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CONCEPTUAL OVERLAPS BETWEEN INVESTMENT PROTECTION STANDARDS: ANALYSIS OF A YET UNEXPLORED SYSTEMIC PROBLEM OF ISDS

Markus Petsche

CONCEPTUAL OVERLAPS BETWEEN INVESTMENT PROTECTION STANDARDS: ANALYSIS OF A YET UNEXPLORED SYSTEMIC PROBLEM OF ISDS

Markus Petsche[*]

This Article explores the problem of conceptual overlaps between standards of protection contained in international investment agreements. Such overlaps occur because existing investment protection standards frequently cover similar categories of state conduct. In other words, where a state measure breaches a particular standard of protection, it will often also violate one or several other standards. This leads, in practice, to a multiplication of claims (or legal bases), which unduly increases the complexity and cost of investor-state arbitration proceedings. Although the problem of overlaps has occasionally been referred to in academic writings, to date, no scholarly work has analysed this phenomenon in any detail. The present contribution seeks to fill this gap in the literature. It (1) offers a comprehensive examination of the nature, frequency, and magnitude of overlaps, (2) identifies and explores the various causes of this problem, and (3) discusses solutions to prevent or minimize overlaps.

I. INTRODUCTION

For at least a decade, investor-state dispute settlement (ISDS) has been the subject of widespread and sometimes vehement criticism,[1] prompting

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[1] *See, e.g.*, RESHAPING THE INVESTOR-STATE DISPUTE SETTLEMENT SYSTEM: JOURNEYS FOR THE 21ST CENTURY (Jean E. Kalicki & Anna Joubin-Bret eds., 2015); Simon Lester, *Rethinking the International Investment Law System*, 49 J. WORLD TRADE 211 (2015); Stephen W. Schill, *Reforming Investor-State Dispute Settlement (ISDS): Conceptual Framework and Options for the Way Forward* (2015), http://e15initiative.org/wp-content/uploads/2015/07/E15-Investment-Schill-FINAL.pdf. *See also* Possible reform of investor-state dispute settlement (ISDS), Comm'n on Int'l Trade L., Working Grp. III, Thirty-Sixth Session, U.N. Doc. A/CN.9/WG.III/WP.149 (2018). *But see* Gloria Maria Alvarez et al., *A Response to the Criticism Against ISDS by EFILA*, 33 J. INT'L ARB. 1 (2016) (presenting a more nuanced view of ISDS criticism).

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distinguished observers to speak of a backlash against ISDS.[2] Critics have raised concerns with regard to a number of (allegedly) problematic features of the current system such as, for example, the inconsistency of arbitral awards and the ensuing lack of predictability,[3] the absence of appellate review as a factor exacerbating the lack of uniformity in arbitral case law,[4] the questionable independence and impartiality of arbitrators,[5] the detrimental effect of ISDS on the regulatory autonomy of states (regulatory "chill"),[6] lack of transparency,[7] and the increasing complexity and cost of the proceedings.[8]

Within the broader framework of this critical literature, the present article explores a phenomenon that has received very little, if any, attention thus far: the issue of conceptual overlaps between investment protection standards contained in investment treaties. This problem arises from the fact that existing treaty standards frequently cover similar categories of state conduct, *i.e.*, where a state measure breaches a particular standard, it is often necessarily captured by one or several other standards. State conduct in

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[2] THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY (Michael Waibel, Asha Kaushal, Kyo-Hwa Liz Chung & Claire Balchin eds., 2010); Tarald Laudal Berge, *Dispute by Design? Legalization, Backlash, and the Drafting of Investment Agreements*, 64 INT'L STUD. Q. 919 (2020).

[3] *See* Possible reform of investor-state dispute settlement (ISDS): Consistency and related matters, Comm'n on Int'l Trade L., Working Grp. III, Thirty-Sixth Session, U.N. Doc. A/CN.9/WG.III/WP.150 (2018).

[4] *See* Gabriel Bottini, *Reform of the Investor-State Arbitration Regime*, *in* RESHAPING THE INVESTOR-STATE DISPUTE SETTLEMENT SYSTEM: JOURNEYS FOR THE 21ST CENTURY 455 (Jean E. Kalicki & Anna Joubin-Bret eds., 2015); Jaemin Lee, *Introduction of an Appellate Review Mechanism for International Investment Disputes: Expected Benefits and Remaining Tasks*, *in* RESHAPING THE INVESTOR-STATE DISPUTE SETTLEMENT SYSTEM: JOURNEYS FOR THE 21ST CENTURY 474 (Jean E. Kalicki & Anna Joubin-Bret eds., 2015); Eun Young Park, *Appellate Review in Investor-State Arbitration*, *in* RESHAPING THE INVESTOR-STATE DISPUTE SETTLEMENT SYSTEM: JOURNEYS FOR THE 21ST CENTURY 443 (Jean E. Kalicki & Anna Joubin-Bret eds., 2015).

[5] For an excellent overview of relevant concerns and reform options, see Chiarra Giorgetti et al., *Independence and Impartiality of Adjudicators in Investment Dispute Settlement: Assessing Challenges and Reform Options*, 21 J. WORLD INV. & TRADE (SPECIAL ISSUE) 441 (2020).

[6] *See, e.g.*, Kyla Tienhaara, *Regulatory chill and the threat of arbitration: A view from political science*, *in* EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION 606 (Chester Brown & Kate Miles eds., 2011).

[7] *See generally* William Kenny, *Transparency in Investor State Arbitration*, 33 J. INT'L ARB. 471 (2016). For two recently adopted legal instruments that have sought to improve transparency of treaty-based investor-state arbitration proceedings, see G.A. Res. 68/109 (Dec. 16, 2013); G.A. Res. 69/116 (10 Dec. 2014).

[8] *See* Possible reform of investor-state dispute settlement (ISDS): cost and duration, *supra* note 3.

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breach of the expropriation standard, for instance, will frequently also be in violation of other investment protection standards such as, for example, the fair and equitable treatment standard.[9]

The problem of overlaps between treaty standards is largely absent from the scholarly debate. Most contributions dealing with standards of investment protection examine the meaning of individual standards, often without exploring how such standards relate or compare to others. Several authors (Bjorklund, Cordero Moss, Junngam, Miljenić, Reinisch & Schreuer, and Ortino) have, admittedly, pointed out the existence of overlaps between certain standards.[10] However, they have done so in passing, merely acknowledging the existence of such overlaps without analysing their frequency, magnitude, causes, or implications. To date, there are no scholarly publications that have attempted to answer these questions.

The basic assumption of this study, which appears to be implicitly shared by some of the writers mentioned above,[11] is that overlaps between

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[9] There is a very large number of cases in which arbitral tribunals have decided that a particular measure violated both the expropriation and the fair and equitable treatment standards. *E.g.*, Metalclad Corp. v. The United Mexican States, ICSID Case No. ARB(AF)/97/1, Award (Aug. 30, 2000), https://www.italaw.com/cases/671, where the arbitral tribunal decided that the Municipality of Guadalcazar's refusal to issue a construction permit for the investor's landfill constituted not only a breach of the fair and equitable treatment standard (¶ 97), but also an indirect expropriation in violation of Art. 1110 NAFTA (¶ 104).

[10] Andrea K. Bjorklund, *National Treatment*, *in* STANDARDS OF INVESTMENT PROTECTION 29, 32 (August Reinisch ed., 2008) (referring to the partial overlap between national treatment and the State's obligation to provide fair and equitable treatment); Giuditta Cordero Moss, *Full Protection and Security*, *in* STANDARDS OF INVESTMENT PROTECTION 131, at 146–49 (August Reinisch ed., 2008) (discussing overlaps between the full protection and security and the fair and equitable treatment standards); Nartnirun Junngam, *The Full Protection and Security Standard in International Investment Law: What and Who Is Investment Fully[?] Protected and Secured From?*, 7 AM. U. BUS. L. REV. 1, at 80 (2018) (discussing arbitral rulings acknowledging overlaps between fair and equitable treatment and full protection and security); Orsat Miljenić, *Full Protection and Security Standard in International Investment Law*, 35 Pravni vjesnik 35, at 40 (2019) (observing that the full protection and security and fair and equitable treatment standards "can be regarded as separate standards, but [that] they overlap in many respects"); AUGUST REINISCH & CHRISTOPH SCHREUER, INTERNATIONAL PROTECTION OF INVESTMENTS: THE SUBSTANTIVE STANDARDS 555, 557 (2020) (discussing case law recognizing frequent overlaps between fair and equitable treatment and full protection and security); FEDERICO ORTINO, THE ORIGIN AND EVOLUTION OF INVESTMENT TREATY STANDARDS: STABILITY, VALUE, AND REASONABLENESS 112 (2019) (referring to "the (at least partial) overlap between the fair and equitable treatment standard and other standards").

