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The Fighting's Done, Now Pay Me: Investment Treaties, War and State Liability

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Notes:

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ABSTRACT

Where major conflict erupts, major state liability follows. Sri Lanka, Zaire, Libya, and Syria have all found themselves subject to extensive liability to investors under bilateral investment treaties for harms incurred in the midst of armed conflicts raging within their borders. This Note argues that war-loss clauses, present in nearly every bilateral investment treaty, should be interpreted to create a lex specialis *regime limiting investor compensation following armed conflicts. Arbitral tribunals, however, have consistently refused to apply war-loss clauses in this manner. This has lead to an over-extension of state liability to foreign investors in the wake of armed conflict. This liability has the potential to create a host of problems for states recovering from armed conflict, and this Note proposes three solutions. First, it outlines how war-loss clauses can plausibly be interpreted under the Vienna Convention on the Law of Treaties to create a special regime limiting states' liability to investors for war losses. Second, it proposes that more explicit war-loss provisions be added to future bilateral investment treaties. Last, it outlines the contours of a multilateral instrument that could supersede the application of bilateral investment treaties in times of armed conflict.*

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I. INTRODUCTION

The West cheered in the early 2010s as the Arab Spring bloomed and anachronistic strongman regimes fell like dominoes to youth-led movements calling for democratic reform. At least one interest, however, was muted in its jubilation—foreigners who had invested heavily in the petrochemical-rich region. Armed conflicts are messy, chaotic affairs in which destruction is rarely limited to the military alone. Foreign enterprises, conspicuous targets for theft and destruction, are often especially affected. In Libya, where the potential for disaster was particularly acute, foreigners had invested billions in the period preceding the bloody civil war that has now drawn on for nearly a decade.

States like Libya, engulfed in armed conflict, are often faced with the most dire of circumstances. Governments approach collapse,

economic disaster looms, control of territory is lost, and the ability to protect citizens or control armed militias evaporates. In crises of this magnitude, states are forced to grapple with difficult decisions. These decisions not only affect compliance with international obligations, but may determine a state's very survival. At the same time, states have accepted duties to foreign investors under investment treaties in order to induce foreign investment domestically or to protect their own investors' ventures abroad.

Balancing state sovereignty and investor rights in wartime is a delicate line which, thus far, the international investment regime has been ill-suited to walk. Part of this stems from the nature of the international investment system. International investment is primarily governed by a fragmented system of bilateral investment treaties (BITs) negotiated between individual states, each with its own quirks and differences. Arbitrators who hear cases arising under these treaties are not obligated to follow the precedent of previous tribunals when rendering decisions. The international investment regime thus creates a substantial degree of uncertainty for states at war, problematic for their ability to make informed decisions in the heat of conflict. For example, a state's duty to send military forces to protect a foreign construction site suffering damage and theft at the hands of militia groups may depend on the nationality of the investment's owner.[1]

BITs and other investment agreements have given investors standing to bring claims to recover damages for their losses directly against host states. For losses incurred during an armed conflict, investors typically claim breach of a host state's duty to provide an investment with adequate protection under a BIT's full protection and security (FPS) clause.[2] Defending against these claims, host states have often argued that they have no duty to compensate for breaches of FPS clauses because a BIT's war-loss clauses[3] create a *lex specialis* regime governing investor compensation in the context of armed conflict. A typical war-loss clause states that investors are only to be compensated for losses incurred during wartime on a national treatment or most-favored-nation basis, meaning that a duty for a state to compensate an investor under the treaty arises only when it has provided compensation to domestic investors or other foreign investors.[4] The *lex specialis* cannon of treaty interpretation holds that

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1. *See* Cengiz v. Libya, Case No. 21537/ZF/AYZ, Final Award, ¶ 683 (ICC Int'l Ct. Arb. 2018) [hereinafter Cengiz], https://www.italaw.com/sites/default/files/case-documents/italaw11275.pdf (last visited Aug. 11, 2021) [https://perma.cc/E5XW-FEYY] (archived Aug. 11, 2021).

2. *See infra* Part II.A for discussion.

