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ARTICLE

# How Informed is Sovereign Consent to Investor-State Arbitration?

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## I. INTRODUCTION

Argentina's recent history of international investment disputes highlights the role of sovereign consent in investor-State dispute resolution. Argentina has been a frequent party to both litigation in the United States and international investment arbitration based on its consent to dispute-resolution provisions in bond agreements and bilateral investment treaties (BITs). Argentina's consent to these methods of dispute resolution is often invoked in response to complaints about the treatment of Argentina in both fora. In other words, the fact that Argentina freely consented to these fora and the applicable law selected in the contracts and treaties is a strong argument for the legitimacy of the processes and resulting awards and judgments.

This article addresses the distinctions between sovereign consent to litigation in national courts and sovereign consent to BITs, especially early or first-generation BITs like those at issue in the arbitrations against Argentina. While consent may be a strong

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argument for the legitimacy of the U.S. judgments against Argentina, consent has less force in the context of BIT arbitration because sovereigns like Argentina had much less information about the procedural and substantive realities of BIT arbitration before they entered into the treaties.

Generally speaking, a sovereign that subjects itself to the jurisdiction of national courts applying national law in a contract setting puts itself in the position of a commercial actor and private party. It has the opportunity, before doing so, to understand the national law that will be applied to, among other things, the counterparty's substantive rights, limits on the sovereign's ability to change the contract, and remedies for breach. With regard to New York contract law and U.S. federal procedural law (the applicable law in the U.S. cases against Argentina), contracting sovereigns have comparative advantages in seeking pre-consent information. The New York state and U.S. federal common-law systems are built on written decisions and binding precedent. And the substantive and procedural law in New York state and the Second Circuit is particularly well-developed, as it is not difficult to find binding decisions of appellate courts in those jurisdictions on a range of issues that would be relevant to understanding contractual rights and remedies. Moreover, a sovereign agreeing to national-court litigation to resolve contractual disputes can reasonably foresee, at the time of contracting, the types of disputes that might arise, and therefore better inform itself of the relevant law.

Of course, the legitimacy of a decision and its correctness are different things. One can still take issue with the latter while accepting the former. Whether or not one believes the U.S. federal courts correctly decided the bondholders' claims against Argentina, it is hard to argue that Argentina did not give informed consent to resolving disputes regarding its bond obligations in U.S. courts under U.S. law, and, that the process and resulting judgments were therefore legitimate.[1]

In contrast, sovereigns that agree to international arbitration in investment treaties issue standing offers to nationals of the other contracting States without the same information that might be obtained before consenting to national-court jurisdiction as part of a bond offering. This information deficit is especially pronounced with regard to first-generation BITs. Sovereigns like Argentina that

1. *See infra* Parts II, IV.

entered into BITs in the 1990s did so many years before the bulk of the claims against those States arose. In addition, the jurisdictional and substantive provisions of most BITs are vague and opened-ended and, in most cases, not easily understood with reference to decisional or other sources of law.[2] For example, while Argentina might have consulted, pre-contract, a New York lawyer to explain with relative certainty the potential remedies against it for failure to make payment under a bond indenture—and the risk of an adverse ruling under the *pari passu* clause—Argentina would have had far less ability to understand with any certainty, pre-treaty, what constitutes an "investment" and what conduct breaches a guarantee of "fair and equitable treatment" under a BIT. And, unlike the decisions of New York and U.S. federal courts, arbitral tribunals are not bound by prior decisions and are not based on a long history of public decisions subject to appellate review.[3]

In short, sovereign States' consent to early BITs may not have been all that informed, calling into question consent as an argument for the legitimacy of investor-State awards.

## II. A BRIEF BACKGROUND ON THE CLAIMS AGAINST ARGENTINA

A thorough summary of the many claims against Argentina relating to measures it has taken in response to its economic crises is beyond the scope of this Article and, in any event, unnecessary here. A brief background serves solely to put in context the discussion that follows.