[11] *See* Moss, *supra* note 10, at 150 (noting that it is "questionable to what extent it is useful to interpret a standard of protection in such a way that it doubles another standard of protection—particularly if the applicable treaty lists the two standards as two separate bases for liability"); Junngam, *supra* note

investment protection standards have a detrimental effect on the efficiency of the ISDS system. In fact, where particular state conduct falls within the spheres of application of several standards, investors can be expected to base their claims on all such standards, rather than on only one of them. This leads to a multiplication of legal bases (and claims), which (unnecessarily) increases the complexity and cost of investor-state arbitration proceedings.

The purpose of this Article is to raise awareness of the problem of conceptual overlaps between investment protection standards and to provide a detailed analysis of the principal aspects of this problem. Specifically, this study seeks to (1) offer a comprehensive examination of the nature, frequency, and magnitude of overlaps, (2) identify and explore the various causes underlying this problem, and (3) design solutions to prevent or minimize overlaps.

The present contribution is organized as follows. Section II clarifies the crucial concept of "overlap" and describes the Article's scope and methodological approach, including its selection of standards of protection. Section III analyzes the meaning and scope of those standards. Based on this analysis, Section IV examines whether and to what extent the spheres of application of the different standards overlap, *i.e.*, it seeks to "map" potential overlaps. Section V explores possible causes for overlaps, including broad/vague treaty drafting and expansive arbitral interpretation. Section VI reviews available remedies, both at the level of treaty drafting and interpretation. Section VII offers concluding observations.

II. CONCEPT OF OVERLAP; METHODOLOGY

A. Concept of Overlap

Two rules can be said to overlap when their respective spheres of application present common areas, *i.e.*, when the normative pre- or proscriptions laid down in those rules are at least partly identical. A simple

10, at 80 (arguing that an extensive interpretation of the full protection and security standard deprives the fair and equitable treatment standard of its meaning); ORTINO, *supra* note 10, at 173 (arguing that "there needs to be stronger rationalization and coordination of the various reasonableness-based provisions, both in existing and future treaties as the extent of the overlap, confusion and inconsistency between the various reasonableness standards [. . .] is a concern").

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example is the overlap between the fair and equitable treatment standard and the standard prohibiting the adoption of "unreasonable, arbitrary or discriminatory measures."[12] Indeed, it almost goes without saying that the former prohibits a state from taking unreasonable, arbitrary, or discriminatory measures. The two standards thus overlap to a very large extent.

Leaving aside the unlikely possibility of a full overlap between two rules (*i.e.*, identical spheres of application), three principal scenarios can be distinguished. The first such scenario is the absence of overlap. This can be illustrated by two hypothetical rules governing the use of a library, namely the prohibition to eat or drink (rule 1) and the prohibition to speak on the phone (rule 2). The normative contents of these two rules are entirely distinct, *i.e.*, the act of eating or drinking does not per se involve any speaking over the phone, or vice versa.

The second scenario consists of partial overlap. In this case, the two rules present a common sphere of application, but also each have an area of application which is not shared. Such a partial overlap would exist, for example, where rule 1 prohibits eating or drinking in the library and rule 2 requires all patrons not to disturb fellow users. These two rules overlap insofar as the act of eating or drinking (a violation of rule 1) may create noise or other disturbances in violation of rule 2. Since this will not always be the case, and since there are disturbances that arise from conduct other than eating or drinking, both rules also have unshared areas of application.

A third possibility is that one rule is entirely contained in the other, *i.e.*, that it constitutes a particular sub-category of that rule. If rule 1 prohibits users from speaking on their cell phones and rule 2 sets forth a general requirement to remain silent, rule 1 is entirely contained within the broader rule 2. In other words, every violation of rule 1 will also constitute an infringement of rule 2. The opposite is not true, however, given that conduct other than the use of one's cell phone may violate rule 2 (playing music, for example).

[12] According to UNCTAD's investment treaty database, 1713 out of 2574 mapped treaties contain such clauses. *See Mapping of IIA Content*, UNITED NATIONS, https://investmentpolicy.unctad.org/international-investment-agreements/iia-mapping (last visited Nov. 24, 2021).

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B. Detrimental Impact of Overlaps Between Investment Protection Standards

The basic assumption of this study is that overlaps between the spheres of application of investment protection standards are inefficient. In fact, these overlaps imply that many state measures will violate not only one, but two or more standards of protection. This essentially compels claimants to rely on all those standards and to argue the case on multiple grounds. It would be more effective and cost-efficient if the litigation/arbitration could focus on one—the most suitable—standard of protection. This would expedite and streamline the process and help contain attorney, arbitrator and other time-dependent fees.

The inefficiency resulting from overlaps can be illustrated by a hypothetical dispute between a library and one of its patrons who is alleged to have violated its rules because he/she was talking over the phone. The library's rules prohibit users from speaking on their phones and further require all users to be silent at all times. Since the user's conduct was in breach of both rule 1 and rule 2, the dispute is likely to be litigated on both grounds. It would save resources if the case was argued on one legal basis only.

C. Methodology; Limitations

Since this study seeks to show how frequent overlaps between investment protection standards are, it must cover a sufficiently sizeable number of such standards. To achieve this purpose, this article will examine overlaps between five investment protection standards: expropriation, fair and equitable treatment, full protection and security, national treatment, and the protection offered under umbrella clauses (a total of ten possible overlap scenarios). These standards have been chosen because of their wide

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recognition[13] (except for umbrella clauses[14]) and importance for the practice of investor-state arbitration. Umbrella clauses have mainly been included because of their significant potential for overlap with other standards.[15]

Overlaps may of course also exist with and between other standards. The rather common prohibition against the adoption of unreasonable, arbitrary or discriminatory measures,[16] for example, obviously overlaps with the fair and equitable treatment[17] and the national treatment[18] standards. An exhaustive analysis of all the overlaps between all the existing standards of protection found in investment treaties is, however, not necessary for the purposes of this study.

This Article has two limitations. First, due to the large number of standards of protection and overlap scenarios covered, the description of the scope of each individual standard is necessarily simplistic, *i.e.*, it focuses on generally accepted key definitional features and prevailing approaches, without addressing controversies, nuances, or minority views. It would have been possible to avoid this difficulty by examining two or three standards

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[13] These standards are notably contained in the U.S., U.K., and German Model BITs. *See* U.S. MODEL BILATERAL INVESTMENT TREATY (2012), https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf; U.K. GR. BRIT. & N. IR., UNITED KINGDOM MODEL BIT 2008 (2008), https:// investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2847/download; FED. MINISTRY FOR ECONS. & TECH., GERMAN MODEL BIT 2008 (2008), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2865/download.

[14] In recent years, there has been a trend away from the inclusion of umbrella clauses in international investment agreements. According to UNCTAD's investment treaty database, out of 186 investment treaties concluded between 2010 and 2021, only forty-one contained umbrella clauses. *See supra* note 12 and accompanying text.

[15] *See infra* Section IV.B.

[16] According to UNCTAD's investment treaty database, 1,713 out of 2,574 mapped treaties contain such clauses. *See supra* note 12 and accompanying text.

[17] The very wording of the fair and equitable treatment standard suggests substantial overlap with the standard prohibiting the adoption of unreasonable, arbitrary, or discriminatory measures. Indeed, it can be assumed that a measure which is either unreasonable, arbitrary, or discriminatory would have to be characterized as unfair and/or inequitable. For a case recognizing this significant (or full?) overlap between the two standards, *see, e.g.*, Dan Cake S.A. v. Hungary, ICSID Case No. ARB/12/09, Decision on Jurisdiction and Liability, ¶¶ 155–57 (Aug. 24, 2015), https://www.italaw.com/cases/1937. In this case, the overlap was particularly evident given that the relevant clause prohibited the adoption of "*unfair* or discriminatory measures" (emphasis added), thus creating a literal overlap with the fair and equitable treatment standard.

[18] *See* Bjorklund, *supra* note 10 ("some treaties specifically prohibit states from according 'arbitrary and discriminatory' treatment, a formulation that to some degree conflates the minimum standard and national treatment obligations").

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only, but such an approach would not have permitted the general exploration pursued in this contribution.

Second, this Article does not seek to prove the basic assumption of the inefficiency of overlaps beyond the explanations provided in Section II.B above. In fact, the detrimental impact of such overlaps is a complex matter that would require a separate empirical study that would exceed the scope of this Article. Admittedly, it may be argued that some level of overlap is inevitable and that, in order to ensure coverage of all possible interferences with foreign investments and related activities, some degree of overlap may even be necessary. While there may be some truth to these arguments, it will be shown that an overlap problem of the magnitude observed in this study cannot possibly be justified by such considerations.

III. MEANING AND SCOPE OF SELECTED STANDARDS OF PROTECTION

A. Expropriation

Under the vast majority of investment treaties, the expropriation standard protects foreign investments/investors from both direct and indirect expropriation.[19] A direct expropriation can be defined as a formal transfer of ownership from the investor to the host state or outright physical seizure of the investment.[20] By contrast, an indirect expropriation does not entail such a formal transfer or physical seizure, but nonetheless produces an effect similar to a direct expropriation.[21] Direct expropriations are rather rare in the contemporary context and virtually all claims by investors alleging breaches of the expropriation standard involve alleged indirect expropriations.

