THE MEANING OF SILENCE IN INVESTMENT TREATIES

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ABSTRACT

The ambiguity of key terms in investment treaties, such as "investment," "fair and equitable treatment," and "indirect expropriation," has been subject to extensive analysis. Less attention has been paid to the silence of investment treaties on numerous issues that routinely arise in practice. In this article, we argue that treaty silence has played a critical role in the development of international investment law. We show that arbitrators frequently adopt a creative approach to silence resulting in expansive interpretations, and that this approach stands in tension with several basic principles of public international law. We conclude by highlighting how current proposals to reform international investment law do not fully resolve the problems posed by the creative approach to silence.

I. INTRODUCTION

Most investment treaties are "bare-bones."[1] They are short, vague, and broadly drafted.[2] Vagueness also occurs in other kinds of treaties in which enforcement mechanisms are either inexistent or lack teeth.[3] But it raises critical issues in a field where private parties enjoy a direct

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[1] Sundaresh Menon, *The Transnational Protection of Private Rights: Issues, Challenges, and Possible Solutions*, *in* PRACTICING VIRTUE: INSIDE INTERNATIONAL ARBITRATION 1 (David D. Caron *et al.* eds. 2015), p. 33.

[2] Lauge Poulsen, BOUNDED RATIONALITY AND ECONOMIC DIPLOMACY: THE POLITICS OF INVESTMENT TREATIES IN DEVELOPING COUNTRIES (2015), p. 20 (commenting that investment treaties are "vague and broadly drafted"); Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 AMERICAN JOURNAL OF INTERNATIONAL LAW (AJIL) 45 (2013), p. 46 (noting that these treaties "have traditionally been short and vaguely worded"); Trinh Hai Yen, THE INTERPRETATION OF INVESTMENT TREATIES (2014), p. 8 (noting that investment treaties "have usually kept their original short and vague version with around ten provisions in a few pages for fifty years"); Zachary Douglas, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS (Brill 2009), p. xxii, xxiii (noting that investment treaties' "general, open-textured standards of investment protection" are "commonly elaborated in a text consisting of no more than a few pages"); José E. Alvarez, *A BIT on Custom*, 42 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS 17 (2009), p. 24 (noting that "the typical BIT is a relatively concise (and perhaps somewhat cryptic) document").

[3] On the lack of a central enforcement mechanism in public international law, *see, e.g.* HUGH THIRLWAY, THE SOURCES OF INTERNATIONAL LAW 2 (Oxford University Press, 2d. ed. 2019); BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 15 (James Crawford, ed., Oxford University Press, 9th ed. 2019).

right to challenge a wide range of state conduct before arbitral tribunals and claim large amounts of damages.[4]

How did such "bare-bones" instruments give rise to so much controversy and litigation? For most commentators, the answer is to be found in the broad and flexible nature of the standards of treatment set out in these treaties and the expansive interpretations made possible by their ambiguity.[5] Open-ended and ambiguous treaty terms encourage private litigants to initiate disputes and arbitrators to use wide discretion in adjudicating them. Some argue that expansive interpretations frustrate States' abilities to understand and comply with their international legal obligations and to regulate in good faith.[6] Others have justified such interpretations as consistent with an intentional delegation of discretion to interpreters and as necessary in the complex modern regulatory landscape.[7] But across these normative assessments of international investment law is an understanding that its expansion has been rooted in ambiguity.

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[4] Thomas Wälde, *Interpreting Investment Treaties: Experiences and Examples*, *in* INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER (Binder et al. eds., 2009), p. 749 ("[T]reaty language, which was drafted and designed for a relatively toothless and political rather than legal instrument, unexpectedly became effective through investment arbitration. The open-ended treaty obligations (fair and equitable, national treatment, indirect expropriation, most-favoured nation) were first drafted and used when legal enforceability was remote. Treaty provisions and concepts made for political discussion and, remotely, for rare inter-State arbitration, suddenly became enforceable through private initiative unhindered by political considerations."). *See also* Jan Paulsson, *Arbitration Without Privity*, 10 ICSID REVIEW - FOREIGN INVESTMENT LAW JOURNAL 232 (1995), p. 233 (noting that investment treaties "create a dramatic extension of arbitral jurisdiction in the international realm" by "allowing direct recourse by private complainants" with respect to a wide range of issues); T.H. Hart and R. Vélez, *Study of Damages Awards in Investor-State Cases*, TRANSNATIONAL DISPUTE MGMT. (Jan. 2021), p. 1 (identifying US$71.9 billion in sums awarded under investment treaties).

[5] *See, e.g.*, Lauge K. Skovgaard Poulsen, BOUNDED RATIONALITY AND ECONOMIC DIPLOMACY: THE POLITICS OF INVESTMENT TREATIES IN DEVELOPING COUNTRIES (Cambridge University Press 2015) (pointing to the "vague terms" and "expansive interpretations" of investment treaties as sources of contemporary controversy); Trinh Hai Yen, THE INTERPRETATION OF INVESTMENT TREATIES (Brill 2014), pp. 8-9 (noting that attacks on investment arbitration "mainly focus on arbitral interpretations of the challengingly vague treaty terms"); Stephan Schill, *The Sixth Path: Reforming Investment Law from Within*, SIEL Working Paper No. 2014/02, p. 2 (citing the "vagueness of the governing treaty standards that, coupled with lenient control mechanisms, do not establish clear limits to arbitral decision-making and allow arbitrators to penetrate deeply into scrutinizing domestic public policy choices" as a "root cause" of discontent with investment treaty arbitration).

[6] Lise Johnson, Lisa Sachs, Brooke Güven, and Jesse Coleman, *Costs and Benefits of Investment Treaties: Practical Considerations for States*, COLUMBIA CENTER FOR SUSTAINABLE INVESTMENT POLICY PAPER (March 2018) p. 11 (highlighting "reduced policy space" as a cost of "expansive" interpretations of investment treaties).

[7] *See, e.g.*, Jeremy K. Sharpe, *From Delegation to Prescription: Interpretive Authority in International Investment Agreements*, *in* BY PEACEFUL MEANS: INTERNATIONAL ADJUDICATION AND ARBITRATION (Oxford University Press, forthcoming), p. 1 ("International investment agreements (IIAs) traditionally have delegated broad authority to arbitral tribunals to interpret and apply open-textured provisions. . . . In some quarters, this was precisely the idea."); *cf. Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, September 18, 2009, ¶ 284 (asserting a need to "adapt the principle underlying the holding of the Neer arbitration to the more complicated and varied economic positions held by foreign nationals today").

This understanding is incomplete. On numerous controversial and recurrent issues of international investment law, treaties are not simply ambiguous; they are silent. Arbitral tribunals have identified and attributed meaning to treaty silence on a wide range of significant issues, including mass claims, coverage of indirectly held investments, claims of dual nationals, reflective loss claims, exceptions to standards of treatment, denial of benefits provisions, coverage of tax matters, and the principles governing compensation. On these issues, claimants typically argue that if the contracting states had intended to limit a treaty's reach, they should have said so expressly.[8] Conversely, respondent states typically argue that treaty silence on an issue cannot be interpreted as creating affirmative obligations.[9] Tribunals have often preferred the first approach, resulting in expansive interpretations of the jurisdictional reach of investment treaties and the scope of investment protection.[10]

New treaties reflect increased attention to the issue of silence. Drafters have attempted to explicitly address a range of unanticipated gaps in early investment treaties. However, they have often done "too little" to clarify the scope of treaty commitments.[11] New treaties, to the extent they are even in force, have also remained largely unused as claimants prefer to litigate under "old-generation" instruments with more "bite."[12] And claimants often engage in "treaty shopping" through corporate structuring or by invoking most-favored-nation (MFN) clauses to "import" provisions from other treaties.[13] On occasion, states have also addressed treaty silence

[8] *See, e.g., Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, August 3, 2004, ¶ 128 (noting Siemens' position that "had the parties intended to exclude certain assets from the Treaty's scope of application, they would have done so").

[9] *See, e.g., Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, August 3, 2004, ¶ 124 (noting Argentina's position that rights to bring indirect claims "cannot be implied but require an express provision in the agreement").

[10] *See, e.g., Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, August 3, 2004, ¶ 137 (upholding Siemens' position on the ground that "[t]he Treaty does not require that there be no interposed companies between the investment and the ultimate owner of the company"). *See also infra*, Part III.

[11] Wolfgang Alschner, *The Impact of Investment Arbitration on Investment Treaty Design: Myth versus Reality*, 42 YALE JOURNAL OF INTERNATIONAL LAW 1 (2017), p. 4 (arguing that states "may have actually done too little in response to a changing policy environment, thus entrenching a pre-ISA [investor-state arbitration] claims architecture rather than engaging in genuine innovation").

[12] United Nations Conference on Trade and Development, *Phase 2 of IIA Reform: Modernizing The Existing Stock of Old-Generation Treaties*, IIA Issues Note No. 2, June 2017, p. 1 (noting that more than 95% treaties in force are "old treaties" that continue to "bite," as "virtually all known" ISDS cases have been based on those treaties).

[13] Julian Arato, *Corporations as Lawmakers*, 56 HARVARD JOURNAL OF INTERNATIONAL LAW 229 (2015), p. 275 (describing the use of corporate restructuring to gain access to favored investment treaties); Stephan W. Schill, THE MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW (2010), p. 124 (arguing that corporate structuring and MFN clauses "multilateralize" investment law); Simon Batifort and J. Benton Heath, *The New MFN Debate? Putting the Brakes on Multilateralization*, 111(4) AJIL 873 (2017) (critiquing the presumption that MFN clauses can be used to "import"' substantive provisions from other treaties) (hereinafter "Batifort & Heath, 'The New MFN Debate'"); OECD Secretariat, 4th Annual Conference on Investment Treaties, Treaty Shopping and Tools for Treaty

through joint interpretations and amendments.[14] But those mechanisms, while straightforward in theory, are difficult to implement.[15] Silence is and will likely remain a significant feature of international investment law for years to come.

Yet little has been said on treaty silence. Some have provided examples of arbitral decisions dealing with silence.[16] Others have engaged with particular rules and canons of treaty interpretation or discrete issues on which treaties are silent.[17] But there has been no systematic assessment of the distinct questions raised by the silence of investment treaties.

This lack of a roadmap is undesirable. At the dispute stage a claimant may enjoy the interpretive leeway afforded by treaty silence, but when making an investment decision an

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Reform, Background Materials at 9–11, *available at* http://www.oecd.org/daf/inv/investment-policy/4th-Annual-Conference-on-Investment-Treaties-agenda.pdf (referring to this use of MFN clauses as "MFN shopping").

[14] One prominent but isolated example of a joint interpretation is the notice of interpretation issued by the Free Trade Commission of the North American Free Trade Agreement (NAFTA) in 2001. NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions, Section B (July 31, 2001). While there are few examples of amendments, the contracting parties to the Energy Charter Treaty have initiated a process to "modernize" that instrument. Energy Charter Secretariat, *Decision of the Energy Charter Conference*, Doc. No. CCDEC 2019 (Nov. 6, 2019); Simon Batifort, Diana Tsutieva, Eleanor Erney, *ASIL DRIG: The Future of Investor-State Dispute Settlement under the Energy Charter Treaty*, KLUWER ARB. BLOG (March 29, 2021).

[15] United Nations Conference on Trade and Development, International Investment Agreements Issues Note No. 3, 'Interpretation of IIAs: What States Can Do', December 2011, p. 3 (noting that States have largely neglected the option of issuing joint interpretations); Lise Johnson and Merim Razbaeva, *State Control over Interpretation of Investment Treaties*, CCSI Policy Paper, April 2014, p. 2 (noting that State interpretive power is "as-yet relatively untapped"); *infra* Part V (noting that India's attempts to clarify the meaning of its investment treaties through joint interpretations have been largely unsuccessful).

[16] Tarcisio Gazzini, THE INTERPRETATION OF INTERNATIONAL INVESTMENT TREATIES 133 (2016); J. Romesh Weeramantry, TREATY INTERPRETATION IN INVESTMENT ARBITRATION (2012), ¶ 6.122.

[17] This includes general issues such as systemic integration and canons of construction, as well as particular substantive issues, such as nationality requirements, implied legality requirements, reflective loss, exhaustion of local remedies, identification of applicable law, and State power over investment treaties. *See* Campbell McLachlan, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, 54(2) INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 279 (2005); BETWEEN THE LINES OF THE VIENNA CONVENTION? CANONS AND OTHER PRINCIPLES OF INTERPRETATION IN PUBLIC INTERNATIONAL LAW (Klingler et al. eds., Kluwer Law International 2019); Javier Garcia Olmedo, *Nationality of Claim: Investment Arbitration*, in MAX PLANCK ENCYCLOPEDIA OF INTERNATIONAL LAW (2019); Mark A. Clodfelter and Joseph D. Klingler, *Reflective Loss and Its Limits under International Law*, *in* CONTEMPORARY AND EMERGING ISSUES ON THE LAW OF DAMAGES AND VALUATION IN INTERNATIONAL INVESTMENT ARBITRATION 57 (Christina L. Beharry ed., Koninklijke Brill NV, Leiden, 2018); Sanja Djajić and Maja Stanivukovic, *The Local Remedies Rule in non-ICSID Investment Arbitration*, 2019 AUSTRIAN YEARBOOK ON INTERNATIONAL ARBITRATION 421; Virtus Chitoo Igbokwe, *Determination, Interpretation and Application of Substantive Law in Foreign Investment Treaty Arbitrations*, 23(4) JOURNAL OF INTERNATIONAL ARBITRATION 267 (2006); Anthea Roberts, *Triangular Treaties: The Extent and Limits of Investment Treaty Rights*, 56(2) HARVARD INTERNATIONAL LAW JOURNAL 353 (2016).

investor wants certainty regarding the scope of investment protection.[18] Investors also prefer *ex ante* that States understand and comply with their obligations rather than being forced to incur the cost and uncertainty of arbitrating disputes.[19] States also need to be able to assess the nature and scope of their treaty obligations and their exposure to investment claims. The states participating in Working Group III of the United Nations Commission on International Trade Law ("UNCITRAL") on the reform of investor-State dispute settlement have thus expressed "concerns of lack of consistency, coherence, predictability and correctness of decisions."[20] A range of solutions are being envisaged to address those concerns, including institutional reform such as the creation of a Multilateral Investment Court or an appellate mechanism for investment claims. But other kinds of solutions are also under consideration, including the development of "interpretative rules that the ISDS tribunal should follow and governing the meaning given to silence on certain matters."[21]

This article is the first detailed study of the meaning of silence in investment treaties. Based on a comprehensive review of arbitral decisions, we argue that tribunals have followed three main approaches to silence: creative, restrained, and systemic. The creative approach treats silence as an opportunity to adopt expansive interpretations, proceeding on the premise that the absence of express restrictions should be read permissively. By contrast, the restrained approach does not generally extend treaty coverage or create obligations in the absence of language to that effect. The systemic approach posits that when a treaty is silent on a matter governed by existing rules of international law, treaty silence will not displace those rules. While examples of each approach exist in practice, our study reveals the outsized role of the creative approach in developing distinct rules of international investment law on jurisdiction, liability and quantum.

