since 1959, including the BIT between West Germany and Pakistan, the use of this instrument was largely expanded from the first decade of the 21st century, with the decisions of the cases *SGS v. Pakistan* and *SGS v. SGS v. Philippines*. Previously there was an understanding that the parties involved had to agree beforehand on an international solution. The umbrella clause is found in Art. 2(2) of the UK model BIT, Art. 8(2) of the German model BIT and Art. 10(1) of the ECT. However, the provision is not included in NAFTA, USMCA, CETA or other FTA agreements negotiated with the European Union.[168]

This institute results from the use of the generic wording of the BIT that can be extended to any obligation to which the foreign investor is a party, as observed in the BIT British model: "art. 1(2) (…) Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party."[169]

The *Serbian Loans* case in 1929 decided that any contract that was not concluded between states as subjects of international law was domestic.[170]

The use of the umbrella clause begins in the post-World War II period, during the period of the Afro-Asian independence movements. During this period capital exporting countries, were "dissatisfied" with an international protection that was considered "ambiguous".[171]

The dissatisfaction derives from the absence of a universal guarantee for foreign investors. In the event of an allegation of violation of a foreign investor's rights, especially with regard to direct expropriation, the investor relied on diplomatic protection and was subordinated to the will of the home state. There were also decisions against the interests of investors at the International Court of Justice, as in the *Anglo-Iranian Oil Company* of 1952, which ruled that there was no jurisdiction because it was a domestic contract and not an international treaty. The ICJ's decision in 1951 was not enough to prevent the coup d'état perpetrated by the United Kingdom and the United States in 1952.[172] From this, these capital-exporting countries built the argument that domestic contracts should be protected at the international level.

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[168] *Supra* at 5, 272, 274-275; *Supra* at 81, 441-444.
[169] United Kingdom Model BIT 2008, UNCTAD, Investment Policy Hub.
[170] *Serbian Loans*, Judgment, PCIJ (July 12, 1929).
[171] *Supra* at 5, 273; *Supra* at 81, 441.
[172] Sundhya Pahuja and Cait Storr, *Rethinking Iran and International Law: The Anglo-Iranian Oil Company Case Revisited*, in THE INTERNATIONAL LEGAL ORDER: CURRENT NEEDS AND POSSIBLE RESPONSES, ESSAYS IN HONOUR OF DJAMCHID MOMTAZ (Brill, 2017).

The use of the umbrella clause has two major positions involving the Swiss company Société Générale de Surveillance S.A. (SGS). While the *SGS v. Pakistan* case has a narrow understanding, the *SGS v. Philippines* case has a broad understanding, automatically elevating a trade dispute to the level of an international violation.

In *SGS v. Pakistan*, the arbitral tribunal established that a breach of contract between the foreign investor and the host state would not constitute an automatic breach of the BIT.

The arbitral tribunal drew important consequences from the inadvertent use of the umbrella clause in international investment law. First, such use would transform various domestic contracts signed by the host State into international obligations. Further, the substantive rules of BITs would become superfluous since it would be unnecessary to demonstrate a breach of such rules to constitute an international liability.[173]

Interestingly, in *SGS v. Pakistan,* the tribunal held that the umbrella clause is procedural and not substantive. Plus, it established that the umbrella clause was not located in the BIT together with the other substantive rules. Thus, it indicated that the signatory parties wished to give this clause a differentiated, and therefore procedural, nature.[174]

When the decision taken was contrary to the interest of the home State, in the case of Switzerland, this country sent a letter of disapproval to the Deputy Secretary-General of ICSID in 2013, registering its indignation.[175]

El Paso v. Argentina and *Pan American v. Argentina* added an important finding: the differentiation between a sovereign act to a management act. While BITs fall under acts of State, only those will be covered by investment arbitration.[176] In *SGS v. Paraguay*, the court

[173] *Supra* at 81, 467.

[174] *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, Decision of the Tribunal on Objections to Jurisdiction, ¶¶ 169-170 (Aug. 6, 2002).

[175]" (…) [T]he Swiss authorities are alarmed about the very narrow interpretation given to the meaning of Article 11 by the Tribunal, which not only runs counter to the intention of Switzerland when concluding the Treaty but is quite evidently neither supported by the meaning of similar articles in BITs concluded by other countries nor by academic comments on such provisions.....With regard to the meaning behind provisions such as Article 11 the following can be said:...they are intended to cover commitments that a host State has entered into with regard specific investments of an investor or investment of a specific investor, which played a significant role in the investor's decision to invest or to substantially change an existing investment, i.e. commitments which were of such a nature that the investor could rely on them...It is furthermore the view of the Swiss authorities that a violation of a commitment of the kind described above should be subject to the dispute settlement procedures of the BIT". Vide: K. Yannaca-Small, *Interpretation of the Umbrella Clause in Investment Agreements*, OECD WORKING PAPERS ON INTERNATIONAL INVESTMENT, 2006/03, OECD Publishing; Also: *Supra* at 5, 279.