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[19] *See, e.g.*, U.S. MODEL BILATERAL INVESTMENT TREATY, *supra* note 13, art. 6(1); U.K. GR. BRIT. & N. IR., *supra* note 13, art. 5(1); FED. MINISTRY FOR ECONS. & TECH., *supra* note 13, art. 4(2). On how expropriation standards have historically come to encompass indirect expropriation, see Courtenay Barklem & Enrique Alberto Prieto-Ríos, *The Concept of "Indirect Expropriation", its Appearance in the International System and its Effects in the Regulatory Activity of Governments*, 11 CIVILIZAR CIENCIAS SOCIALES Y HUMANAS 77, 81–83 (2011).

[20] CONF. ON TRADE AND DEV., UNITED NATIONS, EXPROPRIATION—A SEQUEL: UNCTAD SERIES ON ISSUES IN INTERNATIONAL INVESTMENT AGREEMENTS II, 6 (2012).

[21] *Id.* at 7.

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The core definitional element of an indirect expropriation consists of the investor's substantial deprivation.[22] Such a substantial deprivation may relate to the value or enjoyment of the investment, or to the investor's ability to exercise control over the investment or investment-related activities.[23] In order to qualify as an indirect expropriation, a state measure must be permanent or have a minimum duration; short-term interferences with the value of an investment or the conduct of investment-related operations cannot, in principle, amount to expropriations.[24]

It is generally accepted that regulatory measures adopted in the public interest do not constitute indirect expropriations, even if they have the effect of substantially depriving the investor of the value or enjoyment of, or control over, an investment.[25] Indeed, it is a well-established principle of public international law that states can legislate (in a broad sense) to promote public interests such as public health, environmental protection, or social justice.[26] Measures such as the adoption of a minimum wage,[27] restrictions on the

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[22] *See* Anne K. Hoffmann, *Indirect Expropriation*, *in* STANDARDS OF INVESTMENT PROTECTION, *supra* note 10, at 151, 156 (referring to the "substantiality of the interference" as the key criterion of indirect expropriation).

[23] *See* Telenor Mobile Commc'ns A.S. v. Republic of Hung., ICSID Case No. ARB/04/15, Award, ¶ 65 (Sept. 13, 2006), 21 ICSID Rev. 603 (2006), https://www.italaw.com/cases/documents/1094 ("the interference with the investor's rights must be such as substantially to deprive the investor of the economic value, use or enjoyment of its investment").

[24] RUDOLPH DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 124–25 (2d ed. 2012).

[25] A codification of this principle can notably be found in the U.S. Model BIT. *See, e.g.*, U.S. MODEL BILATERAL INVESTMENT TREATY, *supra* note 13, Annex B, 4(b) ("Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.").

[26] *See, e.g.*, Feldman v. United Mexican States, ICSID Case No. ARB(AF)/99/1, Award, ¶ 103 (Dec. 16, 2002), 18 ICSID Rev. 488 (2003), https://www.italaw.com/cases/435; S.D. Myers, Inc. v. Canada, Partial Award, ¶ 281 (NAFTA 2000), https://www.italaw.com/cases/969; Cont'l Casualty Co. v. Argentine Republic, ICSID Case No. ARB/03/9, Award, ¶ 276 (Sept. 5, 2008), https://www.italaw.com/cases/329.

[27] *See* Veolia v. Egypt, ICSID Case No. ARB/12/15, Award (May 25, 2018). *See also Veolia loses ISDS case against Egypt—after six years and millions in costs*, BILATERALS.ORG (June 4, 2018), https://www.bilaterals.org/?veolia-loses-isds-case-against&lang=fr (providing a useful summary of the decision because the award is not publicly available).

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ability to advertise tobacco products,[28] or a ban on nuclear energy[29]F are thus in principle within the state's regulatory discretion. Where a measure is discriminatory or was adopted in bad faith, however, it does not in principle serve a legitimate regulatory purpose, and thus may amount to expropriation.[30]

It is widely acknowledged that all types of assets that qualify as investments may be the subject of expropriation. This notably implies that an investor's contractual rights can be expropriated.[31] A breach of an investment contract by the host state may thus constitute an expropriation of the investor's contractual rights. Under the prevailing approach, however, only "qualified" contractual breaches, *i.e.*, breaches resulting from the exercise of governmental authority, may amount to expropriation.[32]

B. Fair and Equitable Treatment

As its wording suggests, the obligation to provide fair and equitable treatment is inherently broad and vague. This is at least partly due to its gap-filling (or subsidiary) role, *i.e.*, the fact that it is intended to cover situations

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[28] *See* Philip Morris Brand Sàrl v. Oriental Republic of Uru., ICSID Case No. ARB/10/7, Award, ¶ 307 (July 8, 2016), https://www.italaw.com/cases/460 ("the Tribunal concludes that the Challenged Measures were a valid exercise by Uruguay of its police powers for the protection of public health. As such, they cannot constitute an expropriation of the Claimants' investment.").

[29] *See* Vattenfall v. Germany, ICSID Case No. ARB/12/12. The case was settled by the parties before the tribunal rendered a decision on the merits. *See also* Cosmo Sanderson, *Germany Settles with Vattenfall*, GLOBAL ARB. REV. (Mar. 5, 2021), https://globalarbitrationreview.com/articla/ germany-agrees-settle-vattenfall-case. It must be mentioned that Vattenfall also filed a constitutional complaint against the decision to phase out nuclear energy production. This claim was partly successful, given that the Court found that Germany had violated the petitioners' legitimate expectations. For a general overview of the case, see Daniela Paez-Salgado, *A Battle on Two Fronts:* Vattenfall v. Federal Republic of Germany, KLUWER ARBITRATION BLOG (Feb. 18, 2021), http://arbitrationblog.kluwerarbitration.com/ 2021/02/18/a-battle-on-two-fronts-vattenfall-v-federal-republic-of-germany/ (accessed on 24 Nov. 2021).

[30] *See Philip Morris* at ¶ 305 ("in order for a State's action in exercise of regulatory powers not to constitute indirect expropriation, the action has to comply with certain conditions. Among those most commonly mentioned are that the action must be taken *bona fide* for the purpose of protecting the public welfare, must be non-discriminatory and proportionate.") (internal footnote omitted).

[31] *See* DOLZER & SCHREUER, *supra* note 24, at 126–29. *See also* Siemens A.G. v. Argentine Republic, ICSID Case No. ARB/02/8, Award, ¶ 267 (Feb. 6, 2007), https://www.italaw.com/cases/1026.

[32] *See, e.g.*, Waste Mgmt., Inc. v. United Mexican States, ICSID Case No. ARB(AF)/00/3, Award, ¶ 253, ¶ 175 (Apr. 30, 2004), https://www.italaw.com/cases/1158; Siemens at ¶ 253.

that are not captured by other standards of protection.[33] Some investment treaties specify the threshold and—to a certain extent—the nature of the fair and equitable treatment obligation.[34] Despite such clarifications, the precise meaning and scope of this standard remains elusive.

The specific contents of the fair and equitable treatment standard are best defined by reference to the standard's various constitutive components. Although no categorization can do justice to the great variety of possible fact patterns, there is broad consensus as to the core elements of the standard. Authoritative writers have distinguished the following six areas of application: stability and the protection of the investor's legitimate expectations, transparency, compliance with contractual obligations, procedural propriety and due process, good faith, and freedom from coercion and harassment.[35] Case law and scholarship provide sufficient support for the inclusion of at least one additional component, namely protection from discrimination.[36]

C. Full Protection and Security

Like the fair and equitable treatment standard, the standard providing for full protection and security is broad and inherently ambiguous. To remedy such ambiguity, some investment treaties contain clarifications regarding the nature and threshold of this standard and offer partial definitions. The U.S. Model BIT, for instance, explains that the obligation to provide full protection and security requires the state parties to provide *police* protection in accordance with the minimum standard of treatment of customary

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[33] DOLZER & SCHREUER, *supra* note 24, at 132.

[34] *See, e.g.*, U.S. MODEL BILATERAL INVESTMENT TREATY, *supra* note 13, art. 5(2) (specifying that the fair and equitable treatment obligation contained in the treaty represents the customary international law minimum standard of treatment) and art. 5(2)(a) (clarifying that fair and equitable treatment "includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world").

[35] *See* DOLZER & SCHREUER, *supra* note 24, at 145–60.

[36] *See generally* Stephan W. Schill, *Fair and Equitable Treatment Under Investment Treaties as an Embodiment of the Rule of Law* (Inst. for Int'l L. & Just., Working Paper No. 2006/6, 2006) (for a more detailed explanation, consider Schill at 19–20); Katia Yannaca-Small, *Fair and Equitable Treatment Standard: Recent Developments*, *in* STANDARDS OF INVESTMENT PROTECTION, *supra* note 10, at 111, 120–21.