Notwithstanding its prominence, we argue that there is no clear legal basis for the creative approach in arbitral practice. On the contrary, it stands in tension with three fundamental principles of international law, namely that jurisdiction in international law needs to be expressly conferred, that a State is not bound by an obligation without its consent, and that relevant rules of international law should be taken into account in interpreting a treaty. We urge

[18] On the different and sometimes opposite incentives of investors *ex ante* (investment decision stage) and *ex post* (dispute stage), *see* Julian Arato, *The Elastic Corporate Form in International Law*, 62 VIRGINIA JOURNAL OF INTERNATIONAL LAW (forthcoming 2022).

[19] *See, e.g.*, Julian Arato, Chester Brown, and Frederico Ortino, *Parsing and Managing Inconsistency in Investor-State Dispute Settlement*, 21 JOURNAL OF WORLD INVESTMENT & TRADE 336 (2020), p. 341 ("Inconsistent interpretations also affect the dispute resolution process, for example by making settlement more difficult (and potentially inefficient), or by increasing the length and costs of arbitral proceedings.").

[20] UNCITRAL, Note by the Secretariat: Possible reform of investor-State dispute settlement (ISDS), Interpretation of investment treaties by treaty Parties, January 17, 2020, ¶ 6.

[21] UNCITRAL, Note by the Secretariat: Possible reform of investor-State dispute settlement (ISDS), Interpretation of investment treaties by treaty Parties, January 17, 2020, ¶ 47.

treaty interpreters to pay renewed attention to these "first principles" when approaching situations of treaty silence.[22]

This article is structured in five parts. In Part II, we show that the issue of treaty silence is situated at the confluence of various principles of international law and treaty interpretation. In Part III, we review the prominent role that the creative approach to silence has played in shaping international investment law. In Part IV, we argue that the creative approach stands in tension with several fundamental principles of international law, and that there is no clear legal or policy justification for its prominence in investment law. In Part V, we argue that current proposals to reform international investment law do not fully resolve the problems posed by the creative approach to silence. Part VI concludes.

II. SITUATING SILENCE

There is no established definition of treaty silence, and we do not attempt to propose one.[23] Instead, we focus on cases in which arbitral tribunals themselves have identified instances of silence. Our working definition thus originates in arbitral practice: a treaty is silent when its text does not expressly resolve an interpretive issue to which its application gives rise.[24] Beyond definitional issues, the core question raised by treaty silence concerns its consequences. Absent a generally accepted rule for dealing with silence, a wide range of overlapping, competing, and inconsistent theories of treaty interpretation have emerged.

The starting point for an adjudicator faced with treaty silence is the obligation to reach a legal decision.[25] The prohibition of *non liquet*, that is, a determination that the adjudicator is

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[22] One author has noted that "it is just too early in the evolution of international investment law to be fixating upon a jurisprudence constante" and that "we need to go back to arguing more about first principles." *See* Zachary Douglas, *Can a Doctrine of Precedent Be Justified in Investment Treaty Arbitration?*, 25 ICSID REVIEW-FOREIGN INVESTMENT LAW JOURNAL 104 (2010), ¶ 19. While those comments were made a decade ago, they remain relevant today, as many fundamental controversies surrounding the interpretation of investment treaties persist.

[23] Other commentators who have touched upon the question of treaty silence have not endeavored to develop a definition. *See generally* Gordon, *The World Court*, p. 803; Gazzini, THE INTERPRETATION OF INTERNATIONAL INVESTMENT TREATIES, p. 133; Weeramantry, TREATY INTERPRETATION IN INVESTMENT ARBITRATION, ¶ 6.122.

[24] This approach is underinclusive by design. For instance, we do not purport to offer substantial guidance on how adjudicators should determine whether or not a treaty is silent, even though that question may be a key issue in dispute. We do, however, note certain inconsistencies in the practice of adjudicators in making that determination. We also largely eschew characterizing particular cases as cases on treaty silence where adjudicators themselves have not done so.

[25] H. Lauterpacht, *Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties*, 26 BRITISH YEARBOOK OF INTERNATIONAL LAW 48 (1949), pp. 78-79 ("The completeness of the law when administered by legal tribunals is a fundamental - the most fundamental - rule not only of customary but also of conventional international law. It is possible for the parties to adopt no regulation at all. They may expressly disclaim any intention of regulating the particular subject-matter. But, in the absence of such explicit precaution, once they have clothed it in the form of a legal rule and once they have found themselves in a position in which that subject-matter is legitimately within the competence of a legal tribunal, the latter is bound and entitled to assume an effective common intention of the parties and to decide the issue."); *see also* Hans Kelsen, PRINCIPLES OF

simply unable to resolve the issue, is expressly codified in Article 42(2) of the ICSID Convention, which provides that an arbitral tribunal "may not bring in a finding of non liquet on the ground of silence or obscurity of the law."[26] While it is not clear exactly what interpreters must do in case of treaty silence, they clearly must do something.

Interpreters seeking guidance may turn to the VCLT, but that familiar instrument is of limited assistance when dealing with silence.[27] The VCLT provides guidance on how to interpret treaties by reference to the "ordinary meaning" of their terms and other interpretive tools. But the VCLT offers little direction where there are no treaty terms to interpret.[28]

One VCLT rule that may come into play is Article 31(3)(c), which provides that the interpreter may take into account "relevant rules of international law applicable in the relations between the parties."[29] Article 31(3)(c) recognizes that it may be necessary to look "outside the four corners of a particular treaty to its place in the broader framework of international law, applying general principles of international law."[30] In other words, the treaty may be silent, but other rules of international law may guide the interpreter. Article 31(3)(c) of the VCLT provides an important avenue for dealing with treaty silence, but not a complete solution. In some cases,

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INTERNATIONAL LAW (2d ed., Holt, Rinehart & Winston 1966), p. 439 ("If there is no norm of conventional or customary international law imposing upon the state (or another subject of international law) the obligation to behave in a certain way, the subject is under international law legally free to behave as it pleases; and by a decision to this effect existing international law is applied to the case. But this decision, though logically possible, may be morally or politically not satisfactory. Only in this sense are there 'gaps' in the international as in any legal order. The assumption that the law-applying organs are authorized to fill such gaps, by applying to the particular case norms other than those of existing conventional or customary international law, implies that the law-applying organs have the power to create new law for a concrete case if they consider the application of existing law as unsatisfactory. From the point of view of legal positivism, such a law-creating power must be based on a rule of positive international law."). For a discussion of broader conceptual issues regarding *non liquet* and different conceptions of the structure of international law, *see* Helen Quane, *Silence in International Law*, 84 BRITISH YEARBOOK OF INTERNATIONAL LAW (BYIL) (2014) 240.

[26] ICSID Convention, Article 42(2).

[27] VCLT Article 31 discusses the "terms of the treaty," their "context," their "object and purpose," which is normally identified in the text, and other written instruments that may have been entered into in connection with the treaty or subsequently.

[28] *See, e.g.*, Fuad Zarbiyev, *A Genealogy of Textualism in International Law*, *in* INTERPRETATION OF INTERNATIONAL LAW (Bianchi, Peat and Windsor eds., Oxford University Press 2015), p. 254 (describing textualism as "the dominant interpretative paradigm" of the VCLT); Richard Gardiner, TREATY INTERPRETATION (Oxford University Press, 2d ed. 2015), p. 164 ("The ILC's approach favoured the text as the starting point.").

[29] Vienna Convention on the Law of Treaties, signed 23 May 1969, Article 31(3)(c) (providing that in interpreting a treaty "[t]here shall be taken into account, together with the context . . . Any relevant rules of international law applicable in the relations between the parties.").

[30] Campbell McLachlan, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, 54(2) INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 279 (2005), p. 281.

no specific rule of international law is directly relevant. In others, relevant principles may have been formulated, but may have not gained sufficient acceptance to crystallize into legal norms.

Given the indeterminacy of the VCLT's interpretive rules, some have searched for other guidance on treaty silence. An attractive area consists of the copious compendium of interpretive canons that have emerged over centuries of international adjudication.[31] But their legal basis is controversial[32] and they are not always easy to apply. For example, *expressio unius est exclusio alterius* posits that a list of covered matters implies that other matters are not covered.[33] But *expression unius* does not apply to lists that are "clearly meant to be illustrative," as a different canon, *ejusdem generis*, anticipates.[34] In other words, consulting canons often brings the interpreter back to the difficult task of identifying the parties' intentions. Because canons of interpretation are so numerous and contradictory, some have opined that "[i]n principle they are all correct, but on concrete application they often abrogate each other and frequently appear worthless."[35]

Some suggest that the meaning of silence may depend on the kind of silence at issue ("qualified silence" or "gaps"),[36] whether silence was intended or inadvertent,[37] or the "nature of

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[31] *See generally* BETWEEN THE LINES OF THE VIENNA CONVENTION? CANONS AND OTHER PRINCIPLES OF INTERPRETATION IN PUBLIC INTERNATIONAL LAW (Klingler et al. eds., Kluwer Law International 2019)

[32] *See* Draft Articles on the Law of Treaties with Commentaries, II Y.B. INT'L L. COMM'N 218 (1966), ¶ 4 (noting the "non-obligatory character" of most canons of interpretation and arguing that they are merely "principles of logic and good sense valuable only as guides to assist in appreciating the meaning" of the treaty).

[33] Similarly, according to the *a contrario* canon, indicating in a treaty that "'You may do *this*' implies that you may not do *that*." Edward Gordon, *The World Court and the Interpretation of Constitutive Treaties*, 59 AJIL 794 (1965), p. 805.

[34] Joseph Klingler, *Expressio Unius est Exclusio Alterius*, *in* BETWEEN THE LINES OF THE VIENNA CONVENTION, p. 82 (noting that "[t]he challenge in many cases, of course, lies in determining the extent to which a list really was meant to be illustrative.").

[35] Hersch Lauterpacht, *Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties*, 26 BRITISH YEARBOOK OF INTERNATIONAL LAW 48 (1949), p. 52 (quoting Verzijl's reflections on a list of interpretive rules propounded by the Permanent Court of International Justice); Sean Murphy, *The Utility and Limits of Canons and Other Interpretive Principles*, *in* BETWEEN THE LINES OF THE VIENNA CONVENTION, p. 15 (emphasis in original) (citing Karl N. Llewelyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VANDERBILT LAW REVIEW 395, 401 (1950)) ("there typically could be found *two opposing canons* on almost every issue."). The difficulty of applying canons of interpretation was one of the reason for their omission from the VCLT. Alain Pellet, *Canons of Interpretation Under the Vienna Convention*, *in* BETWEEN THE LINES OF THE VIENNA CONVENTION, pp. 3-4.

[36] *Compare Abaclat and others (formerly Giovanna A. Beccara and others) v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, August 4, 2011, ¶ 517 (distinguishing between "qualified silence," which limits the scope of a treaty, and "gaps," which do not) *with Abaclat and others (formerly Giovanna A. Beccara and others) v. Argentine Republic*, ICSID Case No. ARB/07/5, Dissenting Opinion of Professor Georges Abi-Saab (Decision on Jurisdiction and Admissibility), ¶ 161 (calling into question the validity of the majority's distinction).

the treaty" being applied.[38] While conceptually interesting, those suggestions have not been fully articulated and lack a clear legal foundation. They are also difficult to operationalize, opening the door to potentially endless arguments as to the contracting States' intentions in any given case.[39] One author argues that treaties should simply not be read to contain provisions not set out therein.[40] However unobjectionable in the abstract, this proposition becomes meaningless when divorced from a baseline presumption as to what treaties should state and what may be presumed in the absence of express stipulation. As observed by one early commentator on treaty silence, "why assume one norm rather than another?"[41]

A particular phenomenon in investment treaty arbitration has also been the resort to broad, investor-friendly preambles to resolve difficult questions of treaty interpretation, including on issues of silence. This approach has been widely criticized, however, for improperly conflating preambles with treaties' object and purpose, for confusing a general policy of investment promotion with the particular interests of claimants in particular cases, and due to the inadequacies of vague preambles to provide predictable resolution of recurrent technical legal issues.[42] While arbitrators have often referred to treaty preambles in the face of silence, it is hard to see how any principled guidance could emerge from that exercise.

In other words, the interpretation of silence gives rise to confusion, uncertainty, and potential chaos. On the one hand, the prohibition of *non liquet* requires interpreters to make a decision in the face of treaty silence. On the other hand, guidance on how to do so is scarce and contradictory. Some may consider this unproblematic, as investment treaties vest arbitral

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[37] Gordon, *The World Court*, p. 804 (observing that "[i]t may help to know that the silence of a treaty was deliberately planned by its drafters").

[38] Gardiner, TREATY INTERPRETATION, pp. 165-166 (arguing that the constitutive treaty of an international organization "may require a greater degree of readiness to accept implied powers to exercise its functions, in contrast to a treaty in which precision is the key, such as one fixing a boundary.").

[39] *See* Gazzini, THE INTERPRETATION OF INTERNATIONAL INVESTMENT TREATIES, p. 135 (arguing that interpreters may fill gaps in treaties and that "it is immaterial whether the gap has been intentional or not").

[40] *See* Gazzini, THE INTERPRETATION OF INTERNATIONAL INVESTMENT TREATIES, p. 134 ("[I]nvestment tribunals have refused to import into treaties terms or expressions which are not in their text."); Weeramantry, TREATY INTERPRETATION IN INVESTMENT ARBITRATION, ¶ 6.124 ("When faced with silence, many FIATs are often reluctant to read or imply terms into a treaty.").

[41] Gordon, *The World Court*, p. 806.

