

**OPENING PANDORA'S BOX:
STRICT LIABILITY UNDER UNQUALIFIED EXTENDED WAR CLAUSES
IN INTERNATIONAL INVESTMENT LAW**

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<https://doi.org/10.21684/2412-2343-2023-10-2-68-100>

There has been a growing interest in the extent to which international investment law imposes an obligation on the state to compensate for losses arising from an armed conflict. This contribution explores the prevalence of war clauses that hold the state liable to pay compensation for war losses without the investor needing to prove fault. The contribution considers a recent case against Syria in which an investor was permitted to rely on such a war clause in another treaty through the most favoured nation (MFN) clause. The contribution finds that MFN clauses substantially increase the number of investors who can rely on unqualified extended war clauses. It considers unqualified extended war clauses and the extent to which other investors can rely on them through an MFN clause in Cameroon, Syria and Yemen. It then considers the role that the BRICS countries can play in bringing about the necessary reforms to unqualified extended war clauses. It argues that these reforms are urgently needed as these states emerging from armed conflict can scarcely afford to meet their people's most essential developmental needs, let alone virtually unlimited liability to foreign investors.

Keywords: armed conflict; international investment law; unqualified extended war clauses; Syria; Cameroon; Yemen; Guris case.

Recommended citation: Louis Koen, *Opening Pandora's Box: Strict Liability Under Unqualified Extended War Clauses in International Investment Law*, 10(2) BRICS Law Journal 68–100 (2023).

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Introduction

There has been a growing body of literature on international investment law and its obligations on states amidst an armed conflict. This increased scholarly interest has arisen at least partly due to the substantial surge in claims brought by investors over losses suffered during an armed conflict.¹ Liubashenko provided an overview of the scholarly contributions on standards such as full-protection and security and the interaction between international humanitarian law and international investment law.² Liubashenko's contribution importantly argues that international humanitarian law (IHL) must generally prevail over international investment law (IIL) during an armed conflict.³ He postulates that where the targeting of belligerents

¹ See, *inter alia*, *LESI, S.p.A. and Astaldi, S.p.A. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/05/3; *Gamesa Eólica, S.L.U. v. Syrian Arab Republic*, PCA Case No. 2012-11; *Ampal-American Israel Corporation and others v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11 and *Cengiz Insaat Sanayi ve Ticaret A.Ş. v. State of Libya*, ICC Case No. 21537/ZF/AYZ.

² Viacheslav Liubashenko, *Treatment of Foreign Investments During Armed Conflicts: The Regimes*, 24(1) J. Confl. Secur. L. 145, 146 (2018).

³ *Id.* at 167.

property is lawful under IHL, the more general property protection under IIL may be excluded.⁴

At the time of Liubashenko's writing there had been minimal case law on the operation of investment law in the context of an armed conflict.⁵ Since then there have been at least three additional decisions that Liubashenko had not considered.⁶ The most recent is *Guris Construction and Engineering Inc. v. Arab Republic of Syria* (hereinafter, the *Guris* case), which has not yet attracted much academic attention.⁷ The inclusion of so-called war clauses has also increasingly been interpreted by arbitral tribunals. However, as Ryk-Lakhman recently noted, extended war clauses have been considered far less extensively in the literature.⁸ Extended war clauses contain more onerous obligations for states than standard war clauses. Standard war clauses commonly appear in bilateral investment treaties (BITs). They merely provide for equality in treatment where compensation is paid for any losses arising in the course of an armed conflict.⁹ In contrast, extended war clauses make the payment of compensation to investors for losses resulting from hostilities mandatory if certain conditions are met.¹⁰

⁴ Liubashenko 2018, at 167.

⁵ Liubashenko notes that "[n]o more than few cases directly and indirectly concern damages as the result of an armed conflict: *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No ARB/87/3; *Toto Costruzioni Generali SpA v. The Republic of Lebanon*, ICSID Case No ARB/07/12; *American Manufacturing & Trading, Inc. v. Republic of Zaire*, ICSID Case No ARB/93/1." It is possible that Liubashenko missed the case of *Ampal-American Israel Corporation and others v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss, 21 February 2017 (hereinafter, the *Ampal-American Israel* case) due to the fact that arbitral awards in IIL do not always become available immediately.

⁶ These cases are *Guris Construction and Engineering Inc. and others v. Arab Republic of Syria*, ICC Case No. 21845/ZF/AYZ, Final Award, 31 August 2020 (hereinafter, the *Guris* case); *Strabag SE v. State of Libya*, ICSID Case No. ARB(AF)/15/1, Award, 29 June 2020; *Cengiz Insaat Sanayi ve Ticaret A.S. v. Libya*, ICC Case No. 21537/ZF/AYZ, Award, 7 November 2018 (hereinafter, the *Cengiz* case) and the *Ampal-American Israel* case.

⁷ The author could not find any peer-reviewed articles discussing this case as of the time of writing. This likely results in part from the fact that although the award was rendered in August 2020, it had not been seen before a subscription based arbitration news service had sight of the award and provided a summary thereof in a news post in November 2020 (see Lisa Bohmer, *Analysis: In Previously Unseen Turkey-Syria Bit Award, Majority Imports a More Favourable War-Losses Clause; in Dissent Ziade Warns of "Exorbitant" Implications of Majority Reading*, Investment Arbitration Reporter, 13 November 2020 (July 7, 2021), available at <https://www.iareporter.com/articles/analysis-in-previously-unseen-turkey-syria-bit-award-majority-imports-a-more-favourable-war-losses-clause-in-dissent-ziade-warns-of-exorbitant-implications-of-majority-reading/>). The full award was first published on the Investor State Law Guide database on 17 June 2021. At the time of writing the award had also not been reported on the widely used dispute settlement navigation database of the United Nations Conference on Trade and Development. Indeed its very existence is not even noted on that database.

⁸ Ira Ryk-Lakhman, *The Genealogy of Extended War Clauses: Requisition and Destruction of Property in Armed Conflicts*, in Tobias Ackermann & Sebastian Wuschka (eds.), *Investments in Conflict Zones: The Role of International Investment Law in Armed Conflicts, Disputed Territories, and 'Frozen' Conflicts* 54–83 (2021).

⁹ *Id.* at 54.

¹⁰ *Id.*

The contributions by Ryk-Lakhman and Zrilic have been the most comprehensive studies on extended war clauses to date.¹¹ An earlier contribution by Schreuer also included a section analysing extended war clauses but did not focus on it extensively, considering that “extended war clauses subject the investor’s right to restitution or compensation to a number of stringent requirements.”¹² This is indeed true with respect to the extended war clauses considered by Ryk-Lakhman, Zrilic and Schreuer.¹³ The extended war clauses considered by them are, with slight variations in their wording, some of the most commonly occurring extended war clauses.¹⁴ These extended war clauses only create liability where the conduct is attributable to the state and exclude the state’s liability where the destruction of property arose due to military necessity.¹⁵ However, none of these studies focused on the much rarer extended war clauses where the obligation to pay compensation is absolute and not subject to any qualifications other than harm occurring within the context of a listed event.¹⁶ This contribution will refer to these clauses as unqualified extended war clauses to distinguish them from the more standard extended war clauses.

Unqualified extended war clauses are extremely rare and seem largely, though not exclusively, confined to treaties wherein Italy is one of the parties to the treaty. The Italian unqualified extended war clause had been included in the 2003 iteration of the Italian model BIT.¹⁷ An Italian unqualified extended war clause was at the heart of the

¹¹ Ryk-Lakhman 2021, at 54; Jure Zrilic, *The Protection of Foreign Investment in Times of Armed Conflict* 109–120 (2019).

¹² Christoph Schreuer, *The Protection of Investments in Armed Conflicts*, 3 *Transnat’l Disp. Mgmt.* 1, 11–13 (2012).

¹³ Schreuer 2012, at 11 for example, refers to Article 4(2) of the United Kingdom-Sri Lanka BIT which provides that: “Without prejudice to paragraph (1) of this Article, nationals and companies of one Contracting Party who in any of the situations referred to in that paragraph suffer losses in the territory of the other Contracting Party resulting from (a) requisitioning of their property by its forces or authorities, or (b) destruction of their property by its forces or authorities which was not caused in combat action or was not required by the necessity of the situation, shall be accorded restitution or adequate compensation. Resulting payments shall be freely transferable.” Ryk-Lakhman, in turn, extensively considers the extended war clause contained in Article 9(2) of the Morocco-Nigeria BIT. This provision is virtually identical to the extended war clause considered by Schreuer. The Morocco-Nigeria BIT only differs in that it uses the word “Party” instead of “Contracting Party” and uses “investors” instead of “nationals and companies.”

¹⁴ Zrilic 2019, at 112 notes the relative rarity of extended war clauses in comparison to standard non-discrimination war clauses. However, they still appear in virtually identical form in around a third of all investment treaties.

¹⁵ *Id.* at 115.

¹⁶ The only contribution the author has found that makes any mention of an unqualified extended war clause is the contribution by Kit De Vriese, *COVID-19 and ‘War’ Clauses in Investment Treaties: A Breach Through the Wall of State Sovereignty?*, Ejiltalk.org, 10 June 2020 (July 8, 2021), available at <https://www.ejiltalk.org/covid-19-and-war-clauses-in-investment-treaties-a-breach-through-the-wall-of-state-sovereignty/>. That contribution remarks in passing that Article IV of the Italy model BIT creates liability “irrespective of whether those losses have been caused by governmental forces or other subjects.” It does not contain any further discussion or analysis on the consequences of this clause for states.

¹⁷ *Id.*

dispute in the *Guris* case. This case could potentially have far-reaching consequences as the tribunal in that case held that the investor needn't prove fault on the part of the state.¹⁸ It effectively provided for strict liability where the mere occurrence of damage resulting from an armed conflict is sufficient to establish liability.