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international law.[37] Such clarifications are, however, only of limited help in defining the exact contents of this standard.

The most crucial aspect of the delineation of the precise scope of the full protection and security standard pertains to the nature of the protection provided. Traditionally, full protection and security has been understood to refer only to *physical* protection and security.[38] This is generally considered to cover the obligation to protect the investor and the investor's property from physical injury or damage. It is also generally viewed as having a narrowly defined legal aspect, namely the obligation to make legal remedies available to the investor for the seeking of redress for any physical injury or damage sustained.[39] More recently, a separate and much more extensive obligation to provide legal protection and security has emerged, partly as a result of treaty language to this effect,[40] and partly due to arbitral interpretation extending the traditional scope of full protection and security beyond its physical dimension.[41] Legal protection and security in this sense is considered to

[37] U.S. MODEL BILATERAL INVESTMENT TREATY, *supra* note 13, art. 5(2)(b).

[38] Moss, *supra* note 10, at 138.

[39] *Id.* at 144 (noting that "[t]he traditional scope of application [of full protection and security] has some ramifications that go beyond the mere exercise of police powers" and that "[t]his concerns, particularly, the availability of the judicial and administrative system to protect the interests of the investor.").

[40] *See, e.g.*, Vertrag zwischen der Bundesrepublik Deutschland und der Argentinischen Republik über die Förderung und den gegenseitigen Schutz von Kapitalanlagen [Agreement between the Federal Republic of Germany and the Argentine Republic concerning the Promotion and Reciprocal Protection of Investments], Ger.-Arg., art. 4 (Apr. 9, 1991), 190 U.N.T.S. 171, https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/128/argentina---germany-bit-1991-; Convenio entre el gobierno de la Republica del Ecuador y el gobierno de la Republica de El Salvador para la promocion y proteccion reciprocas de inversiones [Agreement between the Government of the Republic of Ecuador and the Government of El Salvador concerning the Promotion and Reciprocal Protection of Investments], Ecuador-El Sal., art. IV(2) (May 16, 1994), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1050/download.

[41] *See, e.g.*, CME Czech B.V. v. Czech, Partial Award, ¶ 613 (U.N. Comm'n on Int'l Trade L. 2001), https://www.italaw.com/cases/281; Ceskoslovenska Obchodni Banka, A.S. v. Slovak Republic, ICSID Case No. ARB/97/4, Award, ¶ 170 (Dec. 29, 2004) (1999), https://www.italaw.com/cases/238; Compañiá de Aguas del Aconquija S.A. v. Argentine Republic, ICSID Case No. ARB/97/3, Award, ¶ 7.4.15–17 (Aug. 20, 2007), https://www.italaw.com/cases/309; Nat'l Grid P.L.C. v. Argentine Republic, Award, ¶ 189 (U.N. Comm'n on Int'l Trade L. 2008), https://www.italaw.com/cases/732; Levy de Levi v. Republic of Peru, ICSID Case No. ARB/10/17, Award, ¶ 406 (Feb. 26, 2014), https://www.italaw.com/cases/2444; Teinver S.A. v. Argentine Republic, ICSID Case No. ARB/09/1, Award, ¶ 905 (July 21, 2017), https://www.italaw.com/cases/1648.

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include, *inter alia*, legal stability, protection of investors' legitimate expectations, and protection from arbitrary measures.[42]

The second factor defining the scope of the full protection and security standard relates to the persons or entities whose conduct foreign investors (and investments) are protected from. In this respect, it is generally accepted that the full protection and security standard targets not only the conduct of private persons, but also the conduct of state organs or entities.[43] The obligation to provide full protection and security may therefore notably be violated where the state's armed forces unlawfully seize, occupy, or damage property owned by an investor.[44]

D. National Treatment

The scope of the national treatment standard is defined, in the first place, by reference to the specific stages in the lifespan of an investment to which it applies. Many investment treaties limit the application of the obligation to provide national treatment to the post-establishment stage, *i.e.*, to the "management, maintenance, use, enjoyment or disposal of investments."[45] Conversely, in other investment treaties, the national treatment provision also covers the establishment, acquisition and expansion of investments.[46]

The national treatment standard applies to various forms of nationality-based discrimination. In particular, it applies not only to direct discrimination, *i.e.*, to discriminatory treatment deriving from distinctions based on nationality, but also to indirect discrimination.[47] Moreover, the obligation to provide national treatment prohibits both *de jure* discrimination,

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[42] Moss, *supra* note 10, at 150.

[43] *Id.* at 138 ("The physical damage against which the protection is directed may be caused by the State, State organs or otherwise be attributable to the State, or may be caused by third parties.").

[44] *See, e.g.*, Asian Agric. Products Ltd. v. Republic of Sri Lanka (U.K. v. Sri Lanka), ICSID Case No. ARB/87/3, Final Award, ¶¶ 72–86 (June 27, 1990), https://www.italaw.com/sites/default/files/case-documents/ita1034.pdf.

[45] *See, e.g.*, U.K. MODEL BILATERAL INVESTMENT TREATY, *supra* note 13, art. 3(2).

[46] *Id.* art. 3(1)–(2).

[47] *See* Freya Baetens, *Discrimination on the Basis of Nationality: Determining Likeness in Human Rights and Investment Law*, *in* INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW 279–80 (Stephan W. Schill ed., 2010); SIMON KLOPSCHINSKI, CHRISTOPHER S. GIBSON & HENNING GROSS RUSE-KHAN, THE PROTECTION OF INTELLECTUAL PROPERTY RIGHTS UNDER INTERNATIONAL INVESTMENT LAW 212 (2021).

i.e., discrimination resulting from the design or operation of legal rules, and *de facto* discrimination, which is caused by administrative practices or other factual circumstances affecting the treatment of investments.[48]

It is a well-established principle that a breach of the national treatment standard requires not only dissimilar treatment, but also proof that the foreign and domestic investors (or investments) are in like circumstances.[49] Such like circumstances will generally exist where the foreign and domestic investors are in the same business sector. Where the foreign investor is a manufacturer, this requirement is likely to be met where the foreign and domestic investors manufacture like products.[50]

An important limitation on the reach of the national treatment standard is the possibility for host states to justify dissimilar treatment on public interest grounds. Where the differentiation at issue is required (or at least justified) by a public purpose such as the protection of public health or national security, the measure concerned will not be considered to be in breach of the obligation to provide national treatment.[51] According to some tribunals, the discriminatory measures must be proportionate to the aim pursued, failing which they will not be covered by the public purpose exception.[52]

E. Umbrella Clause

An umbrella clause is a clause under which state parties to a treaty undertake to comply with all or specific categories of obligations they may have assumed *vis-à-vis* foreign investors.[53] These obligations thus become

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[48] Baetens, *supra* note 47, at 280.

[49] Andrea K. Bjorklund, *The National Treatment Obligation*, *in* ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES 532, 539–48 (Katia Yannaca-Small ed., 2d ed. 2018).

[50] *Id.* at 537 (noting, however, that the "like circumstances" test differs from the "like products" inquiry in the WTO context).

[51] Ion Galela & Bogdan Biris, *National Treatment in International Trade and Investment Law*, 55 ACTA JURIDICA HUNGARICA 174, 179 (2014).

[52] *See, e.g.*, Parkerings-Compagniet AS v. Republic of Lithuania (Nor. v. Lith.), ICSID Case No. ARB/05/8, Award, ¶ 368 (Sept. 11, 2007), https://www.italaw.com/cases/812.

[53] *See, e.g.*, Anthony C. Sinclair, *The Origins of the Umbrella Clause in the International Law of Investment Protection*, 20 ARB. INT'L 411, 411 (2004); Christoph Schreuer, *Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road*, 5 J. OF WORLD INV. & TRADE 231, 251–52 (2004); Jarrod Wong, *Umbrella Clauses in Bilateral Investment Treaties: Of Breaches of Contract, Treaty*

obligations owed under the treaty, *i.e.*, they are brought under the treaty's umbrella (hence the expression "umbrella clause"). Of particular relevance in this context are contractual obligations undertaken in investment contracts concluded with investors.[54] Umbrella clauses often have jurisdictional implications, given that access to investor-state arbitration is frequently confined to claims alleging treaty breaches.[55]

Many arbitral tribunals have been hesitant to fully recognize the potentially far-reaching impact of umbrella clauses and have adopted various limitations on the effect of such clauses. Those restrictions include (1) the by now rather rare presumption that umbrella clauses do not actually transform contractual obligations into obligations owed under the treaty,[56] (2) the requirement of privity under which only obligations entered into by the host state (and not by a territorial subdivision or a legally independent state entity) *vis-à-vis* the investor (and not an entity owned by, or affiliated with, the investor) fall within the scope of umbrella clauses,[57] (3) the limitation of the

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Violations, and the Divide Between Developing and Developed Countries in Foreign Investment Disputes, 14 GEO. MASON L. REV. 137, 138 (2006); James Crawford, *Treaty and Contract in Investment Arbitration*, 24 ARB. INT'L 351, 367, 369 (2008); Stephan W. Schill, *Umbrella Clauses as Public Law Concepts in Comparative Perspective*, *in* INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW 317, 317 (Stephan Schill ed., 2010); Jude Antony, *Umbrella Clauses Since* SGS v. Pakistan *and* SGS v. Philippines*—A Developing Consensus*, 29 ARB. INT'L 607, 608 (2013); Jaemin Lee, *Putting a Square Peg into a Round Hole? Assessment of the "Umbrella Clause" from the Perspective of Public International Law*, 14 CHINESE J. OF INT'L L. 341, 343 (2015).