[176] *El Paso Energy International Company v. The Argentine Republic*, Decision on Jurisdiction, ¶¶ 79-80, 100 (Apr. 27, 2006).

found that the lack of compensation in a contract of pre-shipment inspection would be configured as a violation of the BIT.[177]

In *Salini v. Jordan,* the tribunal was also emphasized in demonstrating the inconsistency of the decisions between two arbitration cases involving the Swiss company SGS. The same company, in a similar situation and using the same institute, obtained opposite decisions. The court added that the contractual rules of dispute resolution must be observed.[178] In the end, the tribunal decided to a strict position on the umbrella clause, following *SGS v. Pakistan*.

These cases were based on the French doctrine of administrative contracts (*contracts administratifs*), widely applied in Latin America, which recognizes the supremacy of public over private interest. In turn, arbitrators of the Common Law inheritance tend to deny the application of this doctrine in the context of public international law.

In *Impregilo v. Pakistan*[179] and *Azurix v. Argentina*,[180] the *umbrella clause* was not applied because the domestic contracts were signed with separate entities of the host State.[181]

The group of arbitration rulings advocating a restrictive application of the umbrella clause, following the case *SGS v. Pakistan*, applies a restrictive interpretation based on the principle *in dubio mitius*, which means one should decide on the least onerous alternative for the party that assumes the obligation. This principle is also found in the jurisprudence of the WTO in *DS48*.[182]

Regarding the cases that apply the broad understanding of the umbrella clause, the *SGS v. Philippines*,[183] decided in the opposite of *SGS v. Pakistan*. According to this, the contractual obligations would be covered by the BIT provisions.[184]

Texaco v. Libya de 1977 e *AAPL v. Sri Lanka* were crucial in the process of internationalization of concession contracts, replacing domestic jurisdiction with international.

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[177] *SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay*, Award, ¶¶ 91-92 (February 10th, 2010).

[178] *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*, Decision on Jurisdiction, ¶ 127 (Nov. 9, 2004).

[179] *Impregilo S.p.A. v. Islamic Republic of Pakistan*, Decision on Jurisdiction, ¶ 223 (Apr. 22, 2005).

[180] *Azurix Corp. v. The Argentine Republic*, Award, ¶ 384 (Sept. 1, 2009).

[181] *Supra* at 81, 465.

[182] *DS48. European Communities — Measures Concerning Meat and Meat Products (Hormones)* (WTO) Report of the Appellate Body, § 165 and footnote 154 (Jan. 16, 1998).

[183] *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, Decision of the Tribunal on Objections to Jurisdiction, ¶¶ 125, 127 (Jan. 29, 2004).

[184] *Supra* at 81, 468.

In *AAPL v. Sri Lanka*, it was the first time that a violation of the BIT rule was alleged without the existence of a domestic contract between a foreign investor and the host State.[185]

In *Siemens v. Argentina*, the tribunal dismissed the difference between BIT and administrative contract, arguing that the BIT applied to "*any obligations*".[186] The same in *Eureko v. Poland*[187] and *Fedax v. Venezuela.*[188]

In *Noble Ventures v. Romania,* the tribunal dismissed the theory that distinguishes *acta iure imperii* and *acta iure gestionis,* deciding that an international responsibility was identified.[189] The same in *CMS v. Argentina*[190] and *Sempra v. Argentina.*[191] The *Vivendi Annulment Committee* decided the opposite.[192]

The judgement in *Burlington v. Ecuador* goes beyond the grounds found in *CMS v. Argentina* and *Sempra v. Argentina*, understanding that the umbrella clause applies even when it does not exist to the exercise of state sovereignty.[193]

Therefore, it is possible to understand the abundance of positions in the arbitral decisions according to the table below, which summarises each examined clause by the main reasoning identified in arbitration cases.

Table No. 1- Summary of BIT substantive clauses according to the reasoning found in arbitral cases

Standard Clause	Position	Leading Case	Other Cases
MFN	**Applicable in substantive and procedure rules (except if the BIT expressly determines a**	*Emilio Agustín Maffezini v. The Kingdom of Spain* *Ambatielos (ICJ)*	*Siemens v. Argentina* *Salini v. Jordan* *Grid v. Argentina* *Gas Natural SDG v. Argentina* *Suez Sociedad General de Aguas de Barcelona S.A., and Vivendi*

[185] Julien Cantegreil, *The Audacity of the Texaco/Calasiatic Award: René-Jean Dupuy and the Internationalization of Foreign Investment Law*, 22(2) EUROPEAN JOURNAL OF INTERNATIONAL LAW 455 (2011).