This strict liability arose based on the draconian unqualified extended war clause in the Italy-Arab Republic of Syria BIT (Italy-Syria BIT). The tribunal's decision to "import" that clause into another treaty, based on a most-favoured-nation (MFN) clause,¹⁹ serves as an important warning that the rarity of the clause does not make it of lesser significance. This decision has opened the proverbial Pandora's Box. It effectively exposes Syria to strict liability to all foreign investors protected by a BIT containing a sufficiently broad MFN clause.

The *Guris* case highlights the broad implications that unqualified extended war clauses can have for states engaged in an armed conflict. The ongoing efforts to reform international investment law (IIL) to address the overly extensive rights granted to foreign investors should not, therefore, overlook unqualified extended war clauses. BRICS countries have been leaders in the call for fundamental reform of IIL.²⁰ BRICS may well exert significant influence on ongoing reform efforts where its member countries collaborate.²¹ It is, therefore, necessary to consider the role that BRICS as a group may play in the reform of unqualified extended war clauses.

This contribution firstly provides a detailed case discussion on the *Guris* case and the key findings by the tribunal. It then proceeds to critique the award and considers the practical implications of the decision for Syria, including an analysis of other BITs to which Syria is a party with MFN clauses. The article then analyses similar unqualified extended war clauses in other BITs to which two states (Cameroon and Yemen) engaged in ongoing armed conflicts are a party. Lastly, the article considers the role of BRICS in the reform of IIL and the potential elimination of unqualified extended war clauses.

1. The *Guris* Case

1.1. The Factual Background

Güriş İnşaat ve Mühendislik Anonim Şirketi is a Turkish construction company active in the fields of construction, cement production and renewable energy.²² Güriş, together with Mr İdris Yamantürk and his two sons, were the majority shareholders in

¹⁸ Para. 281 of the *Guris* case.

¹⁹ *Id.* Para. 284.

²⁰ Congyan Cai, *Balanced Investment Treaties and the BRICS*, 112 AJIL Unbound 217 (2018).

²¹ *Id.* at 218.

²² Para. 108 of the *Guris* case.

two cement companies incorporated in Syria.²³ The claimants obtained investment authorisation in 2005 and incorporated the two companies on 1 February 2006 and 5 June 2007.²⁴ The complainant averred that the stability and security of Syria deteriorated in early 2011.²⁵ The protests against the government began in March 2011, spreading throughout the country and escalated into violent armed conflicts between the government and numerous opposition groups by 2012.²⁶

The claimant went on to say that in 2012, due to the escalation of the armed conflict, Syrian government forces began to withdraw from most of the northern Syrian territory, including the area where the claimant's cement facilities were located.²⁷ The claimants indicated that various robberies and armed attacks damaged the cement plants after the withdrawal of the Syrian military.²⁸ The claimant had been unable to enter the plants since 2014.²⁹ Therefore, the claimants could not verify the losses but treated the plants as having been lost entirely.³⁰ The claimants sought compensation from Syria for these alleged losses under the Agreement between the Republic of Turkey and the Syrian Arab Republic Concerning the Reciprocal Promotion and Protection of Investments (hereinafter, the Turkey-Syria BIT).³¹ Syria confirmed that it had withdrawn from the region but denies any liability.³²

1.2. Tribunal's Findings on the Alleged Suspension of the BIT

Syria argued that the BIT between itself and Turkey had effectively been suspended, considering what it had described as Turkey's hostility towards Syria.³³ It argued that this hostility violated the principles of economic cooperation and investment protection on which the treaty was based.³⁴ Syria claimed that the suspension of diplomatic relations between itself and Turkey weighed in favour of finding that the treaty had been suspended.³⁵ Regarding the legal consequences

²³ Para. 108 of the *Guris* case.

²⁴ *Id.* Paras. 110–111.

²⁵ *Id.* Para. 113.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* Para. 114.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.* Para. 119.

³³ *Id.* Para. 141.

³⁴ *Id.*

³⁵ *Id.*

of the alleged suspension of the treaty, Syria submitted that no rights could arise during the period of the treaty's effective suspension.³⁶ Effectively Syria argued that there were no treaty obligations after April 2011, when Turkey hosted a meeting with armed militants hostile to Syria. Consequently, the claimants did not enjoy any rights.³⁷

The tribunal rejected Syria's contentions in this respect.³⁸ The tribunal notes that the Turkey-Syria BIT does not contain any provisions addressing the suspension of the treaty. It determines that this question must accordingly be decided "by application of general international law."³⁹ The tribunal finds that in terms of the Vienna Convention on the Law of Treaties (hereinafter, the VCLT), Syria was required to give Turkey written notice if it intended to suspend the treaty.⁴⁰ It finds that in the absence of such notice, the BIT could not be suspended.⁴¹ The tribunal also finds that the provision of Article 3 of the 2011 Draft ILC Articles on the Effect of Armed Conflict on Treaties (hereinafter, the 2011 ILC Articles) reflects customary international law.⁴² The provisions provide that the "existence of an armed conflict does not *ipso facto* terminate or suspend the operation of treaties as between State Parties to the conflict." The tribunal explains that the provision applies equally to international and non-international armed conflicts.⁴³ It accordingly declines to classify the conflict in Syria as either "an 'international' armed conflict (as the Respondent contends) or 'non-international' armed conflict (as the Claimants contend)."⁴⁴

The tribunal also notes the commentary to the 2011 ILC Articles, which explains that a substantive examination of the treaty is needed to determine if it remains operative during an armed conflict.⁴⁵ The tribunal notes that the Turkey-Syria BIT does not contain a clause excluding its operation during times of armed conflict.⁴⁶ It finds that the presence of a full-protection and security clause and the war clause points to an intention that the treaty remains in operation during an armed conflict.⁴⁷

³⁶ Para. 141 of the *Guris* case.

³⁷ *Id.*

³⁸ *Id.* Para. 143.

³⁹ *Id.*

⁴⁰ *Id.* Para. 144.

⁴¹ *Id.*

⁴² *Id.* Para. 146.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* Para. 147.

⁴⁶ *Id.* Para. 148.

⁴⁷ *Id.*

It finds that the use of terms such as “war,” “insurrection” and “civil disturbance” in Article IV(3) captures “both inter-State and internal forms of conflict.”⁴⁸ The tribunal finds that there is a presumption that a BIT continues to operate during an armed conflict as a general rule.⁴⁹ This presumption can only be rebutted if it became clear from the treaties’ provisions that the parties intended for it to be suspended during an armed conflict.⁵⁰ Having already held that the treaty’s provisions point to the contrary, the tribunal rejects Syria’s arguments regarding the suspension of the treaty in its entirety.⁵¹

1.3. Tribunal’s Findings on the Alleged Breach of the War Clause

The Turkey-Syria BIT contains a war clause which provides that

Investors of either Party whose investments suffer losses in the territory of the other Party owing to war, insurrection, civil disturbance or other similar events shall be accorded by such other Party treatment no less favourable than that accorded to its own investors or to investors of any third country, whichever is the most favourable treatment, as regards any measures it adopts in relation to such losses.⁵²

The claimants argued that Syria had violated the war clause by failing to extend the treatment due to Italian investors under Article 4 of the Italy-Syria BIT to them.⁵³ That BIT requires Syria to offer “adequate compensation” to investments protected under the BIT in respect of any losses suffered during an armed conflict.⁵⁴ Syria argued that the war clause in the Turkey-Syria BIT creates no obligation upon it to extend the provisions of the Italy-Syria BIT to the claimants.⁵⁵

⁴⁸ Para. 148 of the *Guris* case.

⁴⁹ *Id.* Para. 150.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Art. IV(3) of the Turkey-Syria BIT.

⁵³ Para. 239 of the *Guris* case.

⁵⁴ Article 4 of the Syria-Italy BIT provides that “[s]hould investors of either Contracting Parties incur losses or damages on their investments in the territory of the other Contracting Party due to war, other forms of armed conflict, a state of emergency, civil strife or other similar events, the Contracting Party in which the investment has been effected shall offer adequate compensation in respect of such losses or damages. Irrespective of whether such losses or damages have been caused by governmental forces or other subjects, compensation payments shall be freely transferable as provided for in article 8 of this Agreement. The investors concerned shall receive the same treatment as the nationals of the other Contracting Party and, at all events, no less favourable treatment than investors of Third States.”

⁵⁵ Para. 239 of the *Guris* case.

The tribunal agrees with Syria and finds that the war clause provides “a relative standard of treatment.”⁵⁶ Its operation is contingent on the state taking “measures” to address losses suffered by investors in the context of an armed conflict.⁵⁷ It requires Syria to extend any measures it may take to provide for such losses, in respect of its own nationals or those of third-states, to Turkish investors.⁵⁸ However, ultimately the measures must be taken before any liability can arise in terms of the war clause.⁵⁹ The tribunal finds that measures refers to “laws, regulations, and administrative or material acts” adopted by the state.⁶⁰ It holds that there is no evidence showing that Syria had taken any “measures” to compensate Italian investors for losses arising from the conflict.⁶¹

The tribunal explains that the claimants’ case is premised on an interpretation of the term “measures” that would include the international law right to receive an offer of compensation that exists under the Italy-Syria BIT.⁶² It finds that this argument confuses the concept of “measure” with the different concept of “treatment.”⁶³ The latter concept is used in various articles of the Turkey-Syria BIT, including the war clause itself, and is a broader and more abstract concept.⁶⁴ Treatment is achieved through measures.⁶⁵ Accordingly, the tribunal finds that Italian investors have the right to receive specific treatment under Article 4 of the Syrian-Italian BIT.⁶⁶ However, as long as Syria does not take measures to give effect to these rights, the war clause in the Turkey-Syria BIT does not entitle the claimants to compensation under it.⁶⁷

1.4. Tribunal’s Findings on the War Clause as *Lex Specialis*

The claimants also relied on the general MFN clause in Article III(2) of the Turkey-Syria BIT.⁶⁸ They argued that the general MFN clause is not excluded by virtue of the

⁵⁶ Para. 242 of the *Guris* case.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* Para. 244.