[42] *HICEE B.V. v. The Slovak Republic*, PCA Case No. 2009-11, UNCITRAL, Partial Award, May 23, 2011, ¶ 116 ("[I]n general, the purpose of bilateral investment treaties can be taken to be the encouragement of investment . . . in and of itself, however, that says nothing about where the balance has been drawn in the particular treaty in question."); Trinh Hai Yen, THE INTERPRETATION OF INVESTMENT TREATIES, p. 97 ("General policies proclaimed in the treaty preamble and title cannot be a basis to deduce a specific meaning of a treaty term because a policy of promoting investment is possibly legalized in various ways."); Richard Gardiner, TREATY INTERPRETATION, p. 213 (pointing out that the object and purpose of a treaty needs to be understood taking in to account not just the preamble but "the whole text" of the treaty); *cf.* Julian Arato, *The Elastic Corporate Form*, p. 41.

tribunals with the authority to resolve situations of treaty silence.[43] As one commentator argues, "a tribunal will deal with a silence of the law" by relying on a broad range of techniques, including "analogy," "the general legal context, "broader principles," and reliance on "[n]on-binding authority such as judicial decisions, scholarly writings, resolutions or codes of conduct."[44] Others may perceive such unbounded freedom in dealing with treaty silence as unjustified and disruptive.[45] If arbitrators enjoy total flexibility in relying on whatever theory they see fit, they depart from their function as interpreters of the law and enter the realm of judicial lawmaking.[46]

III. SILENCE AND ARBITRAL CREATION

Our review of arbitral decisions reveals that tribunals' approach to treaty silence is not entirely uniform. On some issues, tribunals have made genuine attempts to apply the systemic approach, reaching a principled decision based on relevant rules of international law.[47] On occasion, cases also appear to evince arbitral restraint in the face of silence,[48] although it is

[43] *See* Gordon, *The World Court*, p. 803 ("[i]n interpreting silence, the judge's role may be more creative than it is in other kinds of interpretation.").

[44] Christoph H.. Schreuer, THE ICSID CONVENTION : A COMMENTARY (Cambridge University Press 2009), p. 630.

[45] Gardiner, TREATY INTERPRETATION, pp. 166-167 (emphasizing the importance of caution, highlighting the primacy of the treaty text and the importance of good faith as a limit on creativity).

[46] Lauterpacht, *Restrictive Interpretation and Effectiveness*, p. 83 (stating that judges may engage in some creativity, but only so long as "the judge does not consciously and deliberately usurp the function of legislation"); Wälde, pp. 758-759 ("[A]llowing interpretation to depart from the text and redesigning the treaty in light of the presumed evolving purposes would transfer the key power and responsibility from drafters to adjudicators."). For a broad conceptual approach to the notion of "judicial activism" in context of international adjudication, *see* Fuad Zarbiyev, *Judicial Activism in International Law – A Conceptual Framework for Analysis*, 3(2) JOURNAL OF INTERNATIONAL DISPUTE SETTLEMENT 247 (2018).

[47] Examples include cases identifying and applying the principles of attribution reflected in the draft ILC Articles on State Responsibility, cases refusing to read treaty silence to cover investments made illegally, and cases affirming the presumption set out in Article 28 of the Vienna Convention on the Law of Treaties that there is no presumptive retroactive effect of international legal instruments. *See, e.g.*, *Ping An Life Insurance Company of China, Limited and Ping An Insurance (Group) Company of China, Limited v. Kingdom of Belgium*, ICSID Case No. ARB/12/29, Award, April 30, 2015, ¶ 167; *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, October 4, 2013, ¶¶ 121, 372. For a recent overview of temporal issues in international investment law, *see* Sean Murphy, *Temporal Issues Relating to BIT Dispute Resolution*, 36(2) ICSID REVIEW – FOREIGN INVESTMENT LAW JOURNAL (forthcoming) (on file with authors). The application of these principles, which are largely well-established in international law, has been relatively uncontroversial.

[48] *See, e.g.*, *Canfor Corporation, Terminal Forest Products Ltd., Tembec et al. v. United States of America (Consolidated)*, Decision on Preliminary Question, June 6, 2006, ¶ 242 (interpreting NAFTA to preclude parallel trade and investment disputes concerning the same subject matter); *ICS Inspection and Control Services Limited v. The Argentine Republic* (I), PCA Case No. 2010-09, Award on Jurisdiction, February 10, 2012, ¶¶ 280-281 (relying in part on a presumption against broad and unexpected interpretations of treaty provisions to decline to "import" dispute-resolution provisions from another treaty via an MFN clause when the treaty was silent on the possibility of such importation).

difficult to identify any particular issue in investment treaty arbitration on which a "restrained" approach can be seen to have crystallized.

While examples of the systemic and restrained approaches can be found, our study reveals the widespread adoption of the creative approach, under which tribunals consider that silence in investment treaties should be read expansively in the absence of express limitations. In this section, we highlight ten areas in which creative approaches to silence have been deployed, noting other relevant cases along the way. We begin with four issues as to which the creative approach has considerably expanded the jurisdiction of investment treaty tribunals, at times in the face of contrary rules of customary international law. We also highlight four issues where questions relating to the scope of substantive treaty provisions have been resolved in favor of coverage, thus broadening the potential for State liability. Finally, we discuss compensation, both for unlawful expropriations and non-expropriatory breaches, arguing that the creative approach has distorted even tribunals' nominal invocation of relevant rules of international law.

1. Silence Means that Mass Claims Are Permitted

An emblematic example of the creative approach to silence arose out of mass claims brought by Italian holders of defaulted Argentine government bonds. In three arbitrations, *Abaclat*, *Ambiente Ufficio*, and *Alemanni*, large groups of bondholders brought claims collectively worth billions against Argentina under the ICSID Convention and the Italy-Argentina BIT. It was undisputed in each case that the ICSID Convention and the treaty were silent as to mass claims of this nature. As the *Abaclat* tribunal stated, "the ICSID framework contains no reference to collective proceedings as a possible form of arbitration."[49] Each tribunal then set out to determine what it considered to be the threshold question of whether a single case brought by anywhere from dozens to thousands of individuals could be allowed to proceed.

All three tribunals found that they could hear the claims, holding that silence on the issue of mass claims could not be construed as a limitation.[50] The *Abaclat* tribunal gave the question the most detailed consideration. It identified a distinction between "qualified silence" and mere

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[49] *Abaclat and others (formerly Giovanna A. Beccara and others) v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, August 4, 2011, ¶ 517.

[50] *Giovanni Alemanni and others v. Argentine Republic*, ICSID Case No. ARB/07/8, Decision on Jurisdiction and Admissibility, November 17, 2014, ¶¶ 270-271; *Ambiente Ufficio S.p.A. and others (formerly Giordano Alpi and others) v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, February 8, 2013, ¶ 146. The tribunal in another recent case involving mass claims reached the same conclusion after making the following statement, which exemplifies the creative approach: "[T]he [ICSID] Convention is essentially silent on the issue in question. While it does not expressly provide for individual claims to be brought on a multi-party basis, neither does it preclude such claims from being so brought. Thus, if such claims are to be rejected on the basis of jurisdiction, something other than the wording of the jurisdictional provisions of the BITs and the ICSID Convention must be sought." *Theodoros Adamakopoulos, Ilektra Adamantidou, Vasileios Adamopoulos and others v. Republic of Cyprus*, ICSID Case No. ARB/15/49, Decision on Jurisdiction, February 7, 2020, ¶ 200.

"gaps."[51] While the former deserved respect as reflecting limitations on treaty coverage, for the latter, the interpreters could appropriately fill in what was missing.[52] In the mass claims context, what mattered was that "the BIT covers investments which are susceptible of involving a high number of investors," such as bonds, and "such investments require a collective relief in order to provide effective protection to such investment."[53] Thus "it would be contrary to the purpose of the BIT and to the spirit of ICSID to interpret this silence as a qualified silence categorically prohibiting collective proceedings, just because it was not mentioned in the ICSID Convention."[54]

For Georges Abi-Saab writing in dissent in *Abaclat*, this approach went against "basic principles" and "methods of interpretation" in international law.[55] The starting point was that international tribunals "are tribunals of attributed, hence limited jurisdiction."[56] Thus, the absence of provision for a "fundamental[ly] differen[t]" form of proceeding could not be read in favor of coverage.[57] For Abi-Saab, the hybrid of a representative and mass proceeding resulting

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[51] *Abaclat and others (formerly Giovanna A. Beccara and others) v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, August 4, 2011, ¶ 517. A dissenting opinion criticized this framework and much of the Majority's reasoning. *Abaclat and others (formerly Giovanna A. Beccara and others) v. Argentine Republic*, ICSID Case No. ARB/07/5, Dissenting Opinion of Professor Georges Abi-Saab (Decision on Jurisdiction and Admissibility). As Professor Abi-Saab noted, "'[q]ualified silence' is not a term of art." *Id.*, ¶ 161.

[52] Notwithstanding the settlement of the *Abaclat* arbitration, it is notable in context of the three tribunals' confidence that they could hear and manage mass claims that both the *Alemanni* and *Ambiente Ufficio* arbitrations appear to have fallen apart before reaching any resolution. *See Ambiente Ufficio S.p.A. and others (formerly Giordano Alpi and others) v. Argentine Republic*, ICSID Case No. ARB/08/9, Order of discontinuance of the proceeding, May 28, 2015; *Giovanni Alemanni and others v. Argentine Republic*, ICSID Case No. ARB/07/8, Order of the Tribunal Discontinuing the Proceeding, December 14, 2015.

[53] *Abaclat and others (formerly Giovanna A. Beccara and others) v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, August 4, 2011, ¶ 518.

[54] *Abaclat and others (formerly Giovanna A. Beccara and others) v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, August 4, 2011, ¶ 519.

[55] *Abaclat and others (formerly Giovanna A. Beccara and others) v. Argentine Republic*, ICSID Case No. ARB/07/5, Dissenting Opinion of Professor Georges Abi-Saab (Decision on Jurisdiction and Admissibility), ¶ 4.

[56] *Abaclat and others (formerly Giovanna A. Beccara and others) v. Argentine Republic*, ICSID Case No. ARB/07/5, Dissenting Opinion of Professor Georges Abi-Saab (Decision on Jurisdiction and Admissibility), ¶ 7. It is also well established that arbitration as a system of dispute resolution provides a limited, consent-based framework for adjudication in which issues of joinder, consolidation, and intervention are generally subject to the agreement of the parties. Gary B. Born, INTERNATIONAL ARBITRATION: LAW AND PRACTICE (Kluwer Law International 2012), p. 222; Jeffrey Waincymer, PROCEDURE AND EVIDENCE IN INTERNATIONAL ARBITRATION (Kluwer Law International 2012), pp. 546, 562.

[57] *Abaclat and others (formerly Giovanna A. Beccara and others) v. Argentine Republic*, ICSID Case No. ARB/07/5, Dissenting Opinion of Professor Georges Abi-Saab (Decision on Jurisdiction and Admissibility), ¶ 172.

from the admission of the claim, the "brain-child of the majority award's legal imagination, lacks a theoretical basis to stand on, let alone a solid legal basis."[58]

Notwithstanding the purposive interpretation underlying the reasoning of the *Abaclat* tribunal, or the debate about the proper characterization and interpretive significance of investment treaties' "purposes" in general, the rule that emerges from the mass claims cases is remarkable. According to these cases, if the application of investment treaties to a situation that they do not provide for is arguably consistent with their purpose – which includes, apparently, ready access to international arbitration – then it is permitted.[59]

2. Silence Means that Indirect Investments Are Covered

This approach is not limited to mass claims. It has also provided the key analytical step for what some commentators consider to be a settled issue, namely investment treaties' presumptive coverage of indirect investments.[60]

Some investment treaties expressly permit parties with an indirect interest in an underlying investment to bring claims.[61] Many, however, have no express provision on the issue, giving rise to the question of whether the investor raising a claim must be the legal owner of the investment or whether a potentially unlimited number of upstream entities in a corporate chain may initiate claims in respect of the investment. In *Siemens v. Argentina*, for example, a tribunal upheld jurisdiction over claims brought by a German investor regarding measures affecting its third-tier Argentine subsidiary.[62] Argentina had objected to jurisdiction, *inter alia*, on the basis that the Germany-Argentina BIT does not provide that it covers claims by entities

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[58] *Abaclat and others (formerly Giovanna A. Beccara and others) v. Argentine Republic*, ICSID Case No. ARB/07/5, Dissenting Opinion of Professor Georges Abi-Saab (Decision on Jurisdiction and Admissibility), ¶ 145.

[59] The creative approach to silence has also been used to justify other forms of unilateral consolidation. *See, e.g.*, *Guaracachi America, Inc. v. Rurelec Plc v. Plurinational State of Bolivia*, UNCITRAL, PCA Case No. 2011-17, Award, January 31, 2014, ¶ 336 (permitting two claimants invoking different investment treaties to jointly pursue a single arbitration on the ground that "[t]he offers of arbitration contained in the BITs were not subject to any condition or limitation in their scope … [n]or were they subject to any condition that claimants in arbitration proceedings must ground their claims in just one BIT."); *Cambodia Power Company v. Kingdom of Cambodia and Electricité du Cambodge*, ICSID Case No. ARB/09/18, Decision on Jurisdiction, March 22, 2011, ¶ 159 (upholding a similar attempt at unilateral consolidation on the basis that there was "nothing" in the applicable treaties that "expressly prohibits" it).

[60] *See* Dolores Bentolila, ARBITRATORS AS LAWMAKERS (Kluwer Law International 2017), pp. 216-217 (noting that "[i]nvestment arbitrators consistently hold that investment treaties with broad definitions of investment protect indirect shareholdings" even when the treaties "are silent on the directness of the investment.").

[61] *See, e.g.*, Treaty between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investments, signed November 14, 1991, Article 1(1)(a) (defining "investment" as encompassing assets "controlled directly or indirectly" by foreign investors).

[62] *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, August 3, 2004, ¶ 23.

with only an indirect interest in the investments. In upholding jurisdiction, the tribunal stated that it did not see this omission as a limitation:

> The Treaty does not require that there be no interposed companies between the investment and the ultimate owner of the company. Therefore, a literal reading of the Treaty does not support the allegation that the definition of investment excludes indirect investments.[63]

This finding has been repeatedly cited by arbitral tribunals that have adopted the same logic.[64] For instance, in *Fuchs v. Georgia*, the tribunal noted that "[t]he BIT is silent on whether the investor is required to directly own shares in a company investing in Georgia in order to qualify as an 'investment' under the treaty."[65] As a consequence, relying on *Siemens*, the tribunal found that there was no limitation.[66] Similarly, for the *Deutsche Telekom v. India* tribunal, the burden was on India to produce extrinsic evidence that, with respect to indirect investments, "the Treaty's silence should be interpreted as an exclusion."[67] The *Anglo-American v. Venezuela* tribunal expressly rejected the proposition that "when the Contracting States intend

[63] *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, August 3, 2004, ¶ 137.