[186] *Siemens A.G. v. The Argentine Republic*, Award, ¶ 206 (Jan. 30, 2007).

[187] *Eureko B.V. v. Republic of Poland*, Partial Award, ¶ 257 (Aug.19, 2005).

[188] *Fedax N.V. v. The Republic of Venezuela*, Award, ¶ 29 (Mar. 9, 1998).

[189] *Noble Ventures, Inc. v. Romania*, Award, ¶¶ 82, 85. (Oct. 12, 2005)

[190] *CMS Gas Transmission Company v. The Republic of Argentina*, Award, ¶ 299 (May 12, 2005).

[191] *Sempra Energy International v. The Argentine Republic*, Award, ¶¶ 310, 313 (Sept. 28, 2007).

[192] *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, Decision on Annulment, ¶¶ 101-102 (July 23, 2002).

[193] *Burlington Resources Inc. v. Republic of Ecuador*, Decision on Jurisdiction, ¶ 190 (June 2, 2010).

Standard Clause	Position	Leading Case	Other Cases
	restrictive use)		*Universal S.A. v. Argentina* *Camuzzi v. Argentina* *Impregilo v. Argentina*
	Applicable only in substantive rules (except if the BIT expressly determines the use for procedural and dispute resolution rules)	*Plama v. Bulgaria*	*Telenor v. Hungary* *Wintershall v. Argentina*
	Non-application of the MFN	*Anglo-Iranian Oil Company (ICJ)*	*Tecmed v. México* *Parkerings-Compagniet AS v. Lithuania*
NT	**Comparison in different sectors**	*Occidental Exploration Production Company v. Ecuador*	*Methanex v. USA* *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Pakistan*
	Comparison in the same sectors	*Pope & Talbot v. Canada*	*Marvin Feldman v. Mexico* *UPS v. Canada* *S.D. Myers v. Canada* *Feldman v. Mexico*
	Denial of the use of WTO jurisprudence to investments	*Occidental Exploration*	*Methanex v. United States* *Bayindir v. Pakisthan* *Cargill v. Mexico* *Merrill & Ring v. Canada* *Clayton/Bilcon v. Canada*
	Possibility to use of WTO jurisprudence to investments	*SD Meyers v. Canada* *Pope & Talbot v. Canada* *Feldman v. Mexico*	*Corn Products v. Mexico* *Cargill v. Poland*
	Same group of	*Nykomb Synergetics*	*Consortium RFCC v. Morocco*

Standard Clause	Position	Leading Case	Other Cases
	norms and regulations	*Technology Holding AB v. Latvia*	*Ronald Lauder v. Czech Republic*
	Lack of proof	*Thunderbird v. Mexico*	*ADF v. United States*
	Discrimination arising from domestic norms (public policy)	*Oscar Chinn Case (United Kingdom v. Belgium (ICJ)*	*Siemens v. Argentina* *Genin v. Estonia* *GAMI v. Mexico*
MST	**MST as minimum protection**	*Neer (1926)*	*Mondev International Ltd v. United States* *UPS v. Canada* *ADF v. USA* *Robert Azinian, Kenneth Davitian, & Ellen Bacca v. Mexico*
	MST as a consuetudinary norm	*Pope & Talbot v. Canada*	*Merrill & Ring v. Canada* *Metalclad v. Mexico* *Middle East Cement v. Egypt*
	Non-application of the MST	*Loewen v. USA*	*Thunderbird v. Mexico*
FET	**FET = MST**	*Metalclad v. Mexico*	*Occidental Exploration and Production Company v. Ecuador* *MTD v. Chile* *Generation v. Ukraine* *LG&E v. Argentina* *SD Myers v. Canada* *CMS Gas v. Argentina*
	FET = international custom	*Mondev v. USA*	*BG v. Argentina* *Chemtura v. Canada*
	FET like autonomous norm	*Saluka v. Czech Republic*	*Tecmed v. Mexico* *Pope & Talbot v. Canada*