From 1991 through 2001, Argentina issued more than $186.7 billion in bonds.[4] The bonds at issue in the U.S. cases against Argentina had maturity dates ranging from 2005 through 2031.[5] The bond documents included a *pari passu* clause, which stated:

> The Securities will constitute . . . direct, unconditional, unsecured and unsubordinated obligations of the Republic and shall at all times rank *pari passu* without any preference among themselves. The payment

2. Stephan W. Schill, *System-Building in Investment Treaty Arbitration and Lawmaking*, 12 GERMAN L. J. 1083, 1103 (2011).

3. *Id.* at 1094.

4. Abaclat v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, ¶ 50 (Aug. 4, 2011).

5. NML Capital, Ltd. v. Republic of Argentina, 699 F.3d 246, 251 (2d Cir. 2012).

> obligations of the Republic under the Securities shall at all times rank at least equally with all its other present and future unsecured and unsubordinated External Indebtedness . . . .[6]

The bond agreements are governed by New York law, contain a New York forum-selection clause, and include a waiver of sovereign immunity.[7] The bonds were transferrable and were accordingly purchased and sold on the secondary market.[8] The bond agreements did not contain a collective-action clause, which would have permitted Argentina to amend the terms of the bonds if a sufficient number of bondholders agreed.[9]

Argentina experienced a severe economic crisis from approximately 1998 through 2002, which led Argentina to default on its foreign debt in December 2001 and caused Argentina to implement a series of emergency measures, including abandoning its convertibility regime, which had pegged the Argentine peso to the U.S. dollar.[10] These measures led foreign investors to commence numerous arbitrations against Argentina under BITs.[11] Claimants have asserted, among other things, that their rights under Argentina's bonds were deprived in violation of BIT protections of fair and equitable treatment, full protection and security, adequate compensation following expropriation, and other treaty standards.[12] Claimants have also alleged that Argentina's emergency measures harmed investments in energy, water, electricity, and other sectors in

6. *Id.* (emphasis omitted).

7. *Id.* at 253–54, 263.

8. *Id.* at 251.

9. *Id.* at 253.

10. *Id.* at 250–51; INT'L MONETARY FUND, INDEPENDENT EVALUATION OFFICE, THE IMF AND ARGENTINA, 1991-2001, at 3 (2004), *available at* http://www.ieo-imf.org/ieo/files/completedevaluations/07292004report.pdf.

11. According to the website of the International Centre for Settlement of Investment Disputes (ICSID), Argentina has been a respondent in 51 arbitrations conducted at ICSID, many of which were suspended (likely due to settlement) before reaching a reported decision or award. INT'L CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/AdvancedSearch.aspx?rntly=ST4 (last visited Feb. 22, 2015). By the author's own count, approximately 20 of the ICSID cases against Argentina concern measures taken as a result of the 1998-2002 crisis. *See id*.

12. Alemanni v. Argentine Republic, ICSID Case No. ARB/07/8, Decision on Jurisdiction and Admissibility, ¶¶ 31, 33–35 (Nov. 17, 2014); Abaclat v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, ¶¶ 238–39 (Aug. 4, 2011); Daimler Financial Services AG v. Argentine Republic, ICSID Case No. ARB/05/1, Award, ¶¶ 41–42 (Aug. 22, 2012).

violation of various BIT provisions.[13]

With regard to its external debt, Argentina offered exchange bonds in 2005 and 2010.[14] Under the terms of these restructurings, bondholders exchanged their defaulted bonds for new bonds at a rate of 25 to 29 cents on the dollar.[15] Argentina restructured more than 90% of its foreign debt through these bond exchanges.[16] Argentina made payments on the exchange bonds, but, did not do so on the bonds on which it defaulted in 2001.[17] From 2009 through 2011, so-called "holdout" bondholders, who did not accept the bond restructurings, sued Argentina in the U.S. District Court for the Southern District of New York for breach of contract.[18] The district court and the U.S. Court of Appeals for the Second Circuit both held that Argentina violated the *pari passu* clause of the bond agreements when it paid the exchange bondholders but not the holdouts.[19] The district court enjoined Argentina from making payments to the exchange bondholders if it did not make proportional payments to the holdout bondholders; the Second Circuit upheld this injunction.[20] Rather than comply with the injunction, Argentina defaulted on the exchange bonds in July 2014.[21]