[64] *See, e.g.*, *Anglo American PLC v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/14/1, Award, January 18, 2019, ¶ 193; *South American Silver Limited v. Plurinational State of Bolivia*, PCA Case No. 2013-15, Award, November 22, 2018, ¶ 327; *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/14/32, Decision on Jurisdiction, June 29, 2018, ¶ 228; *Deutsche Telekom v. Republic of India*, PCA Case No. 2014-10, Interim Award, December 13, 2017, ¶ 144; *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Jurisdiction, June 6, 2016, ¶ 123; *Hesham Talaat M. Al-Warraq v. Republic of Indonesia*, UNCITRAL, Final Award, December 15, 2014, ¶ 514; *Guaracachi America, Inc. and Rurelec PLC v. Plurinational State of Bolivia*, PCA Case No. 2011-17, Award, January 31, 2014, ¶ 356; *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Jurisdiction, December 21, 2012, ¶ 231; *Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Jurisdiction, December 19, 2012, ¶ 247; *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, August 22, 2012, ¶ 84; *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, October 31, 2011, ¶ 205; *Ioannis Kardassopoulos v. Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, July 6, 2007, ¶ 123; *Krederi Ltd. v. Ukraine*, ICSID Case No. ARB/14/17, Excerpts of Award, July 2, 2018, ¶ 244; Tza Yap Shum v. The Republic of Peru, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence, June 19, 2009, ¶ 107.

[65] *Ioannis Kardassopoulos v. Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, July 6, 2007, ¶ 123.

[66] *Ioannis Kardassopoulos v. Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, July 6, 2007, ¶ 124.

[67] *Deutsche Telekom v. India*, PCA Case No. 2014-10, Interim Award, December 13, 2017, ¶ 147.

to exclude indirect investments from the scope of protected investments, they simply do not mention them and when they want to integrate them, they are stipulated."[68]

For some commentators, cases like *Siemens* correctly assume that treaty silence should not be read to incorporate provisions not set out in the text.[69] Under this view, the onus is on treaty drafters to expressly set out the limits of coverage, and in the absence of such express restrictions, coverage may be presumed. Notwithstanding the prominence of this view, it is difficult to identify a legal basis for such a presumption of treaty coverage.[70]

3. Silence Means that Dual Nationals Can Sue Their Own Country

Claims by dual nationals present another area where investment treaty tribunals have interpreted silence creatively to expand access to international arbitration, in a way that is difficult to reconcile with background rules of international law and the practice of other fora.

A rich body of decisions and State practice on international law claims by dual nationals emerged in the pre-investment arbitration era. In 2006, the International Law Commission ("ILC") codified the principles governing such claims in its draft articles on diplomatic protection, endorsing the test of "dominant and effective nationality." That test precludes claims by dual nationals against their own countries unless the claimant's nationality is not

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[68] *Anglo American Plc v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/14/1, Award, January 18, 2019, ¶ 190; *see also Mr. Franz Sedelmayer v. The Russian Federation*, Arbitration Award, July 7, 1998, ¶ 224 ("the mere fact that the Treaty is silent on the point now discussed should not be interpreted so that Mr. Sedelmayer can not be regarded as a de facto investor."); *Theodoros Adamakopoulos, Ilektra Adamantidou, Vasileios Adamopoulos and others v. Republic of Cyprus*, ICSID Case No. ARB/15/49, Decision on Jurisdiction, February 7, 2020, ¶ 275 ("This provision is silent on the question of the manner (including the degree of remoteness, if any) in which a qualifying investment may be held by a qualifying investor."). Some tribunals have cited the open-ended list of assets that may constitute protected investments to justify coverage of indirect investors. *See, e.g., Bernhard von Pezold and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, July 28, 2015, ¶ 322. But the question of which kinds of assets are covered is different from the question of whether the claimant must own the asset or can simply control it directly or indirectly.

[69] Gazzini, *The Interpretation of International Investment Treaties*, p. 135.

[70] *See infra* Part IV. For criticism of the approach followed in *Siemens* and its progeny, *see, e.g., Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/1, Separate Opinion of Dr. Kamal Hossain (Decision on Jurisdiction), ¶ 23 (arguing that "shares held in a company means shares directly held, unless indirectly held shares are expressly included" and that "[a]n interpretation, which would expand the meaning to include shares 'indirectly held' cannot be understood to be the plain meaning of the word 'held' since 'indirectly held' widens the scope without limit, and enlarges the obligation imposed (also without limit)"); Zachary Douglas, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS (Oxford University Press 2009), pp. 310-311 (arguing that "[t]he reference to 'direct or indirect control' extends the tribunal's ratione personae jurisdiction to claimants who exercise indirect control by holding their investment through intermediate companies, with or without the nationality of the claimant and thus the relevant contracting state party" and that "[i]n contrast, a great number of investment treaties do not contain a provision of the type under consideration and hence there must be a concomitant limitation upon the tribunal's jurisdiction ratione personae: the claimant must exercise effective control directly over the investment.").

predominantly that of the respondent State.[71] In its commentary, the ILC stressed the "exceptional" character of claims by dual nationals against their own country.[72]

The ILC's conclusion was consistent with the approach followed by the Iran-U.S. Claims Tribunal ("IUSCT") in interpreting the Algiers Declaration. In an early case, a chamber of the IUSCT rejected the claimant's argument that the silence of the Algiers Declaration on claims of dual nationals meant that such claims were permitted. In an example of the systemic approach, the IUSCT observed that "[i]n the absence of any specific provision," the treaty should be interpreted in light of relevant rules of international law in accordance with Article 31(3)(c) of the VCLT, and that "the applicable rule of international law is that of dominant and effective nationality."[73] A full formation of the IUSCT concurred with that approach, which was followed in subsequent cases.[74]

Like the Algiers Declaration, most investment treaties are silent on claims of dual nationals.[75] Some treaty drafters have explained that silence on this point means that the question is left to customary international law.[76]

Nevertheless, unlike the IUSCT, several arbitral tribunals have considered that this silence precludes any limitation. In *Pey Casado*, the tribunal noted that the relevant BIT "does not expressly address the question" of claims by dual nationals, and therefore "it would not be justified to add (on the basis of what is supposedly a rule of customary international law) a condition that follows neither from its letter nor its spirit."[77] That statement was *obiter*, as the tribunal had previously concluded that the claimant was not in fact a dual national at the relevant

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[71] International Law Commission, Draft Articles on Diplomatic Protection, with Commentaries (United Nations 2006), Draft Article 7.

[72] International Law Commission, Draft Articles on Diplomatic Protection, with Commentaries (United Nations 2006), p. 35 (commenting on draft Article 7).

[73] *Nasser Esphahanian v. Bank Tejarat*, Iran-U.S. Claims Tribunal Case No. 157, Award No. 31-157-2, March 29, 1983, ¶¶ 23-24.

[74] *Islamic Republic of Iran v. United States of America*, Iran-U.S. Claims Tribunal Case No. A-18, Decision No. DEC 32-A18-FT, April 6, 1984, ¶¶ 50-51.

[75] Javier Garcia Olmedo, *Nationality of Claim: Investment Arbitration*, *in* MAX PLANCK ENCYCLOPEDIA OF INTERNATIONAL LAW (2019), ¶ 30 ("Most IIAs are, however, silent on the standing of dual nationals."); Borzu Sabahi, Noah Rubins, & Don Wallace, Jr., INVESTOR-STATE ARBITRATION (2d ed. 2018), p. 378 ("Most investment treaties are silent about the status of dual nationals.").

[76] Kenneth Vandevelde, *A Comparison of the 2004 and 1994 US Model BITs*, YEARBOOK OF INTERNATIONAL INVESTMENT LAW AND POLICY 283 (2009), p. 295 (explaining that, while the 2004 U.S. model BIT expressly referred to the principle of dominant and effective nationality, the issue of claims by dual nationals was "left to customary law in the 1994 model").

[77] *Víctor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Award, May 8, 2008, ¶ 415 (author's translation).

point in time.[78] But subsequent tribunals relied on it, finding that international law principles were irrelevant in assessing the question of dual nationality in investment treaties.[79] One tribunal went so far as to refer to the emergence of a "trend" on this point.[80]

Some have criticized this approach, and tribunals in two cases rejected claims by dual nationals, reasoning that they were precluded under the relevant treaties, and that even if they were not, the claims would have to be dismissed in accordance with the principle of dominant and effective nationality.[81] But regardless of whether the "trend" eventually reverses, it is remarkable that it could emerge in the first place in light of the "exceptional" character of claims by dual nationals in international law and the IUSCT's recognition of the relevance of customary international law in interpreting treaty silence on this point.[82]

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[78] Javier García Olmedo, *Claims by Dual Nationals Under Investment Treaties: Are Investors Entitled to Sue Their Own States?*, 8(4) JOURNAL OF INTERNATIONAL DISPUTE SETTLEMENT 695 (2017), p. 710 ("It is important to note, however, that the tribunal [in *Pey Casado*] made these comments *obiter dicta*.").

[79] *Serafín García Armas and Karina García Gruber v. The Bolivarian Republic of Venezuela*, PCA Case No. 2013-03, Decision on Jurisdiction, December 15, 2014, ¶ 206 (finding that the text of treaty "does not impose any limitations" on claims of dual nationals and that it "cannot add to the BIT a condition that does not appear in it"). The *Serafín García Armas* decision was subsequently annulled by the Paris Court of Appeal. *Bolivarian Republic of Venezuela v. Serafín García Armas and Karina García Gruber*, Court of Appeal of Paris (5th Pole – 16th Chamber), RG No. 19/03588, Judgment, June 3, 2020.

[80] *Mohamed Abdel Raouf Bahgat v. Arab Republic of Egypt*, PCA Case No. 2012-07, UNCITRAL, Decision on Jurisdiction, November 30, 2017, ¶¶ 224-226, 231 (upholding jurisdiction because "the applicable BITs do not state" that claims of dual nationals are prohibited and "any developments in international law must yield to the *lex specialis* of the investment treaty," and noting the emergence of a "trend" supporting this approach).

[81] *Manuel García Armas et al. v. Bolivarian Republic of Venezuela*, PCA Case No. 2016-08, Award on Jurisdiction, December 13, 2019, ¶¶ 648, 704, 705 (finding that "[i]mported principles of customary law apply unless there is an express derogation" and that, with respect to the restrictions applicable to dual nationals "there is nothing in the Treaty that states otherwise."); *Enrique Heemsen and Jorge Heemsen v. Bolivarian Republic of Venezuela*, PCA Case No. 2017-18, Award on Jurisdiction, October 29, 2019 ¶¶ 435-436 (noting that even "if it is considered that the Treaty is silent," then the claimants could not enjoy treaty protection); Campbell McLachlan, Laurence Shore and Matthew Weiniger, INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES (2nd ed., Oxford University Press 2017), p. 185 (referring to *Serafin García Armas* as an "outlier" by reference to the jurisprudence of the IUSCT); Javier García Olmedo, *Claims by Dual Nationals Under Investment Treaties: Are Investors Entitled to Sue Their Own States?*, 8(4) JOURNAL OF INTERNATIONAL DISPUTE SETTLEMENT 695 (2017), pp. 712, 726 (criticizing *Serafin García Armas* and arguing that the dominant and effective nationality test "should apply to the extent that the applicable investment treaty contains no explicit derogation").

[82] Some commentators have made the same point with respect to the customary international requirement of exhaustion of local remedies, at least where ICSID arbitration is not triggered and a BIT makes no contrary provision. *See* Sanja Djajić and Maja Stanivukovic, *Chapter IV: Investment Arbitration, The Local remedies rule in non-ICSID Investment Arbitration*, 2019 AUSTRIAN YEARBOOK ON INTERNATIONAL ARBITRATION 421. In certain cases the absence of an exhaustion requirement has been inferred simply from the fact that it is not stipulated, notwithstanding that the same was true of the treaty in *ELSI*, where the ICJ affirmed the requirement of exhaustion. *See, e.g.*, *CME Czech Republic B.V. v. The Czech Republic*, Partial Award, September 13, 2001, ¶ 417 ("As the Treaty is silent on the obligation of exhaustion of local remedies, the Claimant is entitled and in the position to substantiate its loss without being obligated to have its subsidiary CNTS obtain a final civil law court decision by

4. Silence Displaces the Corporate Form

Tribunals have dealt similarly with the principle, established under both international law and comparative corporate law, barring shareholders from claiming damages for losses incurred by their companies, also known as "reflective loss."[83]

In the 1970 decision *Barcelona Traction*, and again in the 2010 decision *Diallo*, the ICJ confirmed that customary international law defers to municipal law in defining the content and scope of municipal property rights. As the *Barcelona Traction* court put it with respect to corporations, "international law has had to recognize the corporate entity as an institution created by States in a domain essentially within their domestic jurisdiction."[84] *Barcelona Traction* and *Diallo* went on to hold that as a consequence of these corporate law principles, shareholders had no right to claim on the international plane for harm caused to the underlying companies.[85]

Investment treaties are usually not understood to change the nature of a contract, or alter the "bundle of rights" encompassed in the ownership of real property. [86] And they are silent on

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the Czech Supreme Court."); *Mytilineos Holdings SA v. The State Union of Serbia & Montenegro and Republic of Serbia* (I), Partial Award on Jurisdiction, September 8, 2006, ¶¶ 219-220 ("In the *CME* Final Award the local remedies rule was also considered inapplicable even though it had not been expressly dispensed with in the applicable BIT. This case is particularly relevant because it was an ad hoc arbitration under the UNCITRAL Rules on the basis of a BIT which was silent on the question of exhaustion of local remedies. Without explicitly addressing the *ELSI* presumption, the tribunal rejected an 'injection' into the applicable BIT of a requirement to exhaust local remedies. In effect, the tribunal exercised its jurisdiction without requiring the exhaustion of local remedies. In the opinion of the Tribunal, this interpretation must also be adopted with regard to the Greece-Serbia and Montenegro BIT.").

[83] David Gaukrodger, *Investment Treaties as Corporate Law: Shareholder Claims and Issues of Consistency: A Preliminary Framework for Policy Analysis*, OECD Working Papers on International Investment, No. 2013/3 (2013), p. 25 ("The treatment of shareholder claims in ISDS contrasts significantly from that adopted in advanced systems of national law, ECHR and customary international law.").

[84] *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Judgment, 1970 I.C.J. REPORTS 3, February 5, 1970, ¶ 41; 38; *Ahmadou Sadio Diallo (Guinea v. Congo)*, Judgment, 2010 I.C.J. REPORTS 1, November 30, 2010, ¶ 155.

[85] *Barcelona Traction*, ¶ 52; *Diallo*, ¶ 157.