Standard Clause	Position	Leading Case	Other Cases
	(additional protection)		*LG&E v. Argentina*
	Synonyms of the term FET	*Parkerings v. Lithuania*	*Total v. Argentina* *OKO Pankki v. Estonia* *Bosca v. Lithuania*
	Non-application of the FET	*Eastern Sugar v. Czech Republic*	*Thunderbird v. Mexico* *GAMI v. Mexico*
FPS	**Physical protection**	*Saluka v. Czech Republic*	*Enron v. Argentina* *BG v. Argentina* *Wena Hotels v. Egypt* *Tecmed v. Mexico* *Noble Ventures v. Romania* *Suez and InterAgua v. Argentina* *AMT v. Zaire* *Eureko v. Poland* *Tenaris v. Venezuela*
	Physical and legal protection	*AAPL v. Sri Lanka*	*Compañía de Aguas, Vivendi Universal v. Argentina* *CME v. Czech Republic* *Sempra v. Argentina* *Siemens v. Argentina* *Vivendi v. Argentina* *Biwater Gaulf v. Tanzania* *Azurix v. Argentina*
	Non-application of the FPS	*Ronald Lauder v. Czech Republic*	*Pantechniki v. Albania*
Expropriation	**Direct**	*Saluka v. Czech Republic*	*Santa Elena v. Costa Rica* *Compañía de Aguas, Vivendi Universal v. Argentina* *LG&E v. Argentina* *Middle East Cement v. Egypt*

Standard Clause	Position	Leading Case	Other Cases
	Indirect	*Metalclad v. Mexico*	*Pope & Talbot v. Canada* *CME v. Czech Republic* *Metalclad v. Mexico* *Ampal-American v. Egypt* *Biwater Gaulf v. Tanzania* *Middle East Cement v. Egypt* *El Paso v. Argentina* *Enkev Beheer v. Poland*
	Expropriation of rights derived from an investment	*SPP v. Egypt*	*Tokios Tokelès v. Ukraine* *Eureko v. Poland* *Gold Reserve v. Venezuela* *Vigotop v. Hungary*
	Non-application of the expropriation	*Ronald Lauder v. Czech Republic*	*Oscar Chinn Case (United Kingdom v. Belgium (ICJ)* *Fireman's Fund v. Mexico* *Sempra v. Argentina* *Methanex v. United States* *Thunderbird v. Mexico* *Waste Management v. Mexico II* *SGS v. Philippines* *RFCC v. Morocco* *Suez and InterAgua v. Argentina* *Alpha v. Ukraine* *Grand River v. United States* *ECE v. Czech Republic* *CMS v. Argentina*
Umbrella Clause	**Restricted understanding**	*SGS v. Pakistan*	*El Paso v. Argentina* *Pan American v. Argentina* *Salini v. Jordan* *Impregilo v. Pakistan* *Azurix v. Argentina* *Vivendi Annulment Committee*
	Broad understanding	*SGS v. Philippines*	*SGS v. Paraguay* *Texaco v. Libya*

Standard Clause	Position	Leading Case	Other Cases
			AAPL v. Sri Lanka *Siemens v. Argentina* *Noble Ventures v. Romania* *Eureko v. Poland* *Fedax v. Venezuela* *CMS v. Argentina* *Sempra v. Argentina* *Burlington v. Ecuador*
	Non-application of umbrella clause	*Serbian Loans (PCIJ)* *Anglo-Iranian Oil Company (CIJ)*	

Source: created by the author from the cases of arbitration tribunals and international permanent courts.

VII. CONCLUSION

The lack of consistency in different arbitral cases dismisses the unjustified claim of the *jurisprudence constante*. The investment dispute settlement system, eminently based on ISDS, takes advantage of this anarchical situation that benefits foreign investors, allowing them to use legally weak or controversial positions, such as forum treaty, forum shopping, MFN in procedural rules, autonomous and undefined FET, indirect expropriation, FPS and umbrella clause *lato sensu*. As a consequence, host States, mostly developing countries, find themselves subject to the reduction of the legitimate exercise of public interest, the violation of the principle of *pacta sunt servanda*, and upholding rules historically elaborated by capital exporting nations. Therefore, this lack of coherence is reflected in recent modifications of bilateral and regional agreements, in which States have become more cautious by imposing more stringent substantive clauses or even excluding them from these instruments.

The recent and constant revision of BITs and FTAs and the new agreements concluded after the 2008 financial crisis show that States systematically adopt more restrictive agreements with less room for generic standard clauses. If these agreements do exist, a series of exceptions are necessarily provided for, in order to establish explicit limits. The ISDS system,

therefore, is unable to ensure a secure set of precedents, and the emphasis in the arbitral awards is the preconception idea of the foreign investor's hypo-sufficiency *vis-à-vis* the host State.

Therefore, the movement towards a withdrawal of international investment law is not restricted to developing countries historically disadvantaged by a unilateral system of foreign investor protection. The European Union, the United States, Canada and Australia are also presenting new, and more restricted, agreements. It is notorious that investor protection lacks a legal foundation to constitute an equitable system in public international law.