## III. THE IMPORTANCE OF SOVEREIGN CONSENT

Argentina was subject to suit in U.S. courts by bondholders and before arbitral tribunals by foreign investors based on its consent to those fora. Like many sovereigns, Argentina chose to subject itself to

13. *See* EDF Int'l S.A. v. Argentine Republic, ICSID Case No. ARB/03/23, Award, ¶¶ 141–69, 199–202 (June 11, 2012) (discussing Argentina's emergency measures and injury to a claimant's investments generally); Total S.A. v. Argentine Republic, ICSID Case No. ARB/04/1, Decision on Liability, ¶¶ 25–29 (Dec. 27, 2010) (discussing harm to investments in Argentine energy industries); El Paso Int'l Co. v. Argentine Republic, ICSID Case No. ARB/03/15, Decision on Jurisdiction, ¶¶ 25–33 (Apr. 27, 2006) (same); CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Award, ¶¶ 68–73 (May 12, 2005) (same).

14. *NML Capital*, 699 F.3d at 251.

15. *Id.* at 252.

16. *Id.* at 253.

17. *Id.* at 251, 253.

18. *Id.* at 253.

19. *Id.* at 259–60.

20. *Id.* at 261–63.

21. *See* Nicole Hong et al., *Argentine Debt Feud Finds Much Fault, Few Fixes*, WALL ST. J., Aug. 1, 2014, http://www.wsj.com/articles/argentina-mulls-legal-options-in-debt-dispute-1406814851 (discussing Argentina's decision to default after the U.S. district court's ruling rather than come to an agreement with holdout investors).

suit in exchange for the financial benefits of access to the international bond markets and the perceived benefits of foreign direct investment. But it is important not to overlook the fundamental and extraordinary nature of sovereign consent to international dispute resolution. Sovereign consent to resolving disputes before an international forum or a foreign State's courts are an exception to principles of State sovereignty and sovereign immunity. As the Permanent Court of International Justice put it, "[i]t is well established in international law that no State can, without its consent, be compelled to submit its disputes . . . either to mediation or to arbitration, or to any other kind of pacific settlement."[22] Moreover, the first principle of international arbitration is that it is a consensual means of binding dispute resolution.[23] And so the legitimacy of the process and resulting award in arbitration is always based in large measure on the consent of the parties.[24] Without party consent, the tribunal has no jurisdiction to resolve the dispute.

In his dissenting opinion in *BG Group, PLC v. Republic of Argentina*,[25] Chief Justice John G. Roberts cogently explained the importance of sovereign consent to international dispute resolution:

> It is no trifling matter for a sovereign nation to subject itself to suit by private parties; we do not presume that any country—including our own—takes that step

22. Status of Eastern Carelia, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 5, at 27 (July 23).

23. *See, e.g.*, Granite Rock Co. v. Teamsters, 561 U.S. 287, 299 (2010) ("[T]he first principle that underscores all of our arbitration decisions: Arbitration is strictly 'a matter of consent.'" (quoting Volt Info. Scis., Inc. v. Board of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989))); Iberdrola Energía S.A. v. Republic of Guatemala, ICSID Case No. ARB/09/5, Award, ¶ 291 (Aug. 17, 2012) ("It is not a disputed point that the consent of the parties is the fundamental basis of arbitration."); George A. Bermann, *Arbitration Fundamental: Arbitrability Trouble*, 23 AM. REV. INT'L ARB. 367, 370 (2012) ("Legal systems that fail adequately to ensure a party's consent to arbitration before compelling it to arbitrate run a very real risk of compromising arbitration's very legitimacy as a mode of alternative dispute resolution.").