[86] *See, e.g.*, Douglas, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS, pp. 52, 70; Andrew Newcombe and Lluís Paradell, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT (Kluwer Law International 2009), p. 95; Thomas Roe and Matthew Happold, SETTLEMENT OF INVESTMENT DISPUTES UNDER THE ENERGY CHARTER TREATY (Cambridge University Press 2011), pp. 50-51 ("The rule or principle that a tribunal must first determine as a matter of national law what the claimant's rights are (or were until the matters complained of) is itself an applicable rule or principle of international law."); F.V. García Amador, Fourth Report of the Special Rapporteur, *Responsibility of the State for Injuries Caused in Its Territory to the Person or Property of Aliens – Measures Affecting Acquired Rights*, 2 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 1 (United Nations 1959), ¶ 6 ("Under international law, the acquisition of private rights of a patrimonial nature is governed entirely by municipal law."); Christopher Staker, *Public International Law and the Lex Situs Rule in Property Conflicts and Foreign Expropriations*, 58 BYIL 151 (1987), pp. 155, 251 ("International law does not create property rights as such. Initially they are conferred at the discretion of some system of municipal law, but they are protected by international

the complex questions of corporate governance and risks of double recovery implicated in allowing shareholders to assert reflective loss claims.[87] Yet arbitral tribunals have again refused to recognize this silence as a limitation. Thus, for the *Mera v. Serbia* tribunal, "[t]he fact that the BIT does not expressly anticipate [reflective loss] claims does not suggest that such claims should be excluded."[88] The *Von Pezold* tribunal had earlier made the same finding almost verbatim.[89]

While the *Mera* and *Von Pezold* tribunals have relied on the "silence" of BITs to displace background principles of law, other tribunals, curiously, have considered reflective loss claims admissible on the pretense that BITs expressly address the question. For the *EURAM* tribunal, the "BIT creates a right of action for an investor which would not exist under customary international law . . . in respect of disputes about 'investments,' a term which the BIT defines in some detail."[90] Thus "[t]here is no general rule of customary international law which would normally be applicable in this situation and on which the BIT is silent."[91] Similarly, the *Teinver* tribunal stated that "[i]n the present case, there is no reason to resort to municipal law when the treaty instrument provides the source of the rights asserted by the Claimants."[92]

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law."); Hege Elisabeth Kjos, APPLICABLE LAW IN INVESTOR-STATE ARBITRATION: THE INTERPLAY BETWEEN NATIONAL AND INTERNATIONAL LAW (Oxford University Press 2013), pp. 242, 246 ("[A]rbitral practice of both territorialized and internationalized tribunals supports the need to refer to the national law of the host state for questions pertaining to the existence and scope of the investment allegedly expropriated."); *Quiborax S.A. and Non Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, September 16, 2015, ¶ 135 ("The Tribunal agrees with the Respondent that, in order for a right to be expropriated, it must first exist under the relevant domestic law."); *Emmis International Holding, B.V., Emmis Radio Operating, B.V. and Mem Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. Hungary*, ICSID Case No. ARB/12/2, Award, April 16, 2014, ¶ 162 ("Public international law does not create property rights. Rather, it accords certain protections to property rights created according to municipal law."). *But see* Julian Arato, *The Private Law Critique of International Investment Law*, 113 AJIL 1 (2019) (cataloguing instances in which just such alterations have occurred).

[87] Mark A. Clodfelter and Joseph D. Klingler, *Reflective Loss and Its Limits under International Law*, in CONTEMPORARY AND EMERGING ISSUES ON THE LAW OF DAMAGES AND VALUATION IN INTERNATIONAL INVESTMENT ARBITRATION 57 (Christina L. Beharry ed., Koninklijke Brill NV, Leiden, 2018), p. 63.

[88] *Mera Investment Fund Limited v. Republic of Serbia*, ICSID Case No. ARB/17/2, Decision on Jurisdiction, November 30, 2018, ¶ 127.

[89] *Bernhard von Pezold and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, July 28, 2015, ¶ 322 ("[T]here is nothing in the text of the Swiss or German BITs to preclude a finding that the von Pezold Claimants can bring a claim in respect of the underlying assets of the Zimbabwean Companies. The fact that the BITs do not expressly anticipate such a claim does not suggest that such claims should be excluded.").

[90] *European American Investment Bank AG v. The Slovak Republic*, PCA Case No. 2010-17, Award on Jurisdiction, October 22, 2012, ¶ 332.

[91] *European American Investment Bank AG v. The Slovak Republic*, PCA Case No. 2010-17, Award on Jurisdiction, October 22, 2012, ¶ 332.

[92] *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Jurisdiction, December 21, 2012, ¶ 219.

The distinctions made in *EURAM* and *Teinver* are puzzling. Neither *Barcelona Traction* nor *Diallo* turned on the absence of international protection for shares as a form of property, or on the absence of substantive standards by which to evaluate the conduct of respondent States. In *Diallo,* for instance, the Court carefully assessed the State conduct at issue for its impact on the shareholder's rights *qua* shareholder. Instead, those cases turned on the rights that attach to share ownership, a subject on which BITs are generally silent.

5. Silence Means that States Cannot Invoke Denial of Benefits Clauses in Arbitrations

Even where express restrictions are introduced into treaties, they may be inadequate to protect against creative approaches. For example, arbitral tribunals have creatively located areas of "silence" in seemingly straightforward denial of benefits clauses that have rendered them practically inoperative.

Denial-of-benefits clauses allow States to deny the substantive protections of investment treaties to mailbox companies, or companies with no real economic activity in their ostensible "home" States. For example, Article 17(1) of the Energy Charter Treaty provides that:

> Each Contracting Party reserves the right to deny the [substantive protections of the treaty to] a legal entity if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the Area of the Contracting Party in which it is organized.[93]

States have attempted to rely on this kind of provision when faced with arbitral claims by mailbox companies, denying them the rights that they seek to invoke in arbitration. For arbitral tribunals, however, the issue has not been so simple, even when it was undisputed that the claimant fell within the scope of the denial of benefits clause. As the *Khan Resources v. Mongolia* tribunal held, the question of "[w]hether the Contracting Party's right to deny benefits under Article 17 of the ECT may be exercised after commencement of the arbitration" was a question that, notwithstanding the absence of any relevant limitation on the face of the provision, "is not solved by reference to the terms of Article 17(1)."[94] The *Luxtona v. Russia* tribunal similarly considered that the provision "does not address whether an invocation of this reserved right relates back in time to deprive an existing investment of treaty protections with respect to

[93] Energy Charter Treaty, signed December 17, 1994, Article 17(1).

[94] *Khan Resources Inc., Khan Resources B.V. and Cauc Holding Company Ltd. v. the Government of Mongolia and Monatom Co., Ltd*., PCA Case No. 2011-09, Decision on Jurisdiction, July 25, 2012, ¶ 425.

past events," again notwithstanding the absence of any limitation on the face of the treaty article itself.[95]

For both tribunals, therefore, the meaning of this provision had to be interpreted in light of the ECT's overall "purpose" of creating a "predictable legal framework."[96] For the *Khan* tribunal, if an investor "in principle, could be denied the benefit of the Treaty at any moment after it has invested in the host country, it would find itself in a highly unpredictable situation."[97] This unpredictability, in the tribunal's view, was inconsistent with the object and purpose of the ECT. The better understanding, therefore, was that the denial of benefits provision encompassed a silent "obligation for contracting parties to exercise their Article 17 right in time to give adequate notice to investors."[98]

The difficulty with the invocation of "silence" by the *Khan* and *Luxtona* tribunals is that there was in fact an express denial-of-benefit provision in those cases. Their interpretive approach was premised on the need to remedy a supposed "problem" of legal instability that is nothing more than the natural consequence of the ordinary meaning of the applicable clause. On its face, Article 17(1) of the ECT envisions that States can deny treaty protections to investors who have already made investments. Any *ex ante* questions of treaty applicability facing prospective investors can be remedied simply by not structuring an investment through a mailbox company.[99]

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[95] *Luxtona Limited v. The Russian Federation*, PCA Case No. 2014-09, Interim Award on Respondent's Objections to the Jurisdiction of the Tribunal, March 22, 2017, ¶ 256.

[96] *Khan Resources Inc., Khan Resources B.V. and Cauc Holding Company Ltd. v. the Government of Mongolia and Monatom Co., Ltd*., PCA Case No. 2011-09, Decision on Jurisdiction, July 25, 2012, ¶ 426; *Luxtona Limited v. The Russian Federation*, PCA Case No. 2014-09, Interim Award on Respondent's Objections to the Jurisdiction of the Tribunal, March 22, 2017, ¶ 265.

[97] *Khan Resources Inc., Khan Resources B.V. and Cauc Holding Company Ltd. v. the Government of Mongolia and Monatom Co., Ltd*., PCA Case No. 2011-09, Decision on Jurisdiction, July 25, 2012, ¶ 426.

[98] *Khan Resources Inc., Khan Resources B.V. and Cauc Holding Company Ltd. v. the Government of Mongolia and Monatom Co., Ltd*., PCA Case No. 2011-09, Decision on Jurisdiction, July 25, 2012, ¶ 427. The tribunal in *Khan* was building upon the reasoning in *Plama v. Bulgaria*, where the tribunal held that the respondent State could not invoke the denial of benefits provision of the ECT during the arbitration, otherwise this would mean that the State "could lure putative investors with legitimate expectations only to have those expectations made retrospectively false at a much later date." *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, February 8, 2005, ¶ 162. At least one tribunal has refused to follow this reasoning, holding that "what was offered by both Bolivia and the US, in the BIT concluded between them, was a package of benefits to investors of both countries, including the benefit of being able to submit disputes to arbitration, coupled with an express prior reservation of the right to deny those benefits. . . . Hence, any US investor who invests in Bolivia already knows in advance of the possibility of a denial of benefits by Bolivia." *Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia*, PCA Case No. 2011-17, Award, January 31, 2014, ¶ 373.

[99] As one commentator points out, this approach assumes that the relevant perspective is that of a hypothetical investor relying on the availability of treaty protection, rather than the Contracting Parties themselves. Ramya

The interpretive approach followed in those cases not only ignored the express text of the applicable denial-of-benefits provision but it arguably rendered it inoperative. The ECT expressly covers indirect investors, which means that a potentially infinite number of "investors" may exist with respect to any particular "investment."[100] To assume, in the face of silence, that States bear the affirmative obligation to identify any mailbox companies incorporated in an ECT Contracting State somewhere in the chain of ownership of any active domestic company, and then to expressly notify that mailbox company that it will prospectively be ineligible for the treaty's protections, renders the denial-of-benefits provision unworkable.[101]

6. Silence as to Coverage of Taxation Matters Means They Are Covered

Investment treaties have also been read to silently impinge upon regulatory areas that are arguably *lex specialis*. For example, arbitrators have not hesitated to review States' tax measures for compliance with investment treaty standards even in the face of evidence that States considered tax matters to be excluded.[102]

Customary international law generally does not restrict States' powers to tax.[103] Instead, international law tends to address taxation measures expressly, primarily through a widespread

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Ramachanderan, *Enabling Retrospective Application of the Denial of Benefits Clause: an Analysis of Decisions of Tribunals Under the Energy Charter Treaty*, 26(1) U. MIAMI INT'L & COMP. L. REV. 211 (2018) p. 232. The assumption suffers from the additional flaw that the hypothetical investor, while relying on the ECT protections to invest, inexplicably ignores the denial-of-benefits provision.

[100] Energy Charter Treaty, Article 1.

[101] The EU and several other States have proposed to add a requirement of "substantive business activities" in the definition of "investor" in the ECT, presumably in reaction to arbitral interpretations of the denial of benefits clause in *Khan*, *Luxtona*, and other cases. *See* Energy Charter Secretariat, Report of the Modernisation Group on Progress Made in Fulfilling the Negotiating Mandate, CC 699 (November 25, 2020), *available at* https://www.euractiv.com/wp-content/uploads/sites/2/2020/12/ECT-report-on-progress-made_FS.pdf, pp. 15-16.

[102] Other issues of scope that have arisen in connection with the interpretation of silence include arbitral review of environmental measures, *see William Ralph Clayton, William Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, March 17, 2015, ¶ 597 ("The mere fact that environmental regulation is involved does not make investor protection inapplicable. Were such an approach to be adopted—and States Parties could have chosen to do so—there would be a very major gap in the scope of the protection given to investors."), and whether treaties providing for arbitration to determine the quantum owing for an expropriation may also be read to permit such arbitrators to determine whether an expropriation took place. *See European Media Ventures SA v. The Czech Republic*, Award on Jurisdiction, May 15, 2007, ¶ 60 ("The above conclusion [that the tribunal has jurisdiction to decide whether there was an expropriation] is supported by the fact that the Treaty is silent as to where and how the issues of expropriation and dispossession are to be determined. The Respondent has suggested that this could be in the local courts or under inter-state arbitration under Article 7 of the Treaty. However, these solutions are neither practical nor expressly intended by the Treaty.").

[103] *Id.*, p 1 ("There are no restrictions under international law to a legislative jurisdiction to impose and collect taxes.").

network of double-taxation agreements.[104] In this sense, double taxation agreements provide a specialized technique for dealing with a specialized area of law.[105] This carve-out stems in part from the complex and highly variable nature of State tax regimes as a matter of domestic law. As one commentator has noted, "[w]ithin the global tax system there are still many areas in which states do not agree what constitutes 'normal' and 'legitimate' exercise of the taxing power."[106]

Some States have made clear their view that investment treaties by default exclude taxation from their scope. Thus, as India has stated, "[i]n the [investment] treaties which are silent on inclusion or exclusion of taxation measures from scope, it is implied that such treaties do not apply to any law or measure regarding taxation including measures taken to enforce taxation obligations."[107] Canada has similarly indicated that "taxation measures are outside the scope of a FIPA [Foreign Investment Protection Agreement]," and are instead "addressed through bilateral double taxation agreements."[108]

Despite the lack of guidance from early investment treaties regarding tax measures, arbitrators in numerous cases have not hesitated to examine whether they are "fair and equitable" or provide like treatment to foreign and domestic investors.[109] Tribunals have adopted this inclusive approach even where treaties seek to limit the parties' exposure to tax-based liability. In *Pan American Energy*, for example, the treaty provided that "[w]ith respect to tax policies, each [State] Party should strive to accord fairness and equity in the treatment of investment of nationals and companies of the other Party."[110] For the tribunal, the use of hortatory language

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[104] Matthew Davie, *Taxation-Based Investment Treaty* Claims, 8 JOURNAL OF INTERNATIONAL DISPUTE SETTLEMENT 202 (2015), p. 213 (quoting Canada's Department of Foreign Affairs, Trade and Development) ("In general, taxation measures are outside the scope of a FIPA [Foreign Investment Protection Agreement]. Taxation matters are addressed through bilateral double taxation agreements.").

[105] *See* ILC, Report of the Study Group on the Fragmentation of International Law, p. 34 ("The principle that special law derogates from general law is a widely accepted maxim of legal interpretation and technique for the resolution of normative conflicts.").

[106] Matthew Davie, *Taxation-Based Investment Treaty Claims*, 8 JOURNAL OF INTERNATIONAL DISPUTE SETTLEMENT 202 (2015), p. 222.

[107] Investment Division of the Department of Economic Affairs of India's Ministry of Finance, Office Memorandum on Issuance of Joint Interpretative Statements for Indian Bilateral Investment Treaties, Note 5(1), Feb. 8, 2016, *available at* https://thewire.in/trade/remodeling-indias-investment-treaty-regime.