⁶⁰ *Id.* Para. 243.

⁶¹ *Id.*

⁶² *Id.* Para. 244.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* Para. 246. Article III(2) of the Turkey-Syria BIT provides that “[e]ach Party shall accord to these investments, once established, treatment no less favourable than that accorded in similar situations to investments of its investors or to investments of investors of any third country, whichever is the most favourable.”

war clause.⁶⁹ Syria argued that the war clause was *lex specialis*. Consequently, the substantive protections in other treaty provisions are excluded in relation to losses “owing to war, insurrection, civil disturbance or other similar events.”⁷⁰ The claimants argued that Syria was incorrect as the war clause is merely intended to provide additional protection during an armed conflict and does not in any way displace other provisions in the BIT.⁷¹

The tribunal explains that the clear meaning of the war clause is that Syria must grant Turkish investors MFN treatment and national treatment, “whichever is the most favourable,” with regard to the measures that may be taken against losses under certain circumstances.⁷² It agrees that this clause is of course formulated for a specific situation, that is, losses caused by “war, insurrection, civil disturbance or other similar events.”⁷³ However, it holds that this specificity does not *per se* lead to the conclusion that the treatment provided in the war clause is exclusive of other provisions.⁷⁴ The tribunal finds that the war clause also does not say that its application excludes other BIT provisions.⁷⁵ It finds that if the intention of the contracting states were for the war clause to operate as an exclusion, exemption or repeal clause, the tribunal would expect them to have stipulated such a broad result in the text of the treaty.⁷⁶

Regarding the general MFN clause specifically, the tribunal acknowledges that the war clause also addresses MFN treatment.⁷⁷ This it explains is a highly specific form of MFN treatment that only arises in the context of those exceptional circumstances provided for in the clause.⁷⁸ It finds that there is no conflict between the war clause and the more general MFN clause as compliance with the war clause would be consistent with the general MFN clause.⁷⁹ It accordingly holds that “the two articles are entirely concordant.”⁸⁰ The tribunal finds another provision can only exclude a treaty provision as *lex specialis* where there is an actual conflict between the different provisions.⁸¹

⁶⁹ Para. 229 of the *Guris* case.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* Para. 231.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* Para. 260.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* Para. 261.

The majority of the tribunal finds that the war clause is “directed to an issue which may be debated as a matter of customary international law, namely whether war-losses programmes, which are sometimes discretionary, must be extended to foreign nationals on a footing of equality.”⁸² The majority indicates that it finds comfort in its conclusion from the various arbitral tribunals, which supposedly also concluded that specific MFN clauses do not exclude more general MFN clauses.⁸³

1.5. Importing the Unqualified Extended War Clause Through the General MFN Clause

The tribunal finds that the ordinary meaning of the term “treatment accorded” in the general MFN clause includes the treatment that has actually been accorded and the treatment required by law.⁸⁴ It holds that the requisite treatment can come from an investment treaty between the host country and a third country.⁸⁵ The tribunal indicates that relying on provisions in other treaties is hardly controversial in investment law.⁸⁶ If the state parties wanted to exclude “treatment” owed in terms of other treaties, they were free to do so expressly within the treaty.⁸⁷ In the absence of such exclusion, the tribunal must interpret the clause in accordance with its ordinary meaning.⁸⁸ Therefore, the tribunal finds that the claimant is entitled to avail itself of the more favourable provisions in other treaties to which Syria is a party.⁸⁹

The tribunal also finds that the term “in similar situations” does not require an investor to show that any discrimination had, in fact, occurred.⁹⁰ It disagrees with the

⁸² Para. 261 of the *Guris* case.

⁸³ *Id.* The cases the tribunal cites as purportedly supporting its conclusion are: *Siemens AG v. Argentine Republic*, ICSID Case No ARB/02/8, Decision on Jurisdiction, 3 August 2004, para. 90; *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No ARB/05/1, Award, 22 August 2012, para. 206; *CMS Gas Transmission Company v. Republic of Argentina*, ICSID Case No ARB/01/8, Award, 12 May 2005, paras. 244, 375–377; *Suez, Sociedad General de Aguas de Barcelona, SA and Vivendi Universal, SA v. Argentine Republic*, ICSID Case No ARB/03/19, Decision on Liability, 30 July 2010, paras. 270–271; *El Paso Energy International Co v. Argentine Republic*, ICSID Case No ARB/03/15, Award, 31 October 2011, para. 559; *Total SA v. Argentine Republic*, ICSID Case No ARB/04/01, Decision on Liability, 27 December 2010, paras. 226 and 229; *Enron Corporation and Ponderosa Assets, LP v. Argentine Republic*, ICSID Case No ARB/01/3, Award, 22 May 2007, paras. 319–320; *Sempra Energy International v. Argentine Republic*, ICSID Case No ARB/02/16, Award, 28 September 2007, paras. 362–363; *Impregilo SpA v. Argentine Republic*, ICSID Case No ARB/07/17, Award, 21 June 2011, paras. 340–341.

⁸⁴ Para. 252 of the *Guris* case.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* Para. 253.

⁹⁰ *Id.* Para. 255.

tribunal in *İçkale İnşaat Limited Şirketi v. Turkmenistan* (hereinafter, the *İçkale* case),⁹¹ who interpreted the terms “in similar situations” as restricting the scope of an MFN clause to *de facto* discrimination.⁹² It holds that the terms “in similar situations” require no more than a proper application of the *eiusdem generis* principle.⁹³ The tribunal holds that it is difficult to agree with an interpretation that would allow a state to altogether avoid its MFN obligations by failing to accord third-country nationals the treatment they are legally entitled to.⁹⁴ This, it holds, would contradict the basic concept of MFN treatment.⁹⁵

The tribunal holds that in terms of the *eiusdem generis* principle, it must first determine the scope of the general MFN clause to settle which matters are covered by it.⁹⁶ It holds that the MFN clause in the Turkey-Syria BIT is formulated broadly and not restricted to certain areas of treatment, such as the management of the investment. Therefore, the tribunal finds that the general MFN clause includes all treatment “that falls to be accorded under the Treaty in ‘situations’ in which the Treaty finds application.”⁹⁷

The tribunal finds that the war clause in the Italy-Syria BIT and the war clause in the Turkey-Syria BIT are in *pari materiae*.⁹⁸ The general MFN clause requires the tribunal to inquire whether the treatment in the Italy-Syria BIT is more favourable to the investor.⁹⁹ It concludes that is undoubtedly the case as the Turkey-Syria BIT provides for a relative standard of treatment in the case of war losses contingent upon the treatment offered to other investors.¹⁰⁰ In contrast, the Italy-Syria BIT provides investors with a right to receive compensation irrespective of the treatment offered to any other investors.¹⁰¹ The investor is accordingly permitted to rely on the treatment owed to Italian investors by virtue of the general MFN clause.¹⁰²

⁹¹ ICSID Case No ARB/10/24, Award, 8 March 2016 (hereinafter, the *İçkale* case).

⁹² *Id.* Para. 329.

⁹³ Para. 255 of the *Guris* case.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* Para. 278.

⁹⁷ *Id.*

⁹⁸ *Id.* Para. 279.

⁹⁹ *Id.* Para. 280.

¹⁰⁰ *Id.* Paras. 280–281.

¹⁰¹ *Id.* Para. 280.

¹⁰² *Id.* Para. 281.

1.6. Strict Liability in Terms of an Unqualified Extended War Clause

The tribunal indicates that it is aware that some investment treaties provide for compensation for damages caused by the “forces or authorities” of the host country.¹⁰³ It contrasts these traditional extended war clauses with the unqualified extended war clause contained in the Italy-Syria BIT.¹⁰⁴ The tribunal points out that a common feature in conventional extended war clauses, requiring attribution to the state, is absent from the unqualified extended war clause. It holds that the unqualified extended war clause covers damages regardless of the identity of the person who caused it. The article’s first sentence refers to “loss or damage” arising as a result of any of the listed events, but does not stipulate that such “loss or damage” must be caused by the actions of the host country.¹⁰⁵ Therefore, it holds that the application of this provision is automatically triggered where losses arise due to any of the listed events.¹⁰⁶

The tribunal holds that the inclusion of the second component providing for liability regardless of whether “governmental forces or other subjects” have caused the “losses or damages” serves to place its conclusion beyond doubt.¹⁰⁷ The tribunal holds that the breadth of the term “or other subjects” in the clause contrasts with the more restricted “governmental forces.”¹⁰⁸ Therefore, an attribution analysis is not required: losses arising from the harmful behaviour of any person or entity in the course of a listed event is sufficient to establish liability.¹⁰⁹ The legality of the conduct, or lack thereof, is also entirely immaterial to the question of liability under the unqualified extended war clause.¹¹⁰ Even if the state acts in a manner required out of military necessity, the obligation to pay compensation will remain.

2. Critical Analysis of the *Guris* Case

This contribution disagrees with the *Guris* case on specific key points. The partial dissenting opinion of Professor Ziade correctly points out that of the nine decisions the tribunal relied on, which purportedly supported its conclusion that general MFN clauses aren’t excluded by the more specific MFN provisions in a war clause,

¹⁰³ Para. 284 of the *Guris* case.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* Para. 285.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* Para. 286.

only one dealt with the point.¹¹¹ The other decisions dealt with whether different standards, such as the full protection and security (FPS) standard, are excluded by the war clause as *lex specialis*.¹¹² A standard war clause cannot normally exclude standards such as FPS as they deal with different subject matters.¹¹³ The war clause deals with non-discrimination concerning compensation for war losses, an obligation contingent upon the treatment of other investors. In contrast, FPS provides an objective obligation for the state to provide investments with the level of security reasonably expected from a state at its level of development.¹¹⁴

The author is aware that in the *Cengiz* case, the general MFN clause was not excluded by the MFN treatment contained in the war clause.¹¹⁵ However, the general MFN clause considered in the *Cengiz* case was confined to matters pertaining to the “management, use, enjoyment or disposal” of the investment.¹¹⁶ This makes the *Cengiz* case fundamentally distinguishable from the *Guris* case. The concurrent application of the restricted general MFN clause would not have rendered the war clause redundant. The general MFN clause, in that case, did not cover compensation due to war losses.¹¹⁷ The finding that one clause would not render the other redundant was key to the conclusion that the general MFN clause and the war clause operate concurrently.¹¹⁸ Although referencing the *Cengiz* case earlier in its decision, the majority fails entirely to engage with these material differences.