[54] *See* Sinclair, *supra* note 53, at 425, *passim* (discussing the rationale underlying the umbrella clause contained in the Draft Convention on Investments Abroad 1959, also known as the Abs-Shawcross Draft Convention) ("From an investor's point of view, the umbrella clause was a natural progression in the law of investment protection beyond negotiated contractual techniques to internationalize and stabilize investment agreements.").

[55] *See Mapping of IIA Content*, UNITED NATIONS CONF. ON TRADE AND DEV., https://investmentpolicy.unctad.org/international-investment-agreements/iia-mapping (last visited Nov. 24, 2021) (under "select mapped treaty elements," click "Investor-State Dispute Settlement (ISDS)," then click "Scope and consent," then select "Covers treaty claims only") (stating that 494 out of 2574 mapped investment treaties permit recourse to investor-state arbitration only with respect to treaty breaches).

[56] *See, e.g.*, Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan (Switz. v. Pak.), ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction, ¶¶ 171–73 (Aug. 6, 2003), 18 ICSID Rev. 307 (2003); Noble Ventures, Inc. v. Romania (U.S. v. Rom.), ICSID Case No. ARB/01/11, Award, ¶ 55 (Oct. 12, 2006), https://www.italaw.com/sites/default/files/case-documents/ita0565.pdf.

[57] *See, e.g.*, Impregilo S.p.A. v. Islamic Republic of Pakistan (It. v. Pak.), ICSID Case No. ARB/03/3, Decision on Jurisdiction, ¶ 223 (Apr. 22, 2005), https://www.italaw.com/cases/556; Azurix Corp. v. The Argentine Republic (U.S. v. Arg.), ICSID Case No. ARB/01/12, ¶ 384 (July 4, 2006),

applicability of umbrella clauses to obligations assumed by the state acting in a sovereign capacity,[58] and (4) a similar restriction that limits the scope of application of umbrella clauses to contractual breaches committed in the exercise of governmental authority.[59]

IV. MAPPING OF CONCEPTUAL OVERLAPS

A. Overview

Table 1 Overview of Potential Overlap Scenarios

1	Expropriation and Fair and Equitable Treatment
2	Expropriation and Full Protection and Security
3	Expropriation and National Treatment
4	Expropriation and Umbrella Clause
5	Fair and Equitable Treatment and Full Protection and Security
6	Fair and Equitable Treatment and National Treatment
7	Fair and Equitable Treatment and Umbrella Clause
8	Protection and Security and National Treatment
9	Protection and Security and Umbrella Clause
10	National Treatment and Umbrella Clause

B. Analysis

1. Expropriation and Fair and Equitable Treatment

Considering the major relevance of indirect expropriation and the rather limited significance of direct expropriation for the practice of investment

https://www.italaw.com/cases/118; Antony, *supra* note 53, at 628–34 (discussing the application or non-application of the privity requirement).

[58] *See, e.g.*, El Paso Energy International Company v. The Argentine Republic (U.S. v. Arg.), ICSID Case No. ARB/03/15, Decision on Jurisdiction, ¶ 81 (Apr. 27, 2006), https://www.italaw.com/cases/382; Pan American Energy LLC, and BP Argentina Exploration Company v. The Argentine Republic (U.S. v. Arg.), ICSID Case No. ARB/04/8, Decision on Preliminary Objections, ¶ 109 (July 27, 2006), https://www.italaw.com/cases/808.

[59] *See, e.g.*, Sempra Energy International v. The Argentine Republic (U.S. v. Arg.), ICSID Case No. ARB/02/16, Award, ¶ 310 (Sept. 28, 2007), https://www.italaw.com/cases/documents/1004.

arbitration,[60] the present analysis will focus exclusively on overlaps between the fair and equitable treatment standard and the notion of indirect expropriation.

Where a measure constitutes an indirect expropriation (*i.e.*, where it has an expropriatory effect and is not justified by a public purpose), it will most probably also constitute a breach of the fair and equitable treatment standard. In fact, an indirect taking without compensation and proper justification almost certainly falls short of the requirements of fair and equitable treatment. In that sense, the expropriation standard—at least insofar as it protects from indirect expropriation—is entirely subsumed under the broader fair and equitable treatment standard. In other words, indirect expropriation constitutes a subset of possible violations of the fair and equitable treatment standard. Conversely, not every measure in breach of the obligation to provide fair and equitable treatment constitutes a violation of the expropriation standard; this will only be the case where the measure concerned substantially deprives the investor of the value or enjoyment of, or control over, the investment.

Arbitral case law largely confirms this understanding of the relationship between indirect expropriation and the fair and equitable treatment standard.[61] Indeed, a sample of well-known decisions containing findings of indirect expropriation suggests that indirect expropriation necessarily implies a violation of the fair and equitable treatment obligation.[62] On the other hand,

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[60] DOLZER & SCHREUER, *supra* note 24, at 101 ("Today direct expropriations have become rare. states are reluctant to jeopardize their investment climate by taking the drastic and conspicuous step of an open taking of foreign property.").

[61] *See* Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States (Spain v. Mex.), ICSID Case No. ARB(AF)/00/2, Award, ¶ 151, ¶ 174 (May 29, 2003).

[62] *See* Metalclad Corporation v. The United Mexican States (U.S. v. Mex.), ICSID Case No. ARB(AF)/97/1, Award ¶ 101, ¶ 112 (Aug. 30, 2000), 16 ICSID Rev. 168 (2001) (finding a breach of the fair and equitable treatment standard and that the measures at stake constituted an indirect expropriation); *Tecmed S.A.*, ICSID Case No. ARB(AF)/00/2, Award, ¶ 151, ¶ 174 (May 29, 2003), https://www.italaw.com/cases/1087 (finding that the violation was an expropriation and that the fair and equitable treatment obligation was violated); Siemens A.G. v. The Argentine Republic (Federal Republic of Germany v. Argentine Republic), ICSID Case No. ARB/02/8, Award, ¶ 273, ¶¶ 308–09 (Feb. 6, 2007), https://www.italaw.com/cases/1026 (holding that an unlawful expropriation has occurred and that the fair and equitable treatment standard was violated); Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic (French Republic v. Argentine Republic), ICSID Case No. ARB/97/3, Award, ¶ 7.4.46, ¶ 7.5.34 (Aug. 20, 2007), https://www.italaw.com/cases/309 (finding a breach of the fair and equitable treatment standard and holding that Argentina violated the expropriation standard).

there are numerous cases where the measures at stake were held to be in breach of the latter, without rising to the level of an indirect expropriation.[63]

2. Expropriation and Full Protection and Security

As explained above, the full protection and security standard has a traditional scope (physical protection and security)[64] and a more controversial and less widely recognized scope (legal protection and security). The expropriation standard overlaps with both. It overlaps with physical protection and security to the extent that state conduct causing physical damage to an investor/investment which entails a substantial deprivation of the investor violates both the full protection and security and the expropriation standard. This may notably occur where state conduct leads to the destruction of the investor's productive facilities in the host state, thus annihilating the value of the investment. An illustrative case law example is the arbitral award rendered in *Wena Hotels v. Egypt*,[65] in which the tribunal held that Egypt's failure to prevent and take remedial measures against the unlawful seizure and occupation of hotels managed by the investor constituted a violation of the full protection and security standard, as well as an indirect expropriation.[66]

The expropriation standard also overlaps with legal protection and security. Where a measure that violates the requirement of legal stability or the investor's legitimate expectations, or that is arbitrary, has an expropriatory effect, it will be in breach of both the full protection and security and the expropriation standard. This may be the case, for example,

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[63] *See, e.g.*, S.D. Myers, Inc. v. Can., *supra* note 26, ¶ 268 (finding a breach of the fair and equitable treatment obligation), ¶¶ 287–88 (holding that no expropriation had occurred); LG&E Energy Corp. v. Argentina (United States-Argentine Republic, ICSID Case No. ARB /02/1, Decision on Liability, ¶¶ 132–39 (substantiating tribunal's conclusion that Argentina breached the fair and equitable treatment standard), ¶¶ 198–200 (explaining why Argentina's conduct did not amount to an indirect expropriation) (Oct. 3, 2006), https://www.italaw.com/cases/621.

[64] See, in addition to the explanations contained in Section III.A above, *Teinver v. Argentina*, *supra* note 41, ¶ 905 (noting that "the traditional notion of full protection and security addresses the protection of property from physical threats and injury").