[108] *Quoted in* Matthew Davie, *Taxation-Based Investment Treaty Claims*, 8 JOURNAL OF INTERNATIONAL DISPUTE SETTLEMENT 202 (2015), p. 213.

[109] *See, e.g.*, *Cairn Energy PLC and Cairn UK Holdings Limited (CUHL) v. Government of India*, PCA Case No. 2016-7, Award, December 21, 2020, ¶¶ 796-815 (rejecting India's argument that tax matters were outside the scope of the relevant investment treaty, noting that the treaty "does not contain any explicit exclusion for tax-related investment disputes").

[110] *Pan American Energy LLC and BP Argentina Exploration Company v. Argentine Republic*, ICSID Case No. ARB/03/13, Decision on Preliminary Objections, July 27, 2006, ¶ 132.

could not preclude its ability to adjudicate potential breaches of the provision. Relying on the principle of effectiveness, the tribunal held that "if the Parties to the BIT had intended to instill no meaning at all into Article XII(1), they should and would have said so. Given their silence, the provision must be considered to carry some legal meaning."[111] The meaning to be given to the phrase "should strive to" or the regular inclusion of hortatory treaty provisions in international legal instruments went essentially unaddressed. Given the complexity of tax law and the unpredictability of investment treaty obligations, this presumptive inclusion imposes a potentially meddlesome and untethered set of obligations on States.[112]

7. Failure to Anticipate Creative Interpretations Means They Are Permissible

Another example of the creative approach consists of using the presence of express exceptions to standards of treatment as confirmation that matters outside of the exceptions are covered. For example, several tribunals have relied on typical exceptions contained in an MFN clause, carving out customs unions and other matters, to determine that dispute resolution provisions contained in third-party treaties are covered. As the *Rosinvest* tribunal put it, "[h]ad the Parties intended that the MFN-clauses should also not apply to arbitration, it would indeed have been easy" to add an express exception to that effect.[113] The tribunal reached that conclusion even though the treaty at issue was concluded long before the *Maffezini v. Spain* decision permitting for the first time the "importation" of dispute resolution provisions from third-party treaties. Thus, *Rosinvest* placed the burden on the contracting States to anticipate and expressly address unprecedented readings of particular treaty obligations.

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[111] *Pan American Energy LLC and BP Argentina Exploration Company v. Argentine Republic*, ICSID Case No. ARB/03/13, Decision on Preliminary Objections, July 27, 2006, ¶ 132. By contrast, arbitral tribunals have recognized that treaty provisions may be purely hortatory where alternative readings would carve measures out from liability. *See, e.g.*, *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Award, June 3, 2021, ¶ 777 ("The Tribunal concludes that, interpreted in accordance with the VCLT, Annex I, Section III(1) is not a carve-out from the BIT's protections, but rather a reaffirmation of the State's right to regulate.").

[112] Davie, *Taxation-Based Investment Treaty Claims*, p. 222.

[113] *RosInvestCo UK Ltd v. Russian Federation,* SCC Case No. 079/2005, Award on Jurisdiction, October 1, 2007, ¶ 135. *See also National Grid Plc. v. The Argentine Republic*, UNCITRAL, Decision on Jurisdiction, June 20, 2006, ¶ 82; *Hochtief AG v. The Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction, October 24, 2011, ¶ 74; *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Jurisdiction, December 21, 2012, ¶ 164; *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/19, and *AWG Group Ltd. v. The Argentine Republic*, UNCITRAL, Decision on Jurisdiction, August 3, 2006, ¶ 65. This kind of reasoning has not been universally endorsed. *See Christian Doutremepuich and Antoine Doutremepuich v. Republic of Mauritius*, PCA Case No. 2018-37, Award on Jurisdiction, August 23, 2019, ¶ 211 (finding that "it does not follow" from the fact that dispute resolution does not fall within existing exception "that it is necessarily included" in the scope of the MFN clause); *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, February 8, 2005 ¶ 203 (holding that express exclusions of dispute resolution provisions in certain treaties are "the result of a reaction by States to the expansive interpretation made in the Maffezini case" and therefore it cannot be concluded that the absence of such exclusions means that such provisions are covered).

This interpretive approach has the potential to undermine States' efforts to reform their treaty commitments. In reaction to arbitral interpretations of silence, States increasingly draft more detailed treaties, taking it on themselves to expressly state the limits of treaty coverage by drafting detailed carve-outs and exceptions for a wide range of matters.[114] It is of course always desirable to clarify the scope of treaty commitments. But because these treaties only have prospective effect – and because many applications of investment treaties that now appear ordinary or even uncontroversial would not have been anticipated by treaty drafters – these exceptions risk having a perverse effect. For one, State practice on exceptions risks reinforcing arbitrators' creative readings of the existing stock of investment treaties. As Arato, Claussen, and Heath have recently noted regarding public policy exceptions, these provisions may "reinforce[] the perception that states' trade and investment obligations normally forbid" the measures thereby carved out.[115]

8. No Liability Does Not Mean No Compensation if the Treaty Is Silent

Another problem is that it is difficult to devise exceptions that are adequate to preemptively rebut any creative interpretation that may subsequently be advanced. A striking illustration concerns the interpretation of the exceptions clause in *Eco Oro v. Colombia*.

In that case, Colombia argued that the measures at issue were adopted to prevent mining in a protected ecosystem and therefore fell under the scope of the environmental exception expressly set forth in the relevant treaty.[116] That clause provided that "nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures necessary," *inter alia*, "[t]o protect human, animal or plant life or health, which the Parties understand to include environmental measures necessary to protect human, animal or plant life and health."[117] This text was modelled after the exceptions clause in Article XX of the GATT, which has been repeatedly interpreted by the WTO Appellate Body as carving out environmental and other measures from the substantive commitments in the treaty.[118]

The tribunal did not dispute this point, but that was not the end of the story, since "there is no provision in Article 2201(3) permitting such action [environmental measures] to be taken

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[114] Wolfgang Alschner and Kun Hui, *Missing in Action: General Public Policy Exceptions in Investment Treaties*, *in* YEARBOOK ON INTERNATIONAL INVESTMENT LAW & POLICY 2018 (Oxford University Press 2019).

[115] Julian Arato, Kathleen Clauseen, and Ben Heath, *The Perils of Pandemic Exceptionalism*, 114(4) AJIL 627 (2020) p. 631.

[116] *Eco Oro v. Colombia*, ¶¶ 362-366.

[117] *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, September 9, 2021 ("*Eco Oro v. Colombia*"), ¶ 60 (quoting Article 2201(3) of the Canada-Colombia Free Trade Agreement).

[118] *See, e.g.*, *European Communities - Measures Affecting Asbestos and Asbestos-Containing Products*, Report of the Appellate Body, WT/DS135/AB/R, March 12, 2001, ¶ 115; *United States — Standards for Reformulated and Conventional Gasoline*, Report of the Appellate Body, WT/DS2, April 29, 1996, p. 30.

without the payment of compensation."[119] Thus, "whilst a State may adopt or enforce a measure pursuant to the stated objectives in Article 2201(3) without finding itself in breach of the FTA, this does not prevent an investor claiming under Chapter Eight that such a measure entitles it to the payment of compensation."[120] The tribunal went on to decide that the case should therefore proceed to a separate phase to calculate the amount of monetary reparation supposedly owed to the claimant.

The fundamental flaw in the *Eco Oro* tribunal's reasoning is that, as Canada pointed out in the arbitration, an obligation to provide monetary reparation arises under international law only when a State commits an internationally wrongful act.[121] If there is no breach, for example because the treaty expressly permits the State to adopt particular measures, then no reparation is due.[122] By relying on the supposed silence of the treaty with respect to an obligation that does not exist (*i.e.* to provide reparation in the absence of liability), the tribunal in *Eco Oro* turned those basic principles on their head. Beyond the specific outcome, *Eco Oro* highlights the limitations of improved treaty drafting as a solution to the problems posed by the creative approach.[123]

9. Silence Displaces the Compensation Standard for Expropriation

Although arbitrators have often been unwilling to assume that treaties incorporate customary limits on coverage, they have readily invoked silence to justify the application of customary international law on issues of compensation. Thus, although many BITs provide careful and familiar formulations of the standard of compensation applicable to an expropriation, *i.e.*, prompt adequate and effective compensation based on the fair market value of the investment at the time of the taking, some tribunals have considered that this formula is applicable only so long as all other criteria for an expropriation are satisfied.[124] Otherwise, recourse is made to the supposedly distinct and more generous compensation standard provided

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[119] *Eco Oro v. Colombia*, ¶ 829.

[120] *Eco Oro v. Colombia*, ¶ 830

[121] Draft Articles on State Responsibility, Article 31.

[122] The tribunal noted that "Canada, in its non-disputing party submission, says that if the measure in question meets the requirements of Article 2201(3) then '[…] there is no violation of the Agreement and no State liability. Payment of compensation would therefore not be required.'" *Eco Oro v. Colombia*, ¶ 836. *See also id.*, ¶¶ 362-365 (recording Colombia's argument that environmental measures were carved out from the scope of the treaty).

[123] Claimants may argue that there are other ways for tribunals to disregard express limitations, for example based on broad allegations of discriminatory or bad-faith intent. *See, e.g., Litigating Health and Security Exceptions in Investment Treaties: A Simulation*, PROCEEDINGS OF THE 2021 ASIL ANNUAL MEETING (Forthcoming).

[124] *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, October 2, 2006, ¶ 483.

by customary international law.[125] On this basis, the *ADC* tribunal determined that "the BIT does not contain any *lex specialis* rules that govern the issue of the standard for assessing damages in the case of an unlawful expropriation," and proceeded to apply the customary international law standard of full reparation instead of the standard specified in the treaty.[126] In at least one case, recourse to background principles of customary international law has been made even where the only alleged defect in the "lawfulness" of an expropriation concerned the parties' failure to agree on satisfactory compensation.[127]

Two salient questions have emerged from this approach: first, can a BIT properly be considered silent on the standard of compensation applicable to an expropriation when it specifically states how such expropriation is to be compensated? There is some dissension on this point. For the *British Caribbean Bank* tribunal, the distinction urged between lawful and unlawful expropriation itself lacks any textual foundation:

> [A]t no point does the Treaty, being a *lex specialis*, distinguish between lawful and unlawful expropriations. . . . Neither is the Tribunal convinced that the generally accepted fair market value standard was intended to apply only in cases of the so-called "lawful expropriation." The language of Article 5 was specifically negotiated by the Parties of the Treaty: "compensation shall amount to the fair market value of the investment expropriated." The use of the word "shall" is unambiguous in that there is no room for another method of evaluation of the compensation sought.[128]

Other tribunals and commentators have agreed with this approach, although the issue remains unsettled.[129]

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[125] *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, October 2, 2006, ¶ 483.

[126] *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, October 2, 2006, ¶ 483.

[127] *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Jurisdiction and Merits, September 3, 2013, ¶ 401.

[128] *British Caribbean Bank Ltd. v. The Government of Belize*, PCA Case No. 2010-18, Award, December 19, 2014, ¶¶ 260, 261. *See also* Audley Sheppard, *The Distinction Between Lawful and Unlawful Expropriation*, *in* INVESTMENT ARBITRATION AND THE ENERGY CHARTER TREATY 169 (C. Ribeiro ed., JurisNet, LLC 2006), p. 172 ("[W]here a claim is brought under an investment treaty in respect of an expropriation, and that treaty prescribes a standard of compensation, the question of compliance or non-compliance with the conduct requirements should be immaterial to the standard of compensation and the treaty standard should apply.").

[129] *See, e.g., Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia*, PCA Case No. 2011-17, Award, January 31, 2014, ¶ 613 ("The BIT makes no distinction between the compensation to be provided in respect of an unlawful expropriation as opposed to a lawful one, and the Tribunal does not find any reason to believe

The second question is whether the standard set out in most BITs – modeled on the Hull Formula, which was aggressively asserted by the United States throughout the 20th century as the proper standard of compensation applicable to expropriation – is truly less favorable than what customary international law otherwise provides. Many commentators have seen the development of BITs to be, in part, a response to the New International Economic Order – an effort by newly decolonized States to assert a right to nationalization subject only to appropriate compensation.[130] In his 1981 article extolling the significance of British investment treaty practice, F.A. Mann argued that the compensation standard set out in British BITs was intended to deal with "difficulties which have arisen in the past" concerning the applicable standard of compensation for nationalizations.[131] Likewise, in an article published three years before the *ADC* award, Lowenfeld argued that the proliferation of investment treaties had helped buttress customary international law standards for the protection of investments against the threat posed by the New International Economic Order. One such customary standard that had been effectively bolstered was the standard in investment treaties "concerning expropriation and compensation very close to the previously hated Hull Rule."[132]

If investment treaties were meant to codify the customary international law standard, it is hard to understand tribunal decisions displacing the standard in investment treaties on the basis that customary international law may provide a more protective rule.

10. Silence Displaces Established Principles of Compensation for Non-Expropriatory Breaches

Silence has similarly provided the basis for arbitrators' approach to compensation for breaches of other treaty standards. With respect to these other standards, arbitrators have often

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that the illegality of the expropriation renders what the BIT deems to be 'just and effective compensation' suddenly inadequate."); Jeswald P. Salacuse, THE LAW OF INVESTMENT TREATIES (2nd ed. 2015) pp. 354-356 (observing that "[o]ne common reading of treaty provisions on compensation for expropriation would lead to the conclusion that tribunals are to apply the stipulated standard of compensation not only to determine whether a state has lawfully expropriated an investment but also to determine the amount to be awarded to the investor in the event that the tribunal decides that the state has unlawfully expropriated that same investment," and criticizing the reasoning of an arbitral award which resorted to the "full reparation" standard).

[130] *See, e.g.*, Andreas F. Lowenfeld, *Investment Agreements and International Law*, 42(1) COLUMBIA JOURNAL OF TRANSNATIONAL LAW 123 (2003), p. 124; *see also* José E. Alvarez, *A BIT on Custom*, 42 NYU JOURNAL OF INTERNATIONAL LAW & POLITICS 17 (2009) (discussing the interplay between the New International Economic Order, the Hull Formula, and customary international law); M. Sornarajah, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT (Cambridge University Press 2010) p. 173 (noting that "[t]he purpose of investment treaties was to preserve some of the norms that the developed states advanced as customary international law" and that "[d]eveloped countries made these treaties because their favoured rules on investment protection had been subjected to attack.").

[131] F.A. Mann, *British Treaties for the Promotion and Protection of Investments*, 52 BRITISH YEARBOOK OF INTERNATIONAL LAW 241 (1981), ¶ 7.