An established principle of treaty interpretation is that an interpretation that would render other treaty provisions redundant is to be avoided.¹¹⁹ The *Guris* dissenting opinion correctly points out that concurrently applying the broadly formulated general MFN clause in the Turkey-Syria BIT would render the war clause redundant.¹²⁰ This is indeed alluded to by the majority when it finds that the war clause merely gives effect to the more general MFN clause in certain situations.¹²¹ The majority’s finding that the war clause is directed “to an issue which may be debated as a matter

¹¹¹ *Guris Construction and Engineering Inc. and others v. Arab Republic of Syria*, ICC Case No. 21845/ZF/AYZ, Partial Dissenting Opinion of Nassib G. Ziadé, 31 August 2020 (hereinafter, the *Guris* dissenting opinion), para. 18.

¹¹² *Id.*

¹¹³ Para. 357 of the *Cengiz* case.

¹¹⁴ *Id.* Para. 361.

¹¹⁵ *Id.* Para. 357.

¹¹⁶ *Id.*

¹¹⁷ *Id.* Para. 358.

¹¹⁸ *Id.* Para. 354.

¹¹⁹ Para. 226 of the *Strabag* case.

¹²⁰ Para. 17 of the *Guris* dissenting opinion.

¹²¹ Para. 260 of the *Guris* case.

of customary international law¹²² is also entirely unconvincing. If the general MFN clause were intended to apply during an armed conflict, the investor would have been able to rely on it to seek treatment on a footing of equality. The question of what is required in terms of customary international law would have been entirely irrelevant. Ultimately, the equality of treatment would have arisen from the treaty and not from customary international law.¹²³ This argument would only be persuasive if the general MFN clause was restricted to particular matters that would not have covered compensation for war losses as with the MFN clause in the *Cengiz* case. Therefore, this contention by the majority still fails to address the need to include the war clause if it operates concurrently with the more general MFN clause.

The tribunal ought to have dismissed the reliance on the more general MFN clause where it would have rendered the war clause entirely redundant.¹²⁴ Had it so dismissed the reliance on the more general MFN clause, the tribunal should have confined its analysis to the question of the extent to which the war clause allowed the investor to seek the “treatment” owed to Italian investors. This contribution agrees with the tribunal’s analysis indicating that an investor would only be able to rely on the war clause in the Turkey-Syria BIT to seek compensation if Syria had taken actual measures to compensate such investors.¹²⁵ In the authors view, Turkish investors could not therefore import the strict liability clause in the Italy-Syria BIT and their claim fell to be assessed in terms of other standards applicable during an armed conflict such as FPS.

The *Guris* dissenting opinion also takes issue with the interpretation the majority attached to the terms “in like circumstances.”¹²⁶ The dissenting opinion points to a 2015 ILC study in which it was explained that the inclusion of the words “in like circumstances” placed some limitation on MFN clauses so that “only those investors or investments that are ‘in like circumstances’ with those of the comparator treaty can do so.”¹²⁷ This requires a fact-based comparison with an investor from a third state.¹²⁸

¹²² Para. 261 of the *Guris* case.

¹²³ There is no MFN obligation in terms of customary international law. A state’s MFN obligations, therefore, arise entirely from a treaty and not from customary international law in either event. See in this respect Simon Batifort & J.B. Heath, *The New Debate on the Interpretation of MFN Clauses in Investment Treaties: Putting the Brakes on Multilateralization*, 111(4) Am. J. Int’l L. 873, 878 (2017).

¹²⁴ Para. 17 of the *Guris* dissenting opinion. See also para. 226 of the *Strabag* case and *Conocophillips Petrozuata B.V., Conocophillips Hamaca B.V. and Conocophillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Jurisdiction and the Merits, 3 September 2013, paras. 300–315.

¹²⁵ Para. 244 of the *Guris* case.

¹²⁶ Para. 21 of the *Guris* dissenting opinion.

¹²⁷ *Id.*

¹²⁸ Para. 22 of the *Guris* dissenting opinion.

The majority contends that the specific exclusion of certain treaties from the scope of the MFN clause points to an intention not to exclude treatment arising from a treaty.¹²⁹ It argues that this supports its findings that there is no need for a factual comparison to another investor.¹³⁰ This contribution agrees with the majority that the specific exclusion of certain treaties and not others may point to an intention not to exclude treatment arising from treaties from the scope of the MFN clause. However, in the author's view, this merely suggests an MFN obligation even if the source of the obligation giving rise to the treatment accorded is a treaty. It does not exempt the investor from showcasing that another similarly situated investor was entitled to the treatment. If the investor had showcased to the tribunal that an equally situated Italian investor had suffered losses and was owed compensation, they would have been able to rely on the general MFN clause. However, even if the investor had showcased such a similarly situated Italian investor, it remains the primary contention that the general MFN clause was inapplicable as its concurrent application with the war clause would render the latter redundant.

3. The Practical Implications of the Case for Syria

After years of conflict, the Syrian economy has been decimated. The continuous bombing has destroyed much of the infrastructure needed to run a well-functioning economy.¹³¹ This includes significant damage to critical infrastructure, including more than one-third of the housing stock and half of the sanitation and education facilities.¹³² The Syrian government has estimated that the reconstruction of the country will cost about \$400 billion.¹³³ Syria is already likely to face substantial challenges in raising these funds, even if Western governments were to abandon sanctions policies against it.¹³⁴ The significant liability that Syria could be exposed to in the aftermath of the *Guris* case could greatly exacerbate these challenges. In 2020 Guatemala had, for example, paid an ICSID creditor to avoid defaulting on its sovereign debt.¹³⁵ The ICSID creditor had obtained an attachment order against Guatemala in the United States that would have seen bond payments liable to

¹²⁹ Para. 255 of the *Guris* case.

¹³⁰ *Id.*

¹³¹ Eugenio Dacrema & Valeria Talbot (eds.), *Rebuilding Syria: The Middle East's Next Power Game?* 59–61 (2019).

¹³² *Id.* at 60.

¹³³ *Id.*

¹³⁴ *Id.* at 67.

¹³⁵ Jack Ballantyne, *Guatemala pays ICSID award to avoid default*, Global Arbitration Review, 26 November 2020 (July 6, 2021), available at <https://globalarbitrationreview.com/guatemala-pays-icsid-award-avoid-default>.

attachment.¹³⁶ Where such orders are obtained, a state would need to settle the arbitral award or risk falling into perpetual default, severely limiting the extent to which the state can access credit on the international capital markets.

The extent to which the *Guris* case exposes Syria to liability depends on the number of treaties it has signed with MFN provisions. Syria has signed 44 bilateral investment treaties, of which 34 are in force.¹³⁷ Of the treaties signed by Syria, 23 contain MFN clauses. If the tribunal were to be correct in its findings that the general MFN clause is not excluded by the MFN treatment included in the war clause, investors from the following countries would all be able to rely on the “treatment” owed to Italian investors: Cyprus;¹³⁸ France;¹³⁹ Greece;¹⁴⁰ Germany;¹⁴¹ India;¹⁴² Iran;¹⁴³ Jordan;¹⁴⁴ Lebanon;¹⁴⁵

¹³⁶ Ballantyne, *supra* note 135.

¹³⁷ Syrian Arab Republic, Investment Policy Hub (July 6, 2021), available at <https://investmentpolicy.unctad.org/international-investment-agreements/countries/204/syrian-arab-republic>.

¹³⁸ Art. 4 of the Agreement between the Government of the Republic of Cyprus and the Government of the Syrian Arab Republic on the Promotion and Reciprocal Protection of Investments (2007) (July 6, 2021), available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/4946/download> (hereinafter, the Cyprus-Syria BIT).

¹³⁹ Art. 3 of the Convention between the Government of the French Republic and the Government of the Syrian Arab Republic on Reciprocal Encouragement and Protection of Investments (1977) (July 6, 2021), available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1283/download>.

¹⁴⁰ Art. 4(1) of the Agreement between the Government of the Hellenic Republic and the Government of the Syrian Arab Republic on the Promotion and Reciprocal Protection of Investments (2003) (July 6, 2021), available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1481/download> (hereinafter, the Greece-Syria BIT).

¹⁴¹ Art. 3(1) of the Agreement between the Federal Republic of Germany and the Syrian Arab Republic Concerning the Encouragement and Reciprocal Protection of Investments (1977) (July 6, 2021), available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1422/download>.

¹⁴² Art. 4(1) of the Agreement between the Government of the Republic of India and the Government of the Syrian Arab Republic on the Mutual Promotion and Protection of Investments (2008) (July 6, 2021), available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1605/download> (hereinafter, the India-Syria BIT).

¹⁴³ Art. 4(1) of the Agreement between the Government of the Islamic Republic of Iran and the Government of Syrian Arab Republic on the Promotion and Reciprocal Protection of Investments (1998) (July 6, 2021), available at <https://edit.wti.org/app.php/document/show/052b47cb-4c18-402c-9092-17858cc3d865> (hereinafter, the Iran-Syria BIT).

¹⁴⁴ Art. 2(5) of the Agreement on the Encouragement and Protection of Investments between the Hashemite Kingdom of Jordan and the Government of the Syrian Arab Republic (2001) (July 6, 2021), available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1764/download> (hereinafter, the Jordan-Syria BIT).