24. *See* CDC Group PLC v. Republic of the Seychelles, ICSID Case No. ARB/02/14, Decision on Application for Annulment, ¶ 40 (June 29, 2005) ("[A] Tribunal's legitimate exercise of power is tied to the consent of the parties . . . ."); Nienke Grossman, *The Normative Legitimacy of International Courts*, 86 TEMP. L. REV. 61, 65 (2013) ("State consent is one traditional approach to normative legitimacy. The idea is that international institutions, including international adjudicative bodies, derive legitimacy from the consent of states to their jurisdiction. The state consent approach legitimates authority by focusing on its sources or origins.") (footnotes omitted).

25. 134 S. Ct. 1198 (2014).

> lightly. But even where a sovereign nation has subjected itself to suit in its own courts, it is quite another thing for it to subject itself to international arbitration. Indeed, "[g]ranting a private party the right to bring an action against a sovereign state in an international tribunal regarding an investment dispute is a revolutionary innovation" whose "uniqueness and power should not be over-looked." That is so because of both the procedure and substance of investor-state arbitration.[26]

As Chief Justice Roberts noted, sovereign consent to suit in any forum must be appreciated as exceptional in that is a voluntary relinquishment of sovereign immunity. In the context of investor-State arbitration, consent to suit is even more notable, both from the perspective of the international system and of States themselves. Investor-State arbitration is an alternative to litigation in the host State's courts, with its attendant biases (actual or perceived), which might deter foreign direct investment. It is also an alternative to physical force or gun-boat diplomacy.[27] So the fact that a sovereign has consented to an international forum for the resolution of disputes is of obvious importance to the international legal system. It is also quite important from sovereigns' perspectives when one considers the types of disputes that have been brought before investor-State tribunals. The next section addresses some of the reasons that consent to investor-State arbitration is different than sovereign consent to other means of dispute resolution.

## IV. WHAT MAKES INVESTMENT-TREATY ARBITRATION DIFFERENT

Chief Justice Roberts aptly stated that the "procedure and substance of investor-state arbitration" make sovereign consent to investment arbitration different than consent to other forms of dispute resolution, including litigation in a foreign State's courts.[28] These features make it particularly difficult for sovereigns to have predicted, before ratifying BITs, what treaty arbitration had in store for them. In other words, States' consent to first-generation BITs

26. *Id.* at 1219–20 (Roberts, C.J., dissenting) (internal citation omitted) (quoting JESWALD W. SALACUSE, THE LAW OF INVESTMENT TREATIES 137 (2010)).

27. *See, e.g.*, KENNETH J. VANDEVELDE, BILATERAL INVESTMENT TREATIES: HISTORY, POLICY, AND INTERPRETATION 29 (2010) ("Between 1820 and 1914, Great Britain used military force at least forty times in Latin America to protect its subjects and their property.").

28. *BG Grp.*, 134 S. Ct. at 1220 (Roberts, C.J., dissenting).

was not as fully informed as it might have been with regard to litigating or arbitrating in a different forum under a developed national law, such as Argentina's consent to litigating disputes with bondholders in New York under New York law.

First, as Chief Justice Roberts also noted, "[s]ubstantively, by acquiescing to arbitration, a state permits private adjudicators to review its public policies and effectively annul the authoritative acts of its legislature, executive, and judiciary."[29] The cases therefore have implications for the respondent States' domestic regulatory authority and treasury. The cases against Argentina are a good illustration of this reality.

For example, several tribunals have considered whether measures taken in response to the Argentine fiscal crisis were justified by the defense of necessity.[30] These tribunals have judged whether Argentina was excused from compliance with treaty obligations to foreign investors on account of the severity of the financial crisis it experienced. The tribunals reached different results, but the fact that they evaluated such an issue is itself a substantial limit on sovereign authority because the cases subjected Argentina to judgment and potential liability for its public policies in a time of crisis. In *Suez v. Argentina*, the tribunal rejected the necessity defense and stated, "The severity of a crisis, no matter the degree, is not sufficient to allow a plea of necessity to relieve a state of its treaty obligations."[31] In *Sempra Energy v. Argentina*, the tribunal reasoned that whether necessity was a defense depended on "whether the constitutional order and the survival of the State were imperiled by the crisis"; the tribunal concluded that Argentina's "constitutional