[65] Wena Hotels Ltd. v. Egypt (United Kingdom-Egypt), ICSID Case No. ARB/98/4, Award (Dec. 8, 2000), https://www.italaw.com/cases/1162.

[66] *Id.* ¶ 77 (holding that Egypt breached the full protection and security standard); *id.* ¶ 101 (deciding that Egypt's conduct amounted to an indirect expropriation).

where the state unlawfully terminates an investment contract (in breach of the investor's legitimate expectations and, possibly, arbitrarily), making it impossible for the investor to carry out any investment-related activities. It may also occur where the competent state authorities refuse to issue or renew a permit needed to carry out business operations, despite prior assurances that such an issuance or renewal would take place.[67]

3. Expropriation and National Treatment

To a certain extent, the expropriation standard also overlaps with the obligation to provide national treatment. As explained above, a measure having an expropriatory effect which is not properly justified on public interest grounds, is adopted in bad faith, or is discriminatory will generally be considered an indirect expropriation. Discrimination in this sense can be understood to encompass nationality-based discrimination. Thus, where a discriminatory measure in breach of the national treatment standard has an expropriatory effect, it will likely violate the expropriation standard.

4. Expropriation and Umbrella Clause

The expropriation standard also overlaps with the protection offered under umbrella clauses. As explained above, umbrella clauses transform specified—in particular, contractual—obligations into obligations arising under an investment treaty. Whenever the breach of such obligations (typically, obligations undertaken under an investment contract) have an expropriatory effect, they may thus constitute an indirect expropriation. In fact, it is very unlikely that a host state will be able to justify contractual breaches on the basis of the pursuit of a legitimate public purpose.

According to the prevailing case law, not all contractual breaches are capable of amounting to a violation of the umbrella clause or of the expropriation standard. A prerequisite for such a characterization is that the

[67] It must be noted that while the tribunal found a violation of the fair and equitable treatment standard, it denied the existence of a breach of the full protection and security provision. This is because the *TECMED* tribunal construed that provision narrowly, viewing it as limited to physical protection and security. *See TECMED*, *supra* note 61, ¶¶ 152–74 (addressing the question of whether Mexico violated the obligation to provide fair and equitable treatment), ¶¶ 175–81 (containing the tribunal's analysis of the violation of the full protection and security standard).

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obligation at stake must have been undertaken and/or the breach must have been committed in the exercise of sovereign authority.[68] While this limits the reach of the umbrella clause and expropriation standards and, thus, indirectly, the area of overlap between the two, a broad range of scenarios still fall within the spheres of application of both. For instance, where the host state unlawfully terminates a concession agreement and awards it to a local entity, or where it breaches the stabilization clause contained in such an agreement,[69] such breaches would in principle violate both the umbrella clause and the expropriation standard (provided, of course, that they produce an expropriatory effect).

5. Fair and Equitable Treatment and Full Protection and Security

If there is one overlap between investment protection standards that is widely acknowledged, it is the one between the fair and equitable treatment standard and the obligation to provide full protection and security. The existence of this overlap has been highlighted by scholarly writers such as Cordero Moss, Junngam, Miljenić, and Reinisch & Schreuer;[70] it has also been noted in arbitral decisions.[71]

The overlap between these two standards is particularly substantial where the full protection and security standard forms part of the obligation to provide fair and equitable treatment, *i.e.*, where it is viewed as one specific requirement of the latter obligation.[72] Where such an approach is followed, a

[68] *See supra* Sections III.A, III.E.

[69] That the breach of a stabilization clause could qualify as a violation of a treaty's umbrella clause has notably been recognized by the tribunal in El Paso v. Argentina. *See* El Paso Energy Int'l Co. Claimant v. Argentina, *supra* note 58 (noting that the umbrella clause of the applicable treaty covered "additional investment protections contractually agreed by the State as a sovereign—such as a stabilization clause—inserted in an investment agreement."). *See also* Revere Copper & Brass, Inc. v. Overseas Priv. Inv. Corp., Case No. 1610013776, Award, Am. Arb. Ass'n, ¶¶ 107–33 (Aug. 24, 1978), https://jusmundi.com/en/document/decision/pdf/en-revere-copper-and-brass-inc-v-overseas-private-investment-corporation-award-thursday-24th-august-1978 (holding that the breach of the contractual stabilization clause by Jamaica constituted expropriatory action in the sense of the investment contract).

[70] *See supra* note 10 and accompanying text.

[71] *See, e.g.*, Stati v. Kaz., SCC Arbitration V (116/2010), Award, ¶ 1256 (Dec. 19, 2013) ("[T]he protections granted in this regard [under the full protection and security clause] and by the FET [fair and equitable treatment] obligation overlap, though it may be arguable to which extent.").

[72] *See, e.g.*, Agreement between the Kingdom of the Netherlands and the Republic of Poland on Encouragement and Reciprocal Protection of Investments, Neth.-Pol., arts. 3(1), 3(2), Sept. 7, 1992, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2074/download;

breach of the full protection and security obligation necessarily entails a violation of the broader duty to provide fair and equitable treatment. This approach, and its implications, conflict with the more common view that fair and equitable treatment and full protection and security are separate if partially overlapping standards.[73] The analysis presented below assumes that the full protection and security standard does not formally constitute a sub-requirement of the fair and equitable treatment obligation.

The fair and equitable treatment obligation presents, first of all, a certain degree of overlap with the traditional concept of full protection and security, *i.e.*, with the obligation to protect investors/investments from physical injury, damage, or interference. Even though the fair and equitable treatment standard is mostly concerned with non-physical forms of treatment, it does, as has been explained above, apply to certain forms of physical interference, given that it prohibits host states from subjecting investors to harassment or coercion.[74] Where, for example, state employees block access to the investor's plant, making it impossible for the investor to carry out manufacturing activities, such conduct would in principle qualify both as harassment in breach of the fair and equitable treatment standard and as a violation of the obligation to provide full protection and security.

There is an even larger area of overlap between fair and equitable treatment and the more controversial notion of legal protection and security. The latter includes, as has been pointed out in Section III.C, legal stability and respect for the investor's legitimate expectations, as well as protection from arbitrary measures. Since all these protections are covered by the concept of fair and equitable treatment,[75] a violation of the obligation to provide legal protection and security necessarily entails a breach of the fair and equitable treatment standard.

Agreement between the Government of the French Republic and the Government of the Argentine Republic Concerning the Promotion and Reciprocal Protection of Investments (translation by the author), Fr.-Arg., art. 5(1), July 3, 1991, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/91/download.

[73] *See* REINISCH & SCHREUER, *supra* note 10, at 554–58 (discussing arbitral decisions following this more common approach).

[74] *See supra* Section III.B.

[75] *See supra* Section III.B.

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6. Fair and Equitable Treatment and National Treatment

The fair and equitable treatment obligation also partly overlaps with the national treatment standard.[76] In fact, as has been explained above, one component of fair and equitable treatment is the absence of discrimination. This protection can be viewed as covering various forms of discriminatory measures, including distinctions based on nationality. Where a measure violates the national treatment standard—which notably implies that the differentiation is not justified on public interest grounds—it is thus very likely that it will also be in breach of the broader obligation to provide fair and equitable treatment.

7. Fair and Equitable Treatment and Umbrella Clause

The fair and equitable treatment standard also partially overlaps with the protection offered under umbrella clauses. In fact, as has been highlighted, one constitutive element of fair and equitable treatment is compliance by the host state with contractual commitments undertaken *vis-à-vis* the investor,[77] which—as has also been explained[78]—happens to be the main focus of umbrella clauses. It is true that not all contractual breaches will qualify as breaches of the fair and equitable treatment standard or of an umbrella clause, given that many tribunals require that the underlying obligation be undertaken, or the breach committed, in the exercise of the state's sovereign authority. However, despite such restrictions, there are numerous scenarios where contractual breaches are likely to violate both the fair and equitable treatment obligation and the umbrella clause.[79]

[76] *See* Bjorklund, *supra* note 10, at 32 ("[A]nother area of potential overlap [between the national treatment and other standards] is in a State's obligation to provide 'fair and equitable' treatment, which encompasses a non-discrimination obligation in some instances.").

[77] *See supra* Section III.B.

[78] *See supra* Section III.E.

[79] One example is the violation by the host state of a stabilization clause contained in an investment contract. Such a breach would in principle violate both the fair and equitable treatment standard and the umbrella clause.

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8. Full Protection and Security and National Treatment

If the full protection and security standard was limited to physical protection and security, then the potential for overlap with the obligation to grant national treatment to foreign investors and/or investments would be rather limited. In fact, the former focuses on physical interferences, while the latter targets legal and *de facto* discrimination, neither of which generally affects the physical safety of the investor or the investor's assets.[80] However, with the extension of the standard to legal protection and security, any analysis of possible overlaps has become more complex. In fact, breaches of the national treatment obligation could be considered violations of an investor's legitimate expectations (the expectation not to be discriminated against) and/or as arbitrary, and thus could also constitute violations of the full protection and security standard.