¹⁴⁵ Art. 3(1) of the Agreement between the Government of the Lebanese Republic and the Government of the Arab Republic of Syria on Encouragement and Reciprocal Protection of Investment (2010) (July 6, 2021), available at <https://edit.wti.org/app.php/document/show/f2ed0df0-cf2c-4b86-b01d-738ee-ef2cc3f> (hereinafter, the Lebanon-Syria BIT).

Malaysia;¹⁴⁶ Romania;¹⁴⁷ Slovakia;¹⁴⁸ Spain;¹⁴⁹ Switzerland;¹⁵⁰ the Czech Republic;¹⁵¹ and Ukraine.¹⁵²

The other challenge for Syria is that even if a tribunal held that the war clause is *lex specialis* as contended for in this contribution, this would not preclude all investors from importing the unqualified extended war clause contained in the Italy-Syria BIT. This arises from the fact that most of the BITs to which it is a party use broadly formulated war clauses that do not restrict treatment to “measures taken.”¹⁵³ The Turkey-Syria BIT and Syria’s BIT with Russia are its only BIT’s restricting treatment to “measures taken.”¹⁵⁴ Where the broader term of “treatment” is used without being subject to “measures taken,” the war clause itself would entitle the investor to the

¹⁴⁶ Art. 3(1) of the Agreement between the Government of Malaysia and the Government of the Syrian Arab Republic for the Promotion and Reciprocal Protection of Investments (2009) (July 6, 2021), available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5690/download> (hereinafter, the Malaysia-Syria BIT).

¹⁴⁷ Agreement between the Government of Romania and the Government of the Syrian Arab Republic on the Promotion and Reciprocal Protection of Investments (2008) (July 6, 2021), available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6202/download> (hereinafter, the Romania-Syria BIT).

¹⁴⁸ Art. 3(1) of the Agreement between the Slovak Republic and the Syrian Arab Republic for the Promotion and Reciprocal Protection of Investments (2009) (July 6, 2021), available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2265/download>.

¹⁴⁹ Art. 4(1) of the Agreement between the Kingdom of Spain and the Syrian Arab Republic on the Promotion and Reciprocal Protection of Investments (2003) (July 6, 2021), available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2282/download> (hereinafter, the Spain-Syria BIT).

¹⁵⁰ Art. 5(1) of the Agreement between the Swiss Confederation and the Syrian Arab Republic Concerning the Reciprocal Promotion and Protection of Investments (2007) (July 6, 2021), available at <https://edit.wti.org/app.php/document/show/06986697-a7bf-47e8-b26b-d71797c8638e> (hereinafter, the Switzerland-Syria BIT).

¹⁵¹ Art. 3(1) of the Agreement between the Czech Republic and the Syrian Arab Republic on the Promotion and Reciprocal Protection of Investments (2008) (July 6, 2021), available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/987/download> (hereinafter, the Czech Republic-Syria BIT).

¹⁵² Agreement between the Government of Ukraine and the Government of the Syrian Arab Republic on Promotion and Mutual Protection of Investments (2002) (July 6, 2021), available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6253/download> (hereinafter, the Ukraine-Syria BIT).

¹⁵³ Art. 6(2) of the Cyprus-Syria BIT; Art. 6(1) of the Greece-Syria BIT; Art. 6 of the India-Syria BIT; Art. 7 of the Iran-Syria BIT; Art. 3(4) of the Jordan-Syria BIT; Art. 5 of the Lebanon-Syria BIT; Art. 4 of the Malaysia-Syria BIT; Art. 5(2) of the Romania-Syria BIT; Art. 5(2) of the Slovakia-Syria BIT; Art. 6(1) of the Spain-Syria BIT; Art. 8 of the Switzerland-Syria BIT; Art. 4(1) of the Czech Republic-Syria BIT; and Art. 4(1) of the Ukraine-Syria BIT. The author is aware that the India-Syria BIT has been terminated. However, it will continue in force for a further 10-years after termination in terms of Article 15(4) of the India-Syria BIT.

¹⁵⁴ Art. 5(1) of the Russia-Syria BIT; Art. IV(3) of the Turkey-Syria BIT.

“treatment” legally owed to Italian investors. These war clauses also do not subject the scope of its MFN treatment to investors in like circumstances.

This highlights the fact that the problem with unqualified extended war clauses does not only arise from an overly broad interpretation by the tribunal. This state of affairs can only be rectified through substantive reforms. Merely adopting any of the more restrictive interpretations contended for in this contribution, or the *Guris* dissenting opinion would be ineffective at truly limiting liability. These interpretations would have excluded liability in the *Guris* case but would not do so in many other cases.

4. Unqualified Extended War Clauses and Armed Conflict in Cameroon

4.1. Foreign Investors and Armed Conflict in Cameroon

Cameroon is a lower-middle-income country and is the largest economy in the Economic and Monetary Community of Central Africa (CEMAC).¹⁵⁵ Despite having a higher per capita GDP than the average in Sub-Saharan Africa, Cameroon has seen a growing number of its citizens living in poverty.¹⁵⁶ The growth in the number of people living in poverty conditions has been partially driven by factors such as slower economic growth and the volatility in global oil prices.¹⁵⁷ It has been reported that FDI levels into Cameroon are quite low relative to the size of its economy. Nevertheless, FDI into Cameroon has consistently been above \$600 million a year.¹⁵⁸ Investors from France have traditionally dominated inward FDI into Cameroon. In recent years there has also been substantial growth in the number of Chinese investors investing in Cameroon.¹⁵⁹

Boko Haram has been in Cameroon since 2009. Following the armed conflict between Boko Haram fighters and Nigerian security forces in Maiduguri, several Boko Haram militants crossed the border to seek refuge in the northernmost part of Cameroon.¹⁶⁰ Boko Haram’s presence in Cameroon has undergone tremendous changes in the following years. At first, there had been relatively limited skirmishes between Cameroon and the armed group. However, from 2011 it began recruiting Cameroonians as fighters and used the Far North as a safe haven. The militants now

¹⁵⁵ The World Bank in Cameroon: Overview, The World Bank (July 6, 2021), available at <https://www.worldbank.org/en/country/cameroon/overview>.

¹⁵⁶ Samuel Fambon et al., *Slow Progress in Growth and Poverty Reduction in Cameroon*, in Channing Arndt et al. (eds.), *Growth and Poverty in Sub-Saharan Africa* 293, 301–303 (2016).

¹⁵⁷ *Id.* at 302.

¹⁵⁸ United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 2021: Investing in Sustainable Recovery*, UNCTAD/WIR/2021 (2021), at 249 (July 6, 2021), available at https://unctad.org/system/files/official-document/wir2021_en.pdf.

¹⁵⁹ *Id.*

¹⁶⁰ *Cameroon: Growing Boko Haram Threat*, 51 Afr. Res. Bull. Polit. Soc. Cult. Ser. 20245A–20246C (2014).

frequently engage in armed attacks against security forces in the region and the civilian population. Redaelli noted that

the intensity of the armed violence opposing the Cameroon armed forces and Boko Haram, as well as the level of organization of Boko Haram in Cameroon, allow us to conclude to the existence of a [non-international armed conflict].¹⁶¹

4.2. Unqualified Extended War Clauses in Cameroonian BITs

Cameroon is a party to two treaties containing unqualified extended war clauses. The Cameroon-Italy unqualified extended war clause provides that

Investors of one of the Contracting Parties whose investments have suffered losses due to war or any other armed conflict, revolution, national emergency, or revolt occurred in the territory of the other Contracting Party, the latter Party shall provide a fair and equitable treatment in accordance with Article 3(2) of this Agreement. In any case, they *will be entitled to compensation*.¹⁶²

The first part of the clause appears to be a standard non-discrimination war clause. However, from the last sentence, it becomes clear that the war clause entitles the investor to compensation. This entitlement to receive compensation is also not qualified by any preconditions in the treaty. Accordingly, it is an example of an unqualified extended war clause, albeit less detailed than the clause in the Italy-Syria BIT.

The Agreement between the Government of the United Republic of Cameroon and the Government of The Socialist Republic of Romania on The Reciprocal Guarantee of Investments (hereinafter, the Cameroon-Romania BIT) also contains an unqualified extended war clause. This clause provides that

Investors of one Contracting Party whose investments have suffered losses as a result of war, armed conflict or a state of national emergency in the territory of the other Contracting Party *shall receive from the latter the necessary compensation to cover the losses incurred*. The amounts relating to such compensation shall be freely transferable.¹⁶³

It is immediately apparent that the clause in question is an unqualified extended war clause. It requires the state to provide compensation “to cover the losses

¹⁶¹ *A Non-International Armed Conflict Against Boko Haram in Cameroon's Far North*, Rulac, 16 November 2020 (July 6, 2021), available at <https://www.rulac.org/news/a-non-international-armed-conflict-against-boko-haram-in-cameroons-far-nort>.

¹⁶² Art. 5(6) of the Cameroon-Italy BIT.

¹⁶³ Art. 5(4) of the Cameroon-Romania BIT.

incurred.” Therefore, Italian and Romanian investors are entitled to compensation should their investments incur losses in Cameroon amidst an armed conflict. The extent to which other investors in Cameroon will be able to rely on these clauses is contingent upon them being protected by an MFN clause. However, not all investors protected by an MFN clause will automatically be able to rely on these unqualified extended war clauses as some treaties contain restricted MFN clauses that do not cater for “treatment” in its broadest sense. The Canada-Cameroon BIT, for example, only provides for MFN treatment “with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of an investment in its territory.”¹⁶⁴

Its war clause also only provides for MFN treatment “with respect to *measures*” the state takes to compensate investors.¹⁶⁵ As the tribunal in the *Guris* case correctly noted, the term “measures” is more restricted than “treatment” and requires action on the state’s part.¹⁶⁶ The mere fact that Italian and Romanian investors enjoy an international law right to obtain compensation does not mean that Cameroon has taken any measures. Canadian investors cannot rely on the war clause to seek compensation until such time as Cameroon takes regulatory or other “measures” to provide any investors with compensation for losses.