29. *Id.*

30. *See, e.g.*, Suez, Sociedad General de Aguas de Barcelona S.A. v. Argentine Republic, ICSID Case No. ARB/03/19, Decision on Liability, ¶¶ 257–65 (July 30, 2010) (finding that Argentina's actions leading up to its financial crisis precluded the defense of necessity under customary international law); Cont'l Cas. Co. v. Argentine Republic, ICSID Case No. ARB/03/9, Award, ¶¶ 160–236 (Sept. 5, 2008) (finding that Argentina's conduct conformed with the conditions of the necessity provision in Art. XI of the BIT); Sempra Energy Int'l v. Argentine Republic, ICSID Case No. ARB/02/16, Award, ¶¶ 332–55 (Sept. 28, 2007) (concluding that Argentina failed to meet the requirements for the defense of necessity under customary international law); CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Award, ¶¶ 315–94 (May 12, 2005) (holding that regardless of whether Argentina's wrongful actions were justified or temporarily suspended under Art. XI of the BIT, the State nonetheless was under a duty to compensate the investor for "the right which had to be sacrificed" during the crisis).

31. *Suez*, ICSID Case No. ARB/03/19, ¶ 258.

order was not on the verge of collapse" and that "[e]ven if emergency legislation became necessary in this context, legitimately acquired rights could still have been accommodated by means of temporary measures and renegotiation."[32] Thus, private arbitrators were called upon to evaluate the gravity of the threat to Argentina's economic, political, and social order, and whether the measures it undertook were necessary and otherwise lawful under international law.

Other cases against different sovereigns have subjected national environmental and health policies to challenge under BITs. For example, Philip Morris brought arbitrations against Uruguay for requiring certain graphic images as part of warning labels on cigarette cartons and against Australia for requiring that cigarettes be sold in plain packaging with limited branding.[33] Foreign investors have asserted claims relating to environmental and other regulations, including a claim against the United States arising from restrictions on mining activities near Native American sacred sites.[34]

These are just a few examples of investment-treaty claims that have subjected States' health, environmental, and economic measures to arbitrators' review and judgment. There is little evidence on the face of the BITs that States understood such measures could be challenged as violations of investment treaties. Whether such claims are beneficial to the international legal system or for the development of foreign direct investment is a separate question. But these kinds of cases—which might not have been predictable before States consented to early BITs—confirm that sovereign consent to investor-State arbitration is "no trifling matter."[35]

Second, jurisdictional and substantive standards in BITs are broad and often ambiguous, and therefore do not provide much information, on their own, as to what conduct is a breach of treaty.

32. *Sempra Energy*, ICSID Case No. ARB/02/16, ¶ 332.

33. Philip Morris Brands SÀRL v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Decision on Jurisdiction, ¶ 5 (July 2, 2013); Philip Morris Asia Ltd. v. Commonwealth of Australia, Case No. 2012-12, Notice of Arbitration, at ¶¶ 1.1–1.2 (Perm. Ct. Arb. 2011), http://www.italaw.com/sites/default/files/case-documents/ita0665.pdf.

34. *See generally* Glamis Gold Ltd. v. United States, Award (NAFTA Arb. Trib. 2009), http://www.state.gov/documents/organization/125798.pdf (arbitrating a dispute between a Canadian mining company and the United States over an alleged breach of the North American Free Trade Agreement that arose when the United States and the State of California allegedly expropriated the company's mining interests in a region of southern California).