9. Full Protection and Security and Umbrella Clause

As has been explained above, the primary function of umbrella clauses is to offer investors treaty protection from contractual breaches by the host state.[81] Such breaches are in principle outside of the scope of the full protection and security standard as it is traditionally understood. They may, however, fall within the sphere of the more extensive notion of legal protection and security. In fact, an investor's legitimate expectations—respect for which is required under the principle of legal protection and security—can be understood to include the investor's expectation that the host state will comply with the contractual obligations it has undertaken *vis-à-vis* the investor. In that sense, the violation of an umbrella clause will almost inevitably entail a breach of the obligation to provide full (legal) protection and security.

[80] A review of the existing investment arbitration case law dealing with claims alleging the violation of the national treatment standard suggests that the alleged violations only very rarely, if ever, pertain to the physical security and protection of the investor or the investment. *See, e.g.*, Matteo Sarzo, *The National Treatment Obligation*, *in* 12 GENERAL PRINCIPLES OF LAW AND INTERNATIONAL INVESTMENT ARBITRATION 378 (Andrea Gattini et al. eds., 2018).

[81] *See supra* Section III.E.

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10. National Treatment and Umbrella Clause

No apparent overlaps exist between the national treatment standard and the protection offered by umbrella clauses, given that these two standards of protection address entirely different problems. However, this does not exclude the possibility that particular measures could violate both standards. If, for example, a host state unlawfully terminated all mining concession agreements entered into with foreign investors while maintaining those concluded with domestic entities, such a measure would likely violate both the umbrella clause and the national treatment standard.[82]

C. Summary and Conclusions

The above analysis suggests that overlaps between treaty standards of investment protection are very frequent. In fact, overlaps have been observed in nine out of the ten scenarios examined in this Article. In four scenarios, one standard of protection appears to be a sub-category of the other standard, *i.e.*, the violation of one standard will necessarily entail a violation of the other. Only one scenario did not present any genuine potential for overlap. Table 2 below summarizes these findings and defines, tentatively, the respective areas of overlap.

Table 2 Summary of Findings and Areas of Overlap

	Standards of Protection	**Overlap Yes/No**	**Area of Overlap**
1	Expropriation and fair and equitable treatment	Yes	An indirect expropriation necessarily constitutes a breach of the fair and equitable treatment standard
2	Expropriation and full protection and security	Yes	1) Measures causing physical damage to investor/investment having expropriatory effect (overlap with physical protection and security) and 2) measures violating legal stability or investor's legitimate

[82] A comparable fact pattern existed in *LG&E Energy Corp.*, ICSID Case No. ARB /02/1, at ¶¶ 147–48, ¶ 175. In this case, Argentina's conduct was found to be discriminatory, though technically not in breach of the national treatment standard, and in violation of the treaty's umbrella clause.

	Standards of Protection	**Overlap Yes/No**	**Area of Overlap**
			expectations, or arbitrary measures, having expropriatory effect (overlap with legal protection and security)
3	Expropriation and national treatment	Yes	Measures in breach of national treatment standard having expropriatory effect
4	Expropriation and umbrella clause	Yes	Contractual breaches of obligations undertaken, or committed, in the exercise of sovereign authority having expropriatory effect
5	Fair and equitable treatment and full protection and security	Yes	1) Harassment and coercion of investor (overlap with physical protection and security) and 2) measures violating legal stability or investor's legitimate expectations, or arbitrary measures (overlap with legal protection and security)
6	Fair and equitable treatment and national treatment	Yes	A breach of the national treatment standard necessarily entails a breach of the obligation to provide fair and equitable treatment
7	Fair and equitable treatment and umbrella clause	Yes	A breach of an umbrella clause necessarily entails a breach of the fair and equitable treatment standard
8	Full protection and security and national treatment	Yes	Measures in breach of the national treatment standard that violate legal stability or investor's legitimate expectations, or that are arbitrary
9	Full protection and security and umbrella clause	Yes	A breach of an umbrella clause necessarily entails a violation of the full protection and security standard (legal protection and security)
10	National treatment and umbrella clause	No	No overlap

V. CAUSES OF CONCEPTUAL OVERLAPS

A. Identification of Causes

Two factors account for overlaps between standards of protection contained in investment treaties: treaty drafting and arbitral interpretation. To what extent a particular instance of overlap is due to broad/vague treaty drafting and/or extensive arbitral interpretation is often difficult to ascertain because it is virtually impossible to determine the "natural" spheres of the relevant standards (as they derive from the language of the treaty) and distinguish such spheres from the ones established by arbitral case law. This does not mean, however, that it is not possible to identify concrete examples of both broad/vague treaty drafting and extensive arbitral construction.

B. Broad and/or Vague Treaty Drafting

There are two main reasons why treaty language used to refer to, or define, investment protection standards potentially cause overlaps with other standards. The relevant wording may, first of all, be excessively broad; *i.e.*, it may encroach upon the spheres of application of other standards. Another possible defect of treaty language is its vagueness; *i.e.*, the fact that the terms used to define a particular standard are inherently unclear and ambiguous and thus susceptible of multiple interpretations.

Instances of unduly broad treaty language include, for example, the almost universally accepted inclusion of indirect expropriation within the scope of the expropriation standard. As has been explained above, coverage of indirect expropriation notably leads to substantial overlap with the fair and equitable treatment standard, as well as to potential overlaps with the obligation to provide full protection and security.[83] Another example of broad treaty definitions is the umbrella clause which, due to its "sweeping"

[83] *See supra* Sections IV.B.1, IV.B.2.

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transformative effect,[84] creates overlaps with various other standards, most significantly with the fair and equitable treatment standard.[85]

Vagueness is an issue that affects many, if not most, investment protection standards.[86] A particularly useful example of an inherently ambiguous standard is the obligation to provide fair and equitable treatment.[87] To begin with, the similarity of the terms "fair" and "equitable" raises the question of whether these terms refer to the same concept (in which case, one term would be redundant) or whether this standard encapsulates two separate requirements (in which case one would have to determine how fairness and equity differ from each other).[88] More fundamentally, requirements of fairness or equity are inherently subjective and the absence of any further clarification regarding the nature of the relevant requirements, the applicable threshold, or possible exceptions/defences opens the door to a broad range of possible interpretations which, in turn, may generate overlaps with other treaty standards.

C. Expansive Interpretation

Several of the overlaps identified in this study are caused, at least in part, by extensive (or expansive) interpretation of investment protection standards.

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[84] The term "sweeping" was used by the arbitral tribunal in *SGS*, ICSID Case No. ARB/01/13, ¶ 363. It was the perceived unreasonableness of this far-reaching effect that prompted the tribunal to hold that the parties to an investment treaty should be presumed not to have intended an umbrella clause to have the effect of elevating (all) obligations undertaken *vis-à-vis* the investor to treaty obligations.

[85] *See supra* Section IV.B.7.

[86] *See* VALENTINA VADI, PROPORTIONALITY, REASONABLENESS AND STANDARDS OF REVIEW IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 11 (2018) (referring to the vagueness of investment protection standards contained in investment treaties); Stephan W. Schill, *Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach*, 52 VA. J. INT'L L. 57, 66–67 (2011) (noting that one problem of the current system of international investment protection is "the vagueness, or even ambiguity, of investment treaties, which, on the basis of broadly formulated principles of investment protection, restrict state sovereignty without giving arbitral tribunals clear guidance as to the scope of obligations assumed under the treaties").

[87] Charles H. Brower II, Murray J. Belman, J. Christopher, Thomas Coe & Jack J. Coe, *Fair and Equitable Treatment Under NAFTA's Investment Chapter*, 96 AM. SOC'Y INT'L L. 9, 11 (2002). The authors acknowledge the vagueness of the fair and equitable treatment standard but consider it intentional, arguing that this standard was "designed to give adjudicators the power to articulate the range of principles necessary to achieve the treaty's purpose in particular disputes."

[88] *See* DOLZER & SCHREUER *supra* note 24, at 133 (stating that "[t]he general assumption appears to be that 'fair and equitable treatment' must be considered to represent a single, unified, standard").

One can speak of expansive interpretation when two or more distinct interpretive approaches are possible, and the arbitral tribunal opts for the broader or broadest one. A prime example of such an interpretive attitude is the holding that the full protection and security standard is not limited to physical protection and security, but also extends to legal security and protection. As has been shown above, this approach creates substantial overlap with the obligation to provide fair and equitable treatment.[89]

Such an expansive construction of the notion of full protection and security stems from what can tentatively be labelled as a literal interpretative approach. While justifications are absent from a number of rulings that have attributed a broad meaning to the full protection and security standard,[90] at least one tribunal has explained that its interpretive finding was based on the observation that the standard was not expressly limited to physical protection and security.[91] The same tribunal also pointed out that the prohibition of harassment was an accepted component of full protection and security, and that such harassment was not necessarily confined to physical harassment.[92]

VI. POSSIBLE REMEDIES

A. Adjustments in Treaty Drafting

Different types of adjustments in treaty drafting are conceivable in order to avoid, or reduce the potential for, overlaps between investment protection standards. The most drastic form of adjustment would be the omission of one or several standards. Less radically, one could seek to restrict or limit the scope of certain standards. In other cases, appropriate adjustments may consist of the inclusion of more detailed definitions or clarifications.