However, the war clause in the Agreement between the Government of the Republic of Korea and the Government of the Republic of Cameroon for the Promotion and Protection of Investments (hereinafter, the Korea-Cameroon BIT) is formulated in much broader terms. The clause provides that

Investors of one Contracting Party, whose investments suffer losses owing to war or other armed conflict, a state of national emergency, revolt, insurrection, riot or other similar situation in the territory of the other Contracting Party, shall be accorded by the latter Contracting Party, as regards restitution, indemnification, compensation or other forms of settlement, *treatment no less favourable* than that which the latter Contracting Party accords to its own investors or to investors of any third State.¹⁶⁷

The treaty here does not restrict the term “treatment” by subjecting it to “measures taken.” Where the broader concept of treatment applies, it is not subject to the state taking any actual measures.¹⁶⁸ In such instances, the investor will be allowed to rely

¹⁶⁴ Art. 5(2) of the Canada-Cameroon BIT.

¹⁶⁵ *Id.* Art. 7.

¹⁶⁶ Para. 244 of the *Guris* case.

¹⁶⁷ Art. 4(1) of the Cameroon-Korea BIT.

¹⁶⁸ Para. 244 of the *Guris* case.

on the more favourable treatment owed to another investor. Korean investors can, therefore, rely on the international law treatment owed to Italian and Romanian investors even if Cameroon has not taken any actual “measures.” This is particularly important because even if future tribunals agreed with this contribution that the war clause is *lex specialis*, Korean investors would still be able to claim the treatment due to Romanian and Italian investors.

The majority of BITs to which Cameroon is a party uses the term “treatment” without it being qualified through the inclusion of the word “measures.” The second part of the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United Republic of Cameroon (hereinafter, the UK-Cameroon BIT) war clause is a standard extended war clause that remains subject to the restrictive rules applicable to it.¹⁶⁹ However, the clause itself notes that it is “[w]ithout prejudice to paragraph (I) of this Article.”¹⁷⁰ Accordingly, if more favourable treatment can be obtained under the first part of the war clause, that treatment will apply. The more restricted extended war clause will not, therefore, in any way constrain investors from the United Kingdom from relying on the treatment due to Italian and Romanian investors.

The USA-Cameroon BIT also contains an extended war clause. However, unlike the UK-Cameroon BIT, its extended war clause does not explicitly say that the clause is without prejudice to the non-discrimination war clause.¹⁷¹ Nevertheless, the mere existence of this extended war clause is unlikely to impede American investors from being able to rely on the treatment due to Italian and Romanian investors. It cannot be said that the extended war clause in the USA-Cameroon BIT in any way derogates from the more conventional non-discrimination war clause. These two clauses do not ordinarily deal with the same subject matter, and accordingly, no *lex specialis* argument can reasonably arise. The general war clause deals specifically with non-discrimination regarding any “treatment” accorded to other investors with respect to losses in the course of an armed conflict.¹⁷² The extended war clause, in turn, deals with specific situations in which investors have a right to receive compensation irrespective of any treatment accorded to other investors.

Chinese and German investors will also be able to rely on the broadly formulated standard non-discrimination war clauses contained in their respective nations’ BITs

¹⁶⁹ Art. 4(2) of the UK-Cameroon BIT.

¹⁷⁰ *Id.*

¹⁷¹ Art. IV(2) of the Treaty between the United States of America and the Republic of Cameroon Concerning the Reciprocal Encouragement and Protection of Investment (1986) (July 8, 2021), available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/599/download> (hereinafter, the USA-Cameroon BIT).

¹⁷² *Id.* Art. IV(1).

with Cameroon.¹⁷³ The Trade, Investment Protection and Technical Cooperation Agreement between the Swiss Confederation and the Federal Republic of Cameroon (hereinafter, the Swiss-Cameroon BIT) does not contain a war clause. In the absence of a war clause, there can be no argument that a more specific clause restricts the general MFN clause. Therefore, Swiss investors in Cameroon will be able to rely on their broadly worded MFN clause to seek the treatment to which Romanian and Swiss investors are entitled to concerning compensation for war losses.¹⁷⁴

From the discussion on the various BITs to which Cameroon is a party, it has become apparent that the majority of BIT protected investors in the country will be able to rely on the unqualified extended war clauses contained in the Italian and Romanian BITs. Even if a tribunal agreed with the interpretation contended for in this contribution that the war clause is generally *lex specialis* concerning MFN treatment, this would not offer Cameroon much relief. The broadly formulated war clauses in its BITs would not restrict investors from being entitled to rely on the “treatment” offered to certain investors in terms of the unqualified extended war clauses. It is submitted that this state of affairs is highly unsustainable as it may well expose a developing country such as Cameroon to virtually unlimited liability to foreign investors in its territory. The mere fact that investors incurred losses resulting from an armed conflict would entitle them to compensation. This could well effectively make IIL a shield to protect investors against business risks they had voluntarily assumed. Investors who knowingly invest in volatile regions would benefit from the higher returns often associated with such investments without genuinely being exposed to the heightened risk—a risk premium for risks borne by the state.

5. Unqualified Extended War Clauses and Armed Conflict in Yemen

5.1. Foreign Investors and Armed Conflict in Yemen

The Yemeni government has been engaged in a non-international armed conflict with Houthi rebel groups since 2014.¹⁷⁵ In 2015 President Hadi resigned and fled to Saudi Arabia, when the Houthi rebels occupied Sana’a, the capital of Yemen, and later his last refuge in Aden.¹⁷⁶ President Hadi later withdrew his resignation and

¹⁷³ Art. 5(3) of the Agreement between the Government of the Republic of Cameroon and the Government of the People’s Republic of China for the Promotion and Reciprocal Protection of Investments (1997) (July 8, 2021), available at <https://edit.wti.org/app.php/document/show/9ae94ed8-ec33-480e-a3a7-f2bb14a12dc5>; Art. 3(3) of the Treaty between the Federal Republic of Germany and the Federal Republic of Cameroon on Promotion of Investment of Capital (1962) (July 8, 2021), available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/588/download>.

¹⁷⁴ Art. 7(1) of the Swiss-Cameroon BIT.

¹⁷⁵ Louis Koen & Brooke Hanson, *The Obligation on an Intervening State to Respect the Host State’s IHL and IHRL Obligations in an Intervention by Invitation: An Analysis of the Saudi Intervention in Yemen*, 6(1) Groninger J. Int’l L. 203, 206 (2018).

¹⁷⁶ *Id.*

invited Saudi Arabia and its Gulf Cooperation Council (GCC) partners to use military force against the rebels.¹⁷⁷ The international community has continued to recognise President Hadi's government as the legitimate government of Yemen, and Saudi Arabia has intervened in the conflict on its behalf.

The United Nations has described it as the world's greatest humanitarian disaster.¹⁷⁸ The World Food Programme (WFP) has indicated that around 66% of the Yemeni population faces hunger.¹⁷⁹ In recent years there has been some limited progress towards a peace agreement as Southern separatist and the government has agreed to a ceasefire.¹⁸⁰ Oil production has also resumed in some areas.¹⁸¹ However, most oil projects by foreign investors, such as the French oil giant Total, have not been operational in years. Total has also now sold the last of its operations in Yemen.¹⁸² The presence of an unqualified extended war clause in any Yemeni treaties may expose the country to substantial liability. It could effectively allow these foreign investors to claim profits lost while the security risk in Yemen made it virtually impossible for them to carry on with their operations.

5.2. Unqualified Extended War Clauses in Investment Treaties with Yemen

The Agreement between the Government of the Republic of Italy and the Government of the Republic of Yemen on the Promotion and Protection of Investments (hereinafter, the Italy-Yemen BIT) contains an unqualified extended war clause which provides that

Should investors of either Contracting Parties incur losses or damages on their investments in the territory of the other Contracting Party due to war, other forms of armed conflict, a state of emergency, civil strife or other similar events, the Contracting Party in whose territory the investment has been effected *shall offer adequate compensation* in respect of such losses or damages...¹⁸³

¹⁷⁷ Koen & Hanson 2018, at 206.

¹⁷⁸ Hashim T. Hashim et al., *Yemen's Triple Emergency: Food Crisis Amid a Civil War and COVID-19 Pandemic*, 2 Public Health Pract. 100082 (2021).

¹⁷⁹ Laurent Bukera, *Yemen*, World Food Programme (WFP) (2021) (July 10, 2021), available at <https://www.wfp.org/countries/yemen>.

¹⁸⁰ Ahmed Al-Haj, *Saudis say Yemen's government, separatists agree to truce*, ABC News, 20 June 2020 (July 10, 2021), available at <https://www.abc4.com/news/saudis-say-yemens-government-separatists-agree-to-truce/>.

¹⁸¹ EIA Update on Energy Production in Yemen, U.S. Energy Information Administration (EIA) (2020) (July 10, 2021), available at https://www.eia.gov/international/content/analysis/countries_long/Yemen/yemen.pdf.

¹⁸² *Id.*

¹⁸³ Art. IV of the Italy-Yemen BIT.

This unqualified extended war clause is virtually identical to the one contained in the Italy-Syria BIT. The clause is broadly formulated and will cover armed conflicts and an entire range of events that fall below the threshold of a non-international armed conflict.¹⁸⁴ This clause also does not explicitly include non-state actors. However, a tribunal is unlikely to regard this as limiting liability to conduct by the state as the clause itself merely depends on losses arising from any of the listed events. The tribunal in the *Guris* case interpreted the unqualified extended war clause in that case in a similar manner. The second component of the clause, which includes non-state actors explicitly, was merely regarded as confirmation that the interpretation of the first component was correct. In establishing liability, it is immaterial if the losses arose due to the conduct of the Yemeni government and its allies or Houthi rebels.