[132] Lowenfeld, INTERNATIONAL INVESTMENT AGREEMENTS AND INTERNATIONAL LAW, p. 127.

considered the determination of compensation to be a matter of discretion, rather than, strictly speaking, the ascertainment of applicable rules of law.[133] As the *SD Myers* tribunal put it, "[t]he silence of a treaty in this respect has been interpreted as an indication of the intention of the parties to leave it open to tribunals to determine a measure of compensation appropriate to the specific circumstances of the case."[134]

Perhaps for this reason, important limitations on the quantum of compensation set out in other areas of international law are seldom applied in international investment law. These limitations include presumptions against awarding lost profits to early-stage industries,[135] reluctance to rely on speculative methods for ascertaining damages,[136] and reluctance to award compound interest.[137] While taking nominal guidance from customary international law, investment treaty arbitrators have awarded massive sums for projects with no operational history with little effort to establish a causal relation to treaty breaches on the basis of inherently

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[133] *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, October 31, 2011, ¶ 701 ("[T]he silence of the treaty indicates the intention of the drafters 'to leave it open to tribunals to determine a measure of compensation appropriate to the specific circumstances of the case.'") (quoting *SD Myers v. Canada*); *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, May 16, 2018, ¶ 548 ("In light of Article 10's silence, it is for the Tribunal to determine the remedies for breaches of Article 10. In these circumstances, the default standard provided by customary international law is appropriately applied."); *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, August 27, 2019, ¶ 1568 ("The Treaty provides no compensation formula for non-expropriatory breaches of the Treaty. This gap must be covered applying customary international law, and, to the extent possible, extending by analogy certain rules, which the Treaty provides for expropriation, to other violations.").

[134] *S.D. Myers, Inc v. Government of Canada ("SD Myers I")*, UNCITRAL Rules, First Partial Award, November 13, 2000, ¶ 309; *see also LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Award, July 25, 2007, ¶ 40; *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, May 22, 2007, ¶ 360.

[135] *See* Draft Articles on State Responsibility, Article 36, cmt. 25 ("In cases where a business is not a going concern, so-called 'break-up', 'liquidation' or 'dissolution' value is generally employed."); World Bank Group, *Legal Framework for the Treatment of Foreign Investment: Volume II, Report to the Development Committee and Guidelines on the Treatment of Foreign Direct Investment*, September 21, 1992, pp. 26-27, 41-42 (warning that "particular caution should be observed in applying this [DCF] method as experience shows that investors tend to greatly exaggerate their claims of compensation for lost future profits," that "[c]ompensation under this method is not appropriate for speculative or indeterminate damage," and that the DCF method may be appropriate "for a going concern with a proven record of profitability").

[136] *See* Draft Articles on State Responsibility, Article 36, cmt. 26 (noting that "Discounted Cash Flow" valuation methods "analyse[] a wide range of inherently speculative elements, some of which have a significant impact upon the outcome (e.g. discount rates, currency fluctuations, inflation figures, commodity prices, interest rates and other commercial risks)" and that "[t]his has led tribunals to adopt a cautious approach to the use of the method").

[137] *See* Draft Articles on State Responsibility, Article 38, cmt. 8 ("The general view of courts and tribunals has been against the award of compound interest, and this is true even of those tribunals which hold claimants to be normally entitled to compensatory interest.").

speculative valuation methods.[138] They also, often, award compound interest.[139] As a result, a field perhaps overly eager to pay lip service to the principle of full reparation has developed a damages practice resembling nothing else in public international law.

IV. SILENCE AND FIRST PRINCIPLES

In this section, we argue that the creative approach to silence is in tension with at least three basic principles of international law: an international tribunal's jurisdiction must be expressly conferred, a State must affirmatively consent to a treaty obligation, and treaties must be interpreted in light of relevant principles of international law. Arbitrators have generally not purported to reject these rules as such. But as surveyed above, their interpretive analyses often pay little more than lip service to these principles.

We address each principle in turn. We do not argue that they provide simple, all-purpose solutions to the complex and case-specific issues raised by silence. But we argue that they should be given interpretive weight in situations of silence and that they often cut against the results seen in investment treaty disputes.

A. Jurisdiction Must Be Expressly Conferred

The rule that jurisdiction must be conferred on international tribunals – that they are, in Abi-Saab's words, "tribunals of attributed, hence limited jurisdiction"[140] – has never been seriously contested. In international law, there is no general jurisdiction. As a consequence, States must expressly confer jurisdiction on international tribunals for such jurisdiction to

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[138] One recent award has drawn attention for granting almost US$6 billion in damages to an Australian mining company that never began operations in Pakistan on the basis of a "modern DCF method." *See Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award, July 12, 2019, ¶¶ 361, 1858. The amount drew attention not only due to the fact that the company never began operations of the mine but because the compensation awarded amounted to double Pakistan's annual public spending on healthcare, and substantially all of a recently negotiated IMF bailout for the country. *See* Jeffrey D. Sachs, 'How World Bank Arbitrators Mugged Pakistan', *Project Syndicate*, November 26, 2019.

[139] *See, e.g., Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/23, Award, December 12, 2016, ¶ 773 (noting that "[t]he BITs are silent on the matter" but awarding compound interest "in order to fully compensate the Claimant"); *Quasar de Valores SICAV S.A., Orgor de Valores SICAV S.A., GBI 9000 SICAV S.A. and ALOS 34 S.L. v. The Russian Federation*, SCC Case No. 24/2007, Award, July 20, 2012, ¶ 226 (likewise noting that "[t]he BIT is silent on the subject of interest," as was Russian law, and that "[i]n these circumstances, the Tribunal considers that the Claimants' position should prevail"); *Foresight Luxembourg Solar 1 S.À.R.L., et al. v. Kingdom of Spain*, SCC Case No. 2015/150, Final Award, November 14, 2018, ¶ 544 (observing that the ECT "is silent on the awarding of interest" and awarding compound interest because it is "the generally-accepted standard in international investment arbitration").

[140] *Abaclat and others (formerly Giovanna A. Beccara and others) v. Argentine Republic*, ICSID Case No. ARB/07/5, Dissenting Opinion of Professor Georges Abi-Saab (Decision on Jurisdiction and Admissibility), ¶ 7.

exist.[141] While no investment treaty tribunal has purported to disagree with this principle, arbitrators have often treated it as effectively irrelevant to the process of treaty interpretation.[142]

However, as the approach of other international tribunals makes clear, this rule does bear on interpretation, including when it comes to the interpretation of silence. The International Court of Justice, for instance, has refused to engage in the sort of adventurous determinations that characterize investment treaty arbitration. Thus, it has refused to interpret the ambiguity of compromissory clauses in favor of its jurisdiction.[143] It has also repeatedly rejected any suggestion that a treaty's purpose can overcome the absence of a clear jurisdictional grant.[144] And it has found that arbitral tribunals may not be constituted in a manner that contravenes the clear, albeit implicit process outlined in a treaty, even where doing so would better effectuate its enforcement.[145] The result is a straightforward jurisprudence that in situations of silence is properly influenced by the Court's presumptive lack of jurisdiction.[146]

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[141] Brownlie, *Principles of Public International Law*, p. 15 (noting the "consensual basis for judicial jurisdiction" in international law); *Anglo-Iranian Oil Company (United Kingdom v. Iran)*, Judgment, 1952 I.C.J. REPORTS 93, July 22, 1952, p. 103 ("[J]urisdiction of the Court to deal with and decide a case on the merits depends on the will of the Parties. Unless the Parties have conferred jurisdiction on the Court in accordance with Article 36, the Court lacks such jurisdiction."); *ICS Inspection and Control Services Limited v. The Argentine Republic* (I), PCA Case No. 2010-09, Award on Jurisdiction, February 10, 2012, ¶¶ 280, 281; *Canfor Corporation, Terminal Forest Products Ltd., Tembec et al. v. United States of America (Consolidated)*, Decision on Preliminary Question, June 6, 2006, ¶ 272; *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, August 22, 2012, ¶ 174 (recognizing the "fundamental principle of public international law according to which international courts and tribunals can only exercise jurisdiction over a State on the basis of its consent"); *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award, December 8, 2008, ¶ 160.3 (("[I]t is a general principle of international law that international courts and tribunals can exercise jurisdiction over a State only with its consent. The principle is often described as a corollary to the sovereignty and independence of the State.").

[142] *See* supra Sections III(1) and (2) (discussing the tribunals' assertion of jurisdiction in *Abaclat* and *Siemens*).

[143] *Anglo-Iranian Oil Company (United Kingdom v. Iran)*, Judgment, 1952 I.C.J. REPORTS 93, July 22, 1952, p. 103.

[144] *Fisheries Jurisdiction (Spain v. Canada)*, Jurisdiction of the Court, Judgment, 1998 I.C.J. REPORTS 432, December 4, 1998, ¶ 68; *Interpretation of Peace Treaties*, Advisory Opinion (second phase), July 18 1950, I.C.J. REPORTS 1950, p. 229.

[145] *Interpretation of Peace Treaties*, Advisory Opinion (second phase), July 18 1950, I.C.J. REPORTS 1950, p. 229 (finding that an arbitration mechanism set forth in a treaty could not operate in circumstances where a party refused to appoint an arbitrator and no provisions were made for an appointing authority in such circumstance).

[146] Indeed, commentators have criticized the Court for making *any* statements on matters that are beyond its jurisdiction even in instances where it has made clear that it is not issuing a holding on those matters. Thirlway, for instance, notes that "[t]he Court endeavours to show itself scrupulous in respecting the limits on its jurisdiction imposed by the consent principle," but nevertheless criticized as "regrettable" certain "flourishes" by the Court in the *Genocide Convention (Croatia v. Serbia)* case as "suggest[ing] that the Court was inclined to accept the validity of allegations with which it had admittedly no right to concern itself." Hugh Thirlway, THE INTERNATIONAL COURT OF JUSTICE (Oxford University Press 2016) p. 36 & n. 9.

While the ICJ is occasionally criticized for its perceived deference to States,[147] the same criticism is seldom made of international human rights bodies such as the European Court of Human Rights ("ECtHR").[148] Yet even in this context, threshold questions of jurisdiction are generally settled textually and soberly and recurrent questions of "purposive" jurisdictional expansions have largely failed to emerge. Requirements of exhaustion are enforced.[149] The ECtHR has proceeded cautiously in extending human rights obligations to State conduct outside of its territory (and its tentative expansion in this respect over the past decade arguably constitutes an exception that proves the rule).[150] Whatever role "effectiveness" may play in the substantive jurisprudence of human rights courts, judges in these systems have not felt empowered to invent new types of proceedings in order to satisfy some implicit jurisdictional mandate. Silence, ordinarily, reflects a limitation on coverage. It should not provide a foundation for the jurisdiction of an international tribunal.

B. A State is Not Bound By A Treaty Obligation Without Its Consent

A related, albeit distinct principle is that a State must consent to affirmative treaty obligations in order to be bound. As one commentator has noted, "[t]reaty law most readily reflects the idea of consensual international law" and "[i]ndividual States' explicit consent remains central, in both the initial adoption and subsequent development of treaties."[151] This is consistent with the well-established view of international law as a voluntarist system.[152]

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[147] *See, e.g.*, Anthony Anghie, *C.G. Weeramantry at the International Court of Justice*, 14(4) LEIDEN JOURNAL OF INTERNATIONAL LAW 829 (2001), p. 839 (arguing that "the Court has often been extremely cautious in exercising its functions in situations where states have disputed the jurisdiction of the Court" and that "these doctrines have inhibited the Court's activities, which has often tended to adopt an extremely deferential approach towards state sovereignty in meticulous judgments that are politic and cautious").

[148] The ECtHR has itself often emphasized the importance of teleological interpretive approaches to the primary obligations it construes. *Airey v. Ireland*, Eur. Ct. Human Rights Case No. 6289/73, Judgment, October 9, 1979, § 24 ("The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective.").

[149] *See, e.g., Demopoulos and others v. Turkey*, Eur. Ct. Human Rights Case No. 46113/99 (and others), Judgment (Grand Chamber), March 1, 2010, § 69 ("The rule of exhaustion of domestic remedies is therefore an indispensable part of the functioning of this system of protection. States are dispensed from answering before an international body for their acts before they have had an opportunity to put matters right through their own legal system and those who wish to invoke the supervisory jurisdiction of the Court as concerns complaints against a State are thus obliged to use first the remedies provided by the national legal system.").

[150] For an overview of recent decisions on the extraterritorial application of the Convention, *see* Severin Meier, *Reconciling the Irreconcilable? - The Extraterritorial Application of the ECHR and Its Interaction with IHL*, 9 GOETTINGEN JOURNAL OF INTERNATIONAL LAW 395 (2019), pp. 401-404.

[151] Jutta Brunnée, *Consent, in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW

[152] Prosper Weil, *Towards Relative Normativity in International Law?*, AJIL 413 (1983), p. 420.

The voluntarist structure of international law, while equally foundational as the rule that jurisdiction must be conferred, creates significantly more difficulty in the contemporary landscape. Human rights treaties may evince an intent on the part of signatory States to have the broad rights set out therein broadly construed.[153] International organizations, including international courts, may require an amount of leeway in their operations in order to function, justifying inferences regarding their constituent instruments.[154] Treaties may necessarily imply a logical consequence that it would have been burdensome or redundant to expressly state. In these and other circumstances, States may intend for treaties to have teeth notwithstanding their ambiguities or even certain elisions, rather than be reduced to political commitments.[155]

Notwithstanding these developments, the existence of at times illogical and frustrating *lacunae* in treaty coverage remains a characteristic feature of international law.[156] Whatever limits may be found to the "permissive" principle of international law expressed in the *Lotus* case, there is no anti-*Lotus* principle. Yet the creative approach establishes one by placing the burden on States to demonstrate clear limits on the scope of their international legal obligations, rather than placing the burden on claimants to demonstrate that a particular obligation exists in the first place.

C. Treaties Should Be Interpreted In Light of Relevant Principles of International Law

The rule according to which relevant rules of international law should be taken into account when interpreting a treaty – the so-called rule of systemic integration – is expressly provided for in the Vienna Convention.[157] It has been forcefully and repeatedly emphasized by the International Court of Justice.[158] As the Court stated in *Elsi*, it is difficult to establish "that

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[153] European Convention on Human Rights, pmbl. ("Considering that this Declaration aims at securing the universal and effective recognition and observance of the Rights therein declared…").

[154] Gardiner, TREATY INTERPRETATION, pp. 165-166.

[155] Jennings & Watts, OPPENHEIM'S INTERNATIONAL LAW, VOL. I: PEACE (Oxford University Press 9th ed. 2008) p. 1279 (noting in cautioning about the scope of the *in dubio mitius* principle that "the assumption of obligations constitutes the primary purpose of the treaty"); *but see* Johannes Hendrik Fahner, *In Dubio Mitius – Advancing Clarity and Modesty in Treaty Interpretation*, EJIL (forthcoming) (arguing for a reappraisal of the canon of construction as applied in cases of doubt).