An investment protection standard whose omission may be appropriate is the umbrella clause. As has been explained above, it is highly likely that breaches of an umbrella clause are also covered by the fair and equitable

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[89] *See supra* Section IV.B.5.

[90] *See, e.g.*, CME v. Czech Republic, 403/VERMERK/2001/CME at ¶ 613; CSOB v. Slovakia (Czech Republic-Slovak Republic, ICSID Case No. ARB/97/4 at ¶ 170, https://www.italaw.com/cases/238.

[91] Vivendi, ICSID Case No. ARB/97/3 at ¶ 7.4.15.

[92] *Id.* ¶ 7.4.17.

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treatment standard.[93] The almost universal inclusion of fair and equitable treatment provisions in investment treaties thus renders umbrella clauses largely superfluous. In addition, given that they elevate breach-of-contract claims to treaty claims, umbrella clauses are one of the root causes of parallel proceedings and the various ensuing problems.[94] It is, therefore, not surprising that many recent investment treaties do not contain umbrella clauses.[95]

As regards the expropriation standard, it appears sensible to exclude indirect expropriation from its scope. Indeed, if it is correct that a measure amounting to indirect expropriation necessarily violates the fair and equitable treatment standard, then it is not necessary for it to also be captured by the expropriation standard. It is interesting to note in this respect that several recently concluded investment treaties expressly limit the reach of the expropriation standard to direct expropriation.[96] Admittedly, however, the main justification for such exclusions of indirect expropriation is not so much the desire to avoid overlaps between investment protection standards as the perceived need to preserve the "regulatory space" of host states.[97] Recent treaties that continue to apply the expropriation standard to indirect expropriation generally include clarifications regarding the meaning and scope of the concept.[98]

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[93] *See supra* Section IV.B.7.

[94] *But see* KATIA YANNACA-SMALL, *Contribution*, THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 1010, 1030 (Peter Muchlinski et al. eds., 2008) (noting that, somewhat ironically, umbrella clauses are regarded as tools for the avoidance of parallel proceedings).

[95] Umbrella clauses are absent from the vast majority of recently concluded investment treaties. According to UNCTAD's World Investment Report 2021, twenty-one international investment agreements were concluded in 2020. Twelve of those were rollover agreements concluded by the United Kingdom following its withdrawal from the European Union. As regards the nine remaining agreements, none of them feature an umbrella clause. See U.N. Conference on Trade and Development, *World Investment Report 2021—Investing in Sustainable Development*, UNCTAD/WIR/2021, 131 (Dec. 2021).

[96] *See, e.g.*, Investment Cooperation and Facilitation Treaty between the Federative Republic of Brazil and the Republic of India, Braz.-India, art. 6(3) (Jan. 25, 2020), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5912/download ("For greater certainty, this Treaty only covers direct expropriation, which occurs when an investment is nationalised or otherwise directly expropriated through formal transfer of title or outright seizure.").

[97] *World Investment Report 2021*, *supra* note 95, at 132.

[98] *See, e.g.*, Agreement between the Government of Hungary and the Government of the Kyrgyz Republic for the Promotion and Reciprocal Protection of Investments, Hung.-Kyrg., art. 6(2) (Sept. 29, 2020), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6037/download; Agreement between the Kingdom of Morocco and Japan for the Promotion and Protection of Investment, Japan-Morocco, Annex referred to in Article 9 Expropriation and Compensation (Jan. 8,

As far as the full protection and security standard is concerned, the avoidance of overlaps with the obligation to provide fair and equitable treatment would be furthered by an express limitation of its scope to physical protection and security.[99] Also, for the sake of conceptual clarity, it would be vital to recognize that the obligation to provide full protection and security is formally independent of the fair and equitable treatment standard, which, as has been shown above,[100] is not always the case.

If investment treaties incorporate the above-mentioned adjustments (*i.e.*, omission of an umbrella clause, limitation of the expropriation standard to direct expropriation, and clarification of the scope of the obligation to provide full protection and security), no substantial changes are necessary as far as the fair and equitable treatment standard is concerned. It would evidently be desirable to clarify the meaning and scope of this standard and most recently concluded investment treaties do indeed contain such clarifications, notably in the form of lists of measures in breach of the fair and equitable treatment obligation.[101]

B. Interpretive Remedies

What interpretive approaches arbitral tribunals should follow to avoid overlaps between investment protection standards evidently depends on what adjustments are made at the level of treaty drafting, if any. Indeed, modifications of treaty language and interpretive adjustments are alternative solutions to a common problem (overlaps between treaty standards).

2020), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5908/download; Agreement between the Government of the State of Israel and the Government of the United Arab Emirates on Promotion and Protection of Investments, Isr.-U.A.E., Annex A—Expropriation (Oct. 20, 2020), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6084/download.

[99] It appears, however, that such restrictions have not yet found their way into contemporary international investment agreements.

[100] *See supra* Section IV.B.5.

[101] *See, e.g.*, Agreement between the Government of Hungary and the Government of the Kyrgyz Republic for the Promotion and Reciprocal Protection of Investments, *supra* note 98, art. 2(3); Investment Cooperation and Facilitation Treaty between the Federative Republic of Brazil and the Republic of India, *supra* note 96, art. 4(1) (note that this provision merges the fair and equitable treatment and full protection and security standards into one single "treatment" standard).

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The most interesting issue arising in connection with interpretive remedies is not the identification of particular interpretive outcomes, but the possibility of justifying such outcomes under the applicable rules of treaty interpretation. There is, in fact, no interpretive principle that expressly obliges or encourages courts or arbitral tribunals to interpret an investment protection standard in such a way as to avoid overlaps with other such standards. What rules of treaty interpretation authorize a court or arbitral tribunal to take into account and seek to resolve the problem of overlapping treaty standards?

Two recognized interpretive rules or approaches may do the trick. The first such rule is the principle of effectiveness or *effet utile* under which a treaty provision should be construed in such a manner as not to deprive the said provision, nor any other provision contained in the treaty, of its meaning or usefulness.[102] Where a treaty provision is interpreted in such a way as to generate an overlap, in whole or in part, with another treaty provision, such an interpretation can be considered as undermining the effectiveness of the norm that is being interpreted and/or the norm with which it is found to overlap.[103]

Another interpretive approach, which is part of the general rule of treaty interpretation set forth in Article 31(1) of the Vienna Convention on the Law of Treaties,[104] is to take into account the context of the treaty. The notion of context refers *inter alia* to the textual context, *i.e.*, to the other provisions of a given treaty.[105] Contextual interpretation thus mandates that those other provisions be taken into account and that the overall normative coherence and consistency of the treaty be preserved. An interpretation that leads to overlaps between investment protection standards arguably frustrates the achievement of these objectives.

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[102] *See generally* TARCISIO GAZZINI, INTERPRETATION OF INTERNATIONAL INVESTMENT TREATIES 169–75 (2016) (discussing this interpretive principle and its relevance for international investment law).

[103] For scholarly commentary expressing this view, see Jungam, *supra* note 10, at 80–81 ("Construing the FPS [full protection and security] standard more extensively entails its overlap with the FET [fair and equitable treatment] standard, depriving the latter of its meaning. So doing is thus inconsistent with the principle of *effet utile*.").

[104] Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, 1155 U.N.T.S 331 ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.").

[105] *See* RICHARD K. GARDINER, TREATY INTERPRETATION 202, 205 (2d ed. 2015) (explaining that the notion of context notably includes "any structure or scheme underlying a provision or the treaty as a whole" and "[r]elated and contrasting provisions" contained in the treaty).

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VII. CONCLUSION

Based on the—partly demonstrated—assumption that overlaps between investment protection standards are inefficient, this Article has explored the frequency and magnitude of such overlaps. Focusing on the expropriation, fair and equitable treatment, full protection and security, national treatment, and umbrella clause standards, it has shown that overlaps are frequent and often substantial. This study has also analysed the causes of this phenomenon and discussed possible remedies to avoid, or at least limit, the occurrence of overlaps. The analysis contained in this contribution can thus provide useful guidance to both treaty drafters and arbitral tribunals called upon to interpret investment protection standards.

While this Article has focused on the problem of inefficiency, this is not the only concern that the existence of overlaps between investment protection standards raises. Another issue is that overlaps, inasmuch as they allow claims to be brought on multiple legal bases, potentially favor investors over host states. Overlaps also blur the boundaries between the different standards of protection, thus creating uncertainty as to the meaning of individual standards. Exploration of these questions would be welcome since it would contribute to a fuller understanding of the problem of conceptual overlaps.

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