The war clauses contained in Yemeni BITs are quite diverse. As with Cameroon and Nigeria, several BITs do not restrict the war clause to “measures taken” but instead only use the broader term “treatment.” Therefore, investors from these countries would be able to rely on the treatment owed to Italian investors. These countries are Austria,¹⁸⁵ China,¹⁸⁶ Ethiopia,¹⁸⁷ France,¹⁸⁸ Germany,¹⁸⁹ Hungary,¹⁹⁰ Jordan,¹⁹¹

¹⁸⁴ See Anthony Cullen, *The Definition of Non-International Armed Conflict in the Rome Statute of the International Criminal Court: An Analysis of the Threshold of Application Contained in Article 8(2)(f), 12(3) J. Confl. Secur. L.* 419 (2008) with respect to the threshold for a non-international armed conflict.

¹⁸⁵ Art. 6 of the Agreement between the Republic of Austria and the Republic of Yemen for the Promotion and Protection of Investments (2002) (July 7, 2021), available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/228/download>.

¹⁸⁶ Art. 5 of the Agreement between the Government of the People's Republic of China and the Government of the Republic of Yemen on the Promotion and Reciprocal Protection of Investments (1998) (July 7, 2021), available at <https://edit.wti.org/app.php/document/show/718c3112-dd74-4efb-91ae-053807d18e20>.

¹⁸⁷ Art. 5 of the Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the Republic of Yemen on the Reciprocal Promotion and Protection of Investment (1999) (July 7, 2021), available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1181/download>.

¹⁸⁸ Art. 4(1) of the Agreement between the Government of the French Republic and the Government of the Arab Republic of Yemen on the Promotion and Protection of Investments (1984) (July 6, 2021), available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1296/download>.

¹⁸⁹ Art. 4(3) of the Treaty between the Federal Republic of Germany and the Republic of Yemen Concerning the Encouragement and Reciprocal Protection of Investments (2005) (July 6, 2021), available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/4796/download>.

¹⁹⁰ Art. 4(1) of the Agreement between the Republic of Hungary and the Republic of Yemen for the Promotion and Reciprocal Protection of Investments (2004) (July 6, 2021) available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1559/download>.

¹⁹¹ Art. 3(2) of the Agreement between the Government of the Hashemite Kingdom of Jordan and the Government of the Republic of Yemen on the Mutual Promotion and Protection of Investments (1996) (July 6, 2021), available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1778/download>.

Lebanon,¹⁹² the BLEU,¹⁹³ and the Czech Republic.¹⁹⁴ However, the war clauses in Yemen's treaties with both the Russian Federation and Turkey restrict the operation of MFN treatment to "measures taken."¹⁹⁵ The Russian treaty also limits the general MFN clause to matters pertaining to the investment framework concerning the "management" or the "disposal" of the investment. It is submitted that receiving compensation for war losses does not ordinarily form part of the management or disposal of an investment. The *Cengiz* tribunal also implicitly recognised this when it found that the general MFN clause and the war clause dealt with different subject matters.¹⁹⁶ Russian investors would accordingly not be able to rely on the war clause or the general MFN clause to seek the treatment owed to Italian investors. However, as soon as Yemen takes actual measures to compensate other investors, they may rely on the war clause to seek compensation as well.

The Agreement between the Government of the Islamic Republic of Iran and the Government of the Republic of Yemen on the Promotion and Reciprocal Protection of Investments (hereinafter, the Iran-Yemen BIT) contains a somewhat unique war clause that does not use the term "treatment" at all. The war clause, in that case, provides that

Should an investor of one of the Contracting Parties incur losses or damages on its investment in the territory of the other Contracting Party due to revolution, war, other forms of armed conflict, state of emergency, civil strife, riot, or other similar events, the Contracting Party in which the investment has been effected shall accord to such investor compensation in respect of such losses or damages not less favorable than that accorded to its own investors or to investors of any other country whichever is more favorable.¹⁹⁷

¹⁹² Art. 4(3) of the Agreement between the Government of the Republic of Yemen and the Government of the Republic of Lebanon (1999) (July 6, 2021), available at <https://edit.wti.org/app.php/document/show/e04f2373-ca74-4671-b520-990d716dccc5>.

¹⁹³ Art. 5 of the Agreement between the Belgo-Luxembourg Economic Union and the Government of the Republic of Yemen Concerning the Reciprocal Encouragement and Protection of Investments (2000) (July 6, 2021), available at <https://edit.wti.org/app.php/document/show/e118d805-0fce-4043-80b4-85dd32f11d4c>.

¹⁹⁴ Art. 4(1) of the Agreement between the Czech Republic and the Republic of Yemen for the Promotion and Reciprocal Protection of Investments (2008) (July 6, 2021), available at <https://investment-policy.unctad.org/international-investment-agreements/treaty-files/1000/download>.

¹⁹⁵ Art. 5(1) of the Agreement between the Russian Federation and the Government of the Republic of Yemen on the Promotion and Mutual Protection of Investments (2002) (July 6, 2021), available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5938/download>; Art. III(2) of the Agreement between the Republic of Turkey and the Republic of Yemen Concerning the Reciprocal Promotion and Protection of Investments (2000) (July 6, 2021), available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2357/download>.

¹⁹⁶ Para. 357 of the *Cengiz* case.

¹⁹⁷ Art. 7 of the Iran-Yemen BIT.

The clause in this instance will likely be interpreted in a manner akin to clauses limiting the obligation to “measures taken.” The clause confines the duty of non-discrimination entirely to “compensation accorded.” Therefore, this war clause cannot be used to seek the “treatment” owed to Italian investors. The same war clause can be found in Yemen’s investment treaty with Oman.¹⁹⁸ The extent to which investors from Iran and Oman can rely on the treatment owed to Italian investors is accordingly dependant on whether or not the war clause is *lex specialis*.

From the preceding discussion, it becomes apparent that some treaties to which Yemen is a party would restrict investors’ ability to import the unqualified extended war clause. However, many countries still have broadly worded war clauses that would permit reliance on the “treatment” owed to Italian investors. If Yemen is forced to take “measures” to compensate any of those investors, the obligation to accord compensation to the other investors is triggered in either event. The limitations in those extended war clauses are only effective as long as Yemen can avoid the need to take measures to compensate other investors for war losses.

It has been estimated that Yemen will need around \$25 billion over five years just to repair basic infrastructure in its 16 largest cities.¹⁹⁹ Yemen is already likely to experience substantial challenges in raising the necessary funds. If Yemen were to be required to compensate investors for all losses incurred, it might well make it impossible for Yemen to fund the required reconstruction after the conflict. There is an urgent need to address the substantial imbalance between investors’ rights and the need for Yemen to address the needs of its people. In the author’s view, unqualified extended war clauses are a prime example of an instance in which gains have been privatised while risks are socialised. The risk may also appear purely hypothetical, as no investor has ever invoked this clause against Yemen. However, the *Guris* case serves as a clear warning that states should not grow complacent by the infrequency at which a particular clause has been invoked and regard the risk as inconsequential.

6. The Role of the BRICS Countries in Reforming IIL

BRICS countries such as South Africa, India and Brazil have been particularly vocal on the need to reform IIL.²⁰⁰ These countries recognise the urgent need to address

¹⁹⁸ Art. 7 of the Agreement for the Reciprocal Promotion and Protection of Investments between the Government of the Sultanate of Oman and the Government of the Republic of Yemen (1998) (July 7, 2021), available at <https://edit.wti.org/app.php/document/show/3a70b787-8edd-4daf-a55d-2c088b87fb23>.

¹⁹⁹ World Bank, *Yemen Dynamic Needs Assessment: Phase 3 – 2020 Update* (2020), at 1 (July 8, 2021), available at <https://documents1.worldbank.org/curated/en/490981607970828629/pdf/Yemen-Dynamic-Needs-Assessment-Phase-3-2020-Update.pdf>.

²⁰⁰ Malebakeng A. Forere, *The New Developments in International Investment Law: A Need for Multilateral Investment Treaty?*, 21 Potchefstroom Electron. L.J. 1 (2018). The South African approach has also not been without criticism. See, e.g., Mmiselo F. Qumba, *South Africa’s Move Away from International Investor-State Dispute: A Breakthrough or Bad Omen for Investment in the Developing World?*, 52(1) De Jure 358 (2019).

the imbalance between investors' rights and states' ability to regulate in the public interest.²⁰¹ It is widely believed that IIL imposes extreme limitations on states power to regulate and provides investors with overly broad rights.²⁰² The BRICS countries have all expressed support, in principle, for the reform of IIL in their submissions to the United Nations Commission on International Trade Law (UNCITRAL) Working Group III.²⁰³ However, UNCITRAL Working Group III is principally focused on procedural reforms. South Africa noted in its submissions to the working group that

Any discussion on [Investor State Dispute Settlement] ISDS has to be located in a wider context and reform dialogue – to *include reform of the terms of the underlying treaties*, because reforming ISDS is in itself not sufficient to solve the current problems the regime faces. *Many problems of the current regime can only be tackled through a reform of substantive standards...*²⁰⁴

This contribution aligns itself with the views of South Africa. The unqualified extended war clauses discussed here are a prime example of an instance where the problem arises not only through interpretation but also through the very wording of the clause itself. It is acknowledged that these unqualified extended war clauses could theoretically be addressed through bilateral discussions between the parties to such treaties. However, practically speaking, several of the countries specially affected by these clauses, such as Yemen, lack the diplomatic capacity to seek such reforms. The internationally recognised government of Yemen barely has control over its territory, which results in discussion on ISDS reform being relatively low on its list of immediate priorities.

Akinkugbe also correctly notes that critical voices from the Global South have been largely marginalised in discussions on the reform of IIL.²⁰⁵ This is further exacer-

²⁰¹ Fabio C. Morosini, *Reconceptualizing the Right to Regulate in Investment Agreements: Reflections from the South African and Brazilian Experiences*, SSRN (2018), at 2 (July 7, 2021), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3209000.