35. BG Grp. PLC v. Republic of Argentina, 134 S. Ct. 1198, 1219 (2014) (Roberts, C.J., dissenting).

The jurisdictional requirement of an "investment" is one familiar example. Article 25(1) of the ICSID Convention limits ICSID jurisdiction to "any legal dispute arising directly out of an investment, between a Contracting State . . . and a national of another Contacting State."[36] BITs also ordinarily protect "investments" of foreign nationals. But the ICSID Convention and BITs do not precisely define the term, and instead leave it broad and subject to much interpretation. The Organisation for Economic Co-operation and Development has noted:

> There is no single definition of what constitutes foreign investment. International investment agreements usually define investment in very broad terms. They refer to "every kind of asset" followed by an illustrative but usually non-exhaustive list of assets, recognising that investment forms are constantly evolving. The ICSID Convention does not define the term investment.[37]

Given the current uncertainty on the meaning of "investment," it is reasonable to conclude that sovereigns entering into early BITs—before a body of arbitral jurisprudence arose interpreting the term—lacked a clear understanding of what might be considered an "investment" and would therefore be protected under the treaties.

The Fair and Equitable Treatment (or FET) Clause in most BITs is equally troublesome. There is a recurring debate about whether such clauses incorporate the minimum standard of treatment under customary international law, and what such a standard might be.[38] If the FET standard does not incorporate principles of customary international law, and is therefore not governed by a "special meaning" under Article 31(4) of the Vienna Convention on the Law of Treaties (VCLT), the phrase is not easily analyzed using its ordinary meaning in context or in light of the treaty's "object and

36. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 25(1), Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID Convention].

37. ORG. FOR ECON. CO-OPERATION & DEV., INT'L INV. LAW: UNDERSTANDING CONCEPTS AND TRACKING INNOVATIONS 9 (2008), *available at* http://www.oecd.org/daf/inv/internationalinvestmentagreements/40471468.pdf.

38. *See, e.g.*, U.N. CONFERENCE ON TRADE AND DEV., FAIR AND EQUITABLE TREATMENT: UNCTAD SERIES ON ISSUES IN INT'L INV. AGREEMENTS II, at 7–8, U.N. DOC. UNCTAD/DIAE/IA/2011/5, U.N. Sales No. E.11.II.D.15 (2012), *available at* http://unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf [hereinafter UNCTAD].

purpose," as required under VCLT Article 31(1).[39] Noting tribunals' struggle to give content to the FET standard, UNCTAD has recognized that:

> with regard to the capacious wording of most FET provisions, many tribunals have interpreted them broadly to include a variety of specific requirements including a State's obligation to act consistently, transparently, reasonably, without ambiguity, arbitrariness or discrimination, in an evenhanded manner, to ensure due process in decision-making and respect investors' legitimate expectations. This extensive list of disciplines can be taxing on any State, but especially developing and least-developed ones.[40]

Such an approach to the FET Clause ventures very close to granting arbitrators the power to decide *ex aequo et bono*, which the ICSID Convention, like most arbitral rules, forbids without party consent.[41]

Although one might say that domestic legal standards can be equally broad and non-self-defining, domestic legal systems do not ordinarily have the other features of investor-State arbitration that make imprecise codification problematic. To be sure, the Due Process Clause of the U.S. Constitution says little about what is or is not a constitutional violation, but the binding interpretations of U.S. courts fill the gap in ways that nonbinding, and sometimes conflicting, decisions of arbitral tribunals do not. Again, the fact that, decades after first-generation BITs came into force, there is still widespread disagreement about the meaning and application of a fundamental protection in BITs suggests that sovereign consent at the time of ratification was not fully informed.

Third, the system lacks binding precedent or an appellate body, and decisions can often conflict. As Professor Susan D. Franck has stated, "[t]here is no coherent system for addressing inconsistencies across the investment treaty network and . . . there is no uniform mechanism to correct inconsistent decisions."[42] While the lack of

39. Vienna Convention on the Law of Treaties art. 31(1), (4), May 23, 1969, 1155 U.N.T.S. 331.

40. UNCTAD, *supra* note 39, at xiii.

41. *See* ICSID Convention, *supra* note 37, art. 42(3) (providing that the parties must consent for a tribunal to decide a dispute *ex aequo et bono*).

42. Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73

appellate review to harmonize the law is not unusual for arbitration, conflicting decisions in commercial arbitration pose little risk to the coherence or perceived legitimacy of the applicable legal systems. A disagreement between two commercial arbitral tribunals applying New York law to the same contract language will have no impact on the coherence of New York law. Even if the awards are made public (which happens with much less frequency in commercial arbitration than in investor-State arbitration), it is unlikely that the awards would be relied upon to determine rights and responsibilities *ex ante*; parties simply do not need the guidance of commercial arbitrators on the scope of New York law—they have written decisions backed by the common-law system of binding precedent for that. But arbitral tribunals are the main "lawmakers" when it comes to interpreting investment treaties. Two tribunals reaching opposing decisions on the same claim or treaty text has a much more significant systemic impact.

And such divergent results do occur. In the *Lauder* cases, for example, one tribunal found that the Czech Republic breached a variety of BIT provisions to the Dutch affiliate of a U.S. investor, while another tribunal rejected most of the claims and concluded that the Czech Republic committed a single, more limited violation against the U.S. investor.[43] In another example, two companies that provided preshipment customs inspections services claimed that Paraguay violated various BIT provisions by persistently failing to pay bills for services rendered.[44] The factual basis for the claims, the contracts between the State and the claimants, and the relevant BIT standards of treatment were the same or substantially the same. In both cases, Paraguay argued that the claim was nothing more than a breach of contract, which was subject to a forum-selection clause in the contracts that made all claims relating to breach of contract within the exclusive jurisdiction of the Paraguayan courts.[45] In *SGS*, the tribunal held that the forum-selection clause did not apply and that Paraguay breached the Umbrella Clause in the treaty (that is, the

FORDHAM. L. REV. 1521, 1546 (2005).

43. *See id.* at 1559–68 (discussing the difference between the Stockholm and London *Lauder* arbitrations).

44. SGS Société Générale De Surveillance S.A. v. Republic of Para., ICSID Case No. ARB/07/29, Decision on Jurisdiction, ¶¶ 25–30 (Feb. 10, 2010); Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. Republic of Para., ICSID Case No. ARB/07/9, Decision of the Tribunal on Objections to Jurisdiction, ¶¶ 7, 11–12 (May 29, 2009).

45. *SGS*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, ¶ 126; *BIVAC*, ARB/07/9, ¶¶ 130–31.

clause that called for Paraguay to guarantee the observance of its commitments towards foreign investments) by breaching the contract.[46] In *BIVAC*, on the other hand, the tribunal held that a claim under the Umbrella Clause was inadmissible because BIVAC's claim was based on a breach of contract, which was within the exclusive jurisdiction of the Paraguayan courts,[47] and that BIVAC could not prove an FET violation for nonpayment when Paraguay had not used its sovereign power in any way to frustrate BIVAC's contract rights, including its right to redress in the Paraguayan courts.[48]

These cases—in which tribunals hearing essentially the same claim rendered inconsistent decisions without any means to reconcile them—is emblematic of the challenges that States face in determining what conduct violates a BIT.

## V. CONCLUSION

There is no doubt that Argentina and other States have consented through their BITs to arbitrate a wide range of investment disputes, to an arbitral system without binding precedent or appellate review, and to ambiguous substantive and jurisdictional standards. One might argue that by agreeing to such provisions, States should not be heard to complain about the legitimacy of investor-State arbitration. It is not the author's position that investor-State arbitration is an inherently unfair or illegitimate means of dispute resolution. But the nature of the claims subject to investment-treaty arbitration, coupled with certain aspects of the system, call into question the argument that States get what they legitimately expected or bargained for in investor-State arbitration, an argument that is more easily applied to other forms of sovereign dispute resolution.

46. SGS Société Générale De Surveillance S.A. v. Republic of Para., ICSID Case No. ARB/07/29, Award, ¶¶ 72, 74–75, 101 (Feb. 10, 2012).

47. *BIVAC*, ICSID Case No. ARB/07/9, ¶¶ 148–49.

48. Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. Republic of Para., ICSID Case No. ARB/07/9, Further Decision on Objections to Jurisdiction, ¶¶ 279–84 (Oct. 9, 2012).