[156] For an illustrative early example see *Interpretation of Peace Treaties*, Advisory Opinion (second phase), July 18, 1950, I.C.J. REPORTS 1950, p. 229 (finding that the dispute settlement mechanisms under certain peace treaties could not function absent cooperation by the respondents). States' continuing abilities to simply block the function of established international dispute resolution procedures likewise continues to be seen in the WTO Appellate Body crisis.

[157] *See supra* Section II.

[158] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276*, 1970 I.C.J. Reports 16, June 21, 1971, ¶ 96; *Elettronica Sicula S.P.A. (ELSI) (United States v. Italy)*, Judgment, 1989 I.C.J. Reports 15, July 20, 1989, ¶ 50.

an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so."[159] The Court has made unequivocal that a treaty's purpose will not pre-empt consideration of the surrounding international legal environment in situations of silence.[160] Consequently, the conceit seen in investment arbitration that treaties cannot encompass limitations not expressly incorporated disregards that restrictions existing in international law should ordinarily be taken into account when interpreting a treaty.[161]

Arbitrators' refusal to read the silence of investment treaties in light of relevant international law norms undermines the predictability and stability of the international legal order beyond even the confines of international investment law.[162] International investment law interacts with a range of legal systems that are outside of its purview both as a matter of both treaty text and institutional competence. These include many well-established rules of customary international law, general principles of law, as well as specialized regimes such as EU law and double-taxation agreements. Coherence, we suggest, is appropriate both as an interpretive approach to silence and as an aspiration in the investment treaty regime – not necessarily with respect to every legal issue that comes before an arbitrator, but certainly with respect to those that are primarily regulated through other legal systems and with respect to which there is no express mandate for adopting a different approach.[163]

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[159] *Elettronica Sicula S.P.A. (ELSI) (United States v. Italy)*, Judgment, 1989 I.C.J. Reports 15, July 20, 1989, ¶ 50; *see also South West Africa*, ¶ 96 ("The silence of a treaty as to the existence of such a right cannot be interpreted as implying the exclusion of a right which has its source outside of the treaty, in general international law.").

[160] *Haya de la Torre Case (Colombia/Peru)*, Judgment, 1951 ICJ Reports 71, June 13, 1951, pp. 80-81 (interpreting a convention meant to circumvent and avoid "abusive" grants of asylum in favor of an asylee due to background principles of customary international law).

[161] *See supra* Sections III(3) and (4) (discussing arbitrators' disregard of the prohibition of reflective loss claims and claims by dual nationals in international law).

[162] *See, e.g.*, Julian Arato, *The Private Law Critique of International Investment Law*, 113 AJIL 1 (2019) (describing disruptive effects of international investment law on domestic private law institutions such as corporate law, contracts, and bankruptcy).

[163] *Cf.* Verzijl P., *Georges Pinson Case*, (1927-8) AD No 292 ("Every international convention must be deemed tacitly to refer to general principles of international law for all questions which it does not itself resolve in express terms and in a different way."). Part of the incoherence that has instead emerged may be built into the structure of investment treaty arbitration. In treaty arbitrations, a suspicion of host State conduct is a premise of the adjudicative process, which focuses on whether States have mistreated private parties. *See, e.g.*, David Schneiderman, *The Coloniality of Investment Law*, May 21, 2019, https://ssrn.com/abstract=3392034, pp. 10-11. This inherent suspicion may explain, for instance, why arbitrators have sometimes been too quick to invoke the principle that domestic law is no excuse to an international obligation in contexts where it plainly has no bearing, such as the evaluation of shareholder rights or the valuation of a contract. An arbitral award was partially annulled precisely due to the tribunal's misapplication of this doctrine. *See Venezuela Holdings, B.V. et al. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Annulment, March 9, 2017, ¶ 150.

The ILC has observed that "specialized law-making and institution-building tends to take place with relative ignorance of legislative and institutional activities in the adjoining fields and of the general principles and practices of international law."[164] This results in "conflicts between rules or rule-systems, deviating institutional practices and, possibly, the loss of an overall perspective on the law."[165] That loss of perspective is evident in investment law, where prominent international arbitrators' approaches to interpretation are often surprisingly parochial, oblivious to the broader normative environment in which they operate.

V. SILENCE AND REFORM

Tensions between the creative approach to silence and fundamental principles of international law show the need for reform. Extensive discussions of reform options for international investment law are underway, focusing primarily on drafting better treaties and on moving away from the traditional model of arbitration to resolve investor-State disputes. In this Section, we argue that those reform options may be insufficient to redress the problems highlighted by the creative approach to silence.

One common reform prescription for international investment law is for States to simply draft better treaties. New model BITs by both capital-exporting and capital-importing States, which have grown over the past few decades from simple, three to five page texts to detailed, forty-plus page regulatory instruments, reflect that many States have taken up this criticism.[166] The "better drafting" approach constitutes a rare point of agreement between critics and proponents of the current system of investment treaty arbitration. For critics of the system, detailed treaties hold the allure of expressly protecting States' right to regulate in the public interest.[167] For defenders of the regime, the "better-drafting" approach is consistent with their

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[164] ILC, *Fragmentation*, ¶ 8.

[165] ILC, *Fragmentation*, ¶ 8.

[166] The United States' model BIT, for instance, has gone from 11 pages in 1994 to 42 pages in 2012. *See* 1994 U.S. Model BIT, *available at* https://investmentpolicy.unctad.org/international-investment-agreements/model-agreements, *with* 2012 U.S. Model BIT, *available at* https://investmentpolicy.unctad.org/international-investment-agreements/model-agreements.

[167] *See, e.g.*, UNCTAD, REFORM PACKAGE FOR THE INTERNATIONAL INVESTMENT REGIME (2018), Chapter III (surveying techniques for improved drafting of investment treaties); Céline Lévesque and Armand de Mestral, IMPROVING INTERNATIONAL INVESTMENT AGREEMENTS (Routledge 2014), p. 3 (assessing :the ways IIAs could be improved"); Federico Ortino, *Refining the Content and Role of Investment 'Rules' and 'Standards': A New Approach to International Investment Treaty Making*, 28(1) ICSID REVIEW - FOREIGN INVESTMENT LAW JOURNAL 152 (2013), p. 153 (arguing that treaty-makers should limit the role of certain investment norms by making sure that they operate as 'rules' and not as 'standards'" and "should clarify and refine the content of investment standards"). For a far-sighted view of the possibility of treaty reform to, e.g., exclude investor-State arbitration or particular treaty protections, *see* Lise Johnson, Lisa Sachs and Nathan Lobel, *Aligning International Investment Agreements with the Sustainable Development Goals*, 58(1) COLUM. J. TRANSNAT'L L. 60 (2019); *see also* Suzanne A. Spears, *The Quest for Policy Space in a New Generation of International Investment Agreements*, 13(4) JOURNAL OF INTERNATIONAL ECONOMIC LAW 1037 (2010) (providing an early overview of perspectives on treaty reform).

view that States bear the burden of limiting the scope of their treaties.[168] The result is a process by which treaties are expected to expressly address contested issues that have arisen in actual cases.[169]

While treaty drafting can bring substantial improvements, there are several reasons to be skeptical that it will be sufficient on its own to resolve the issues raised by the creative approach. As discussed earlier, fixing new treaties accomplishes little while claimants primarily litigate disputes under older instruments.[170] New provisions incorporated to preserve regulatory autonomy may also reinforce the perception that treaties must expressly spell out all their limitations.[171] And even where claimants rely on new treaties, the *Eco Oro* and *Khan* examples show that it is difficult for those treaties to ever say enough.[172]

Fixing treaties can also be impractical. States may hesitate to reach out to their counterparts about treaty reform for fear of appearing acrimonious. They may be reluctant to accept overtures to renegotiate a treaty for fear of sending negative signals to global markets. As India's experience illustrates, a State's attempts to clarify the meaning of its investment treaties through joint interpretation may also simply be ignored by treaty partners for whom the issue may not appear pressing.[173] Concerns may stem from ministries responsible for investment

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[168] Spears, *The Quest for Policy Space*, p. 1071 (arguing that re-balancing investment treaties "should alleviate some of the concerns that have been raised in recent years about the social legitimacy of the investment law regime" by "providing arbitrators more flexibility, allowing them to render decisions better tailored to the facts of specific cases and encouraging them to consider the public interest more openly and systematically than they have done in the past"); *see also* Andrea K. Bjorklund, *Are Arbitrators (Judicial Activists?)*, 17 LAW AND PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS 49 (2018) (arguing that "the lack of agreement among states about what certain obligations mean suggests that arbitral tribunals are not going beyond their authority; rather, the fault, if fault there is, lies in the language of the agreements themselves")

[169] This process of "legislative inflation" is highly reactionary. For instance, in response to proliferating claims by mailbox companies, States have introduced denial-of-benefits clauses. In response to investors essentially cobbling together new treaties through MFN clauses, new treaties have clarified first the inapplicability of these clauses to dispute resolution procedures, and, increasingly, their inapplicability to substantive standards in other treaties. But as our analysis in Part III shows, these drafting changes have yielded unsatisfactory results.

[170] *See supra* Section I.

[171] *See supra* Section III(7).

[172] *See supra* Section III(6).

[173] In 2015, India proposed to 25 of its treaty partners to agree to joint interpretive statements clarifying the scope of commitments under investment treaties, but only two states, Bangladesh and Colombia, have agreed to date. *See* Sarthak Malhotra, *India's Joint Interpretive Statement for BITs: An Attempt to Slay the Ghosts of the Past*, INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT, INVESTMENT TREATY NEWS (December 12, 2016); Joint Interpretive Notes on the Agreement between the Government of the Republic of India and the Government of the People's Republic of Bangladesh for the Promotion and Protection of Investments, signed October 4, 2017; Joint Declaration between the Republic of India and the Republic of Colombia regarding the Agreement for the Promotion and Protection of Investments between India and Colombia signed on November 10, 2009, signed October 4, 2018; Government of India, Department of Economic Affairs, Bilateral Investment Treaties/Agreements, https://dea.gov.in/bipa?page=8.

promotion, who lack involvement (or accountability) in actual investment disputes, and whose job is to attract foreign investment. As Poulsen and others insightfully observe, exit from the investment treaty regime is more difficult than avoiding entry, for reasons that have little to do with States' substantive agreement with the content of these treaties as interpreted by arbitrators.[174]

Another major reform angle focuses not on treaty texts but on their interpreters. While these proposals vary in ambition, from ICSID and UNCITRAL's proposed Code of Conduct for Arbitrators to the attempt by EU and other States to overhaul arbitration in favor of a multilateral investment court, they place primary responsibility for the interpretive expansion of international investment law where it belongs.[175] But serious questions remain about the adequacy of those proposals to rein in the unreasoned foundations on which much of extant international investment law has been built.

First, the cases decided to date under international investment treaties remain. So long as adjudicators are tasked with interpreting similar instruments, the influence of those decisions may be difficult to avoid. An effort to better institutionalize a legal regime is not *per se* good when its problems are foundational. For this reason, critics have expressed concern about "entrenching", "institutionalizing" or "locking in a broken system" through current reform efforts.[176]

Second, "judicializing" international economic law has not, to date, served as a robust check on the perception – real or imagined – of "regime creep." To take the example of the WTO, whatever one's view of the merits of challenges to the Appellate Body, it is hard to maintain that the Dispute Settlement Understanding has reduced controversy as to the meaning of the GATT. To the contrary, the United States has pointed to "persistent overreaching" by the Appellate Body to justify its efforts to hamstring that institution.[177] In fact, it is easy to imagine that the effort to stabilize international investment law by routing its interpretation through a specialized court could serve more to focus public scrutiny on a particular institution, rather than

[174] Poulsen, BOUNDED RATIONALITY, pp. 201-202.

[175] *See* ICSID and UNCITRAL, Draft Code of Conduct for Adjudicators in International Investment Disputes, Version II, April 19; 2021; Council of the European Union, Negotiating directives for a Convention establishing a multilateral court for the settlement of investment disputes, March 1, 2018.

[176] Lisa Sachs, Lise Johnson, Brooke Guven, Jesse Coleman, and Ladan Mehranvar, *The UNCITRAL Working Group III Work Plan: Locking in a Broken System?*, May 4, 2021, *available at* https://ccsi.columbia.edu/news/uncitral-working-group-iii-work-plan-locking-broken-system; James Thuo Gathii, *Reform and Retrenchment in International Investment Law* (January 13, 2021), *available at* https://ssrn.com/abstract=3765169, p. 2; George Kahale, III, *The Wild, Wild West of International Practice*, 44 BROOK. J. INT'L L. 1 (2019), 10.

[177] *See* WTO Dispute Settlement Body, Minutes of Meeting, WT/DSB/M/417, August 27, 2018, ¶ 12.2.

ad hoc arbitral tribunals whose operations may have always been difficult for a lay public to understand.[178]

Beyond discussions on treaty terms and adjudicators is a basic need for better legal reasoning. Default rules in international law deserve meaningful engagement and, where they do not apply, cogent distinction. Bare policy judgments based on loose inferences from portions of a treaty's preamble cannot provide an adequate basis for finding a grant of jurisdiction. And arbitrators should exhibit an understanding of the content of legal rules developed outside the context of international investment law from which investment treaties do not clearly depart, rather than relying on the specialized nature of the regime as providing *carte blanche* for unsophisticated and legally unsound decisions. An appellate mechanism, by placing pressure on the quality of legal reasoning, may go furthest in promoting these aims, but no single reform will be adequate to achieve them. New treaties, new institutions, and new adjudicators are all necessary, but perhaps insufficient, ingredients in a rebalanced international investment law.

VI. CONCLUSION

We have shown that the interpretation of treaty silence presents a distinct and significant problem in investment arbitration. Arbitrators have too often interpreted silence creatively, expanding the reach of investment treaties and placing the burden on States to stipulate all of their limits. In doing so, they have given too little weight to basic precepts of international law, including that jurisdiction must be conferred, treaty obligations must be rooted in a positive expression of consent, and treaties should be read in light of other relevant rules of international law. The reform options currently on the table may well be necessary but appear insufficient to resolve the challenges facing the field.

Nevertheless, for all of its flaws, investment arbitration retains the virtue of flexibility. Nothing prevents arbitrators from adopting a more restrained approach to silence, mindful of fundamental principles and of the broader legal environment in which investment treaties operate. A more cautious and systemic approach has the benefit of both more predictable results in individual cases and a more coherent system of law overall. It may not be too late for investment law to re-anchor itself in the broader international legal order of which it forms a part.

[178] These same objections apply to the creation of an appellate mechanism. While that would arguably place the most pressure on the quality of the legal reasoning of adjudicators deciding international investment disputes, it remains inadequate in isolation to deal with the challenges that arise from judicialization.