²⁰² *Id.*

²⁰³ United Nations Commission on International Trade Law, Working Group III (Investor-State Dispute Settlement Reform), *Possible reform of investor-State dispute settlement (ISDS): Submission from the Government of China*, A/CN.9/WG.III/WP.181, 19 July 2019 (July 7, 2021), available at <https://undocs.org/en/A/CN.9/WG.III/WP.177>; United Nations Commission on International Trade Law, Working Group III (Investor-State Dispute Settlement Reform), *Possible reform of investor-State dispute settlement (ISDS): Submission from the Government of the Russian Federation*, A/CN.9/WG.III/WP.188/Add.1, 31 December 2019 (July 7, 2021), available at <https://undocs.org/en/A/CN.9/WG.III/WP.188/Add.1>; United Nations Commission on International Trade Law, Working Group III (Investor-State Dispute Settlement Reform), *Possible reform of investor-State dispute settlement (ISDS): Submission from the Government of South Africa*, A/CN.9/WG.III/WP.176, 17 July 2019 (July 7, 2021), available at <https://undocs.org/en/A/CN.9/WG.III/WP.176> (hereinafter, the South African UNCITRAL submissions).

²⁰⁴ Paras. 19–20 of the South African UNCITRAL submissions.

²⁰⁵ Olabisi D. Akinkugbe, *Africanization and the Reform of International Investment Law*, 53(1) Case W. Res. J. Int'l L. 7, 10 (2021).

bated by the limited expertise available on IIL in some states. In its submissions to the working group, Mali candidly notes that developing countries often have “only limited expertise in complex legal issues.”²⁰⁶ This limited expertise also affects the agreement’s content as states may not always be fully aware of the consequences of specific clauses contained in these agreements. Therefore, the support of a group with greater diplomatic influence, such as the BRICS, may be necessary to place these reforms on the international agenda. However, this must be done to allow these countries a greater opportunity to have their concerns heard and not per se to let the BRICS countries take over the entirety of the reform agenda.

South Africa’s stance on the extent of a state’s obligation to provide an investor with physical security is reflected in its Protection of Investment Act.²⁰⁷ The Act shows a clear preference for limiting states liability to what is practically possible within the state’s available resources.²⁰⁸ Although it does not speak specifically to South Africa’s stance on unqualified extended war clauses, it provides insight into South Africa’s attempts to limit obligations on the state, which would be practically impossible to implement. In light of its submissions to the UNCITRAL working group, South Africa supports significant substantive reforms. If its other BRICS partners were to join it in pushing to have substantive reforms such as unqualified extended war clauses placed on the agenda, it may yet succeed.

Despite the substantial potential for the BRICS countries to advance the reform of IIL, some scholars are of the view that the BRICS countries have substantially diverged from each other in terms of their policy stance.²⁰⁹ As previously noted, all of the BRICS countries acknowledge the need for reform in IIL. However, they seem to differ somewhat on the extent to which reforms are needed.²¹⁰ Cai argues that China’s support for gradual change diverges substantially from the fundamental changes sought by Brazil, India and South Africa.²¹¹ The author agrees that China has not publicly expressed support for radical changes to the contemporary IIL regime. However, it has expressed an evident willingness to reform those areas of IIL where there is a vast imbalance between investor’s rights and the ability of the state to regulate. Man has, for example, argued that although the inclusion of sustainable development in international investment agreements has a positive impact, few

²⁰⁶ United Nations Commission on International Trade Law, Working Group III (Investor-State Dispute Settlement Reform), *Possible reform of investor-State dispute settlement (ISDS): Submission from the Government of Mali*, A/CN.9/WG.III/WP.181, 17 September 2019 (July 7, 2021), available at <https://undocs.org/en/A/CN.9/WG.III/WP.181>.

²⁰⁷ Forere 2018, at 14.

²⁰⁸ Sec. 9 of the Protection of Investment Act 22 of 2015; Forere 2018, at 14.

²⁰⁹ Cai 2018, at 217.

²¹⁰ *Id.*

²¹¹ *Id.*

countries do so.²¹² She points out that one of the few exceptions is China, which is increasingly incorporating sustainable development into its international investment agreements, especially in agreements with its African partners.²¹³ Clauses creating strict liability are perhaps some of the clearest examples of an area with a substantial imbalance between the investor and the state. The author submits that this is an area where China would likely support its BRICS partners in seeking more significant substantial reforms.

Russia has also been supportive of substantive reforms to IIL. However, it is not clear what the Russian position is on unqualified extended war clauses. Russia has not included such clauses within its bilateral investment treaties. However, Russia is a party to one such clause contained in the Agreement on Promotion and Mutual Protection of Investments in the Member States of the Eurasian Economic Community (the EAEC Investment Agreement). This unqualified extended war clause provides that

*Investors have the right to compensation for damage to their investment and income as a result of civil unrest, hostilities, revolution, insurrection, state of emergency or other similar circumstances in the territory of the recipient state...*²¹⁴

This unqualified extended war clause is also broadly formulated and covers a range of events that fall well below the threshold of a non-international armed conflict. The consequences of this clause for members of the EAEC may be tempered somewhat by the fact that MFN clauses frequently excludes agreements signed as part of a regional integration agreement. Nevertheless, for purposes of this contribution, the existence of the clause raises important questions as to whether the Russian approach to limiting state liability during an armed conflict diverges from that of some of its other BRICS partners. Notwithstanding this clause, the author does not believe that the Russian government supports broad, unqualified extended war clauses as a general Russian investment policy. If it had supported the expansion of such clauses, the author would expect to have seen such clauses in at least some of its BITs concluded after the EAEC Investment Agreement.²¹⁵

²¹² Amy Man, *Old Players, New Rules: A Critique of the China-Ethiopia and China-Tanzania Bilateral Investment Treaties*, in Clair Gammage & Tonia Novitz (eds.), *Sustainable Trade, Investment and Finance: Toward Responsible and Coherent Regulatory Frameworks* (2019) (July 8, 2021), available at <https://uwe-repository.worktribe.com/output/845897>.

²¹³ *Id.* at 2.

²¹⁴ Art. 5 of the Agreement on Promotion and Mutual Protection of Investments in the Member States of the Eurasian Economic Community (2008) (July 8, 2021), available at <https://edit.wti.org/app.php/document/show/732e30de-bd49-431b-a69e-ab7797c2ce58>.

²¹⁵ Russia has concluded several agreements since the EAEC Investment agreement. None of these agreements contain unqualified extended war clauses. See, *inter alia*, the Agreement between the

Conclusion

From this contribution, it becomes apparent that the relatively infrequent occurrence of unqualified extended war clauses does not make it of lesser importance to understand these clauses. Italian BITs generally contain these clauses in BITs precisely with those engaged in an armed conflict. The broad interpretation of MFN clauses adopted by investment tribunals also results in a vast increase in the number of investors who may rely on an unqualified extended war clause. This also showcases the need for states to pay greater attention to MFN clauses when implementing treaty reforms. States have not paid adequate attention to the reform of MFN clauses when adopting treaty reform. The Nigeria-Morocco BIT has, for example, widely been hailed as a prime example of a reformed BIT.²¹⁶ Yet, that treaty contains a largely unreformed MFN provision in its war clause, which uses the broader term “treatment” without being subject to “measures taken.”²¹⁷ If the treaty comes into force, investors from Morocco could potentially rely on the unqualified extended war clause in the Nigeria-Italy BIT instead of the more limited specific extended war clause contained in the Nigeria-Morocco BIT.

In this contribution, it has also been argued that states should not regard the risk of unqualified extended war clauses as immaterial merely because such clauses had not been frequently invoked in the past. The *Guris* case, and the implications it holds for broadly formulated unqualified extended war clauses, may not be as widely known yet. However, its discussion on arbitration news subscription services means it has been brought to the attention of precisely those advising investors.²¹⁸ Pandora’s Box has been opened, and more investors will likely rely on such clauses in future arbitrations. This would not be surprising given the substantial surge in compensation sought by investors over losses suffered during an armed conflict.

Government of the Russian Federation and the Government of the Kingdom of Morocco on the promotion and mutual protection of capital investments (2016) (July 8, 2021), available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5963/download>; the Agreement between the Government of the Russian Federation and the Government of the Islamic Republic of Iran About Promotion and Mutual Protection Capital Investments (2015) (July 8, 2021), available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5935/download>; the Agreement between the Government of the Russian Federation and the Government of the Kingdom of Cambodia on the Promotion and Mutual Protection of Investments (2015) (July 8, 2021), available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5999/download> and the Agreement between the Russian Federation and Government of the Republic of Uzbekistan on Encouragement and Mutual Protection of Investments (2013) (July 8, 2021), available at <https://edit.wti.org/app.php/document/show/c946a0d0-63f6-4805-be84-0af482f05120>.

²¹⁶ Chidebe Nwankwo, *Balancing International Investment Law and Climate Change in Africa: Assessing Vertical and Horizontal Norms*, 17(1) *Manch. J. Int’l Econ. L.* 48, 61–63 (2020).

²¹⁷ Art. 9(1) of the Morocco-Nigeria BIT.

²¹⁸ Bohmer, *supra* note 7.

The unqualified extended war clauses make obtaining compensation substantially easier than proving a breach of standards such as full protection and security.

This contribution has also opined that the BRICS countries can play a clear role in placing the elimination of unqualified extended war clauses on the international agenda. Their support may well be essential to assist smaller states who lack the diplomatic capacity and/or expertise in investment law matters. However, there is a need for the BRICS countries to adopt a more unified approach when seeking reform. This contribution has acknowledged that it is unlikely that the BRICS countries will adopt an entirely unified approach given their unique national interests. The clearest point of consensus among the BRICS countries has been the need to reform those areas of IIL that grants investors disproportionate rights. Unqualified extended war clauses represent an ideal point for these nations to adopt a unified approach, given the far-reaching implications of such clauses for developing countries.

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