3. *See infra* Part II.B for discussion.

4. *See, e.g.*, Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Democratic Socialist Republic of Sri Lanka for the Promotion and Protection of Investments, art. 4(1), Sri

specifically applicable treaty terms displace general terms when the terms conflict.[5] In relation to FPS and war-loss clauses, this means that a state's duty to compensate investors for the breach of "general" FPS clauses is displaced by the compensation regime set forth in war-loss clauses, which specifically apply in times of armed conflict.[6] Because states rarely compensate investors for losses in these contexts, a *lex specialis* regime based on war-loss clauses provides a solution to the difficult problem of limiting exorbitant state liability to investors for war losses.

Whether war-loss clauses in fact create such a regime is controversial and unsettled in international investment law,[7] but this was not always the case. The first investor state dispute settlement (ISDS) tribunal to render a decision based on a BIT grappled with this very question and seemed to implicitly answer in the affirmative.[8] As time has gone on, however, treatment has varied. In addition to the fragmented nature of the international investment regime, this uneven treatment partly stems from the proliferation of a modified version of the war-loss clause, which, rather than limiting *all* compensation for investor losses sustained in armed conflict on a national treatement or most-favored-nation basis,[9] applies the limitation only to "measures

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Lanka-U.K., Feb. 23, 1980, [hereinafter Sri Lanka-UK BIT], https://www.italaw.com/sites/default/files/laws/italaw6236.pdf (last visited Aug. 10, 2021) [https://perma.cc/927N-X33D] (archived Aug. 10, 2021).

5. Ralf Michaels & Joost Pauwelyn, *Conflict of Norms or Conflict of Laws?: Different Techniques in the Fragmentation of Public International Law*, 22 DUKE J. COMPAR. & INT'L L. 349, 363–67 (2012).

6. *See infra* Part II.B.3; *see also* L.E.S.I.S.p.A. v. Algeria, Case No. ARB/05/3, ¶ 177 (CIRDI 2008) [hereinafter L.E.S.I.], https://www.italaw.com/sites/default/files/case-documents/ita0457.pdf (last visited Aug. 10, 2021) [https://perma.cc/T3QZ-3FV6] (archived Aug. 10, 2021); Oztas Constr. v. Libyan Inv. Dev. Co., Case No. 21603/ZF/AYZ, Final Award, ¶¶ 162–67 (ICC Int'l Ct. Arb. 2018), https://www.italaw.com/sites/default/files/case-documents/italaw11415.pdf (last visited Aug. 10, 2021) [https://perma.cc/R3EF-SBRM] (archived Aug. 10, 2021).

7. *Compare* Asian Agric. Prods. Ltd. v. Sri Lanka, ICSID Case No. ARB/87/3, Dissenting Opinion of Samuel K.B. Asante, ¶¶ 29, 39 (June 15, 1990) 6 ICSID Rev. 574 (1991) [hereinafter AAPL Dissent] https://www.italaw.com/sites/default/files/case-documents/ita1035.pdf (last visited Aug. 10, 2021) [https://perma.cc/Z49F-UJTK] (archived Aug. 10, 2021) (explicitly stating that war-loss clauses create a *lex specialis* regime) *with Strabag*, ICSID Case No. ARB(AF)/15/1, ¶¶ 221–28 *and* Cengiz v. Libya, Case No. 21537/ZF/AYZ, Final Award, ¶¶ 350–58, 370 (ICC Int'l Ct. Arb. 2018) (both rejecting the argument that war-loss clauses create a *lex specialis* regime).

8. The majority of the tribunal in *AAPL v. Sri Lanka* found it necessary to import liability for breach of FPS into the war-loss clause in order to find state liability, rather than finding liability under the FPS alone. *See* Asian Agric. Prods. Ltd. v. Sri Lanka, ICSID Case No. ARB/87/3, Final Award, ¶¶ 53, 65–67 (June 27, 1990), 6 ICSID Rev. 526 (1991) [hereinafter AAPL], https://www.italaw.com/sites/default/files/case-documents/ita1034.pdf (last visited Aug. 10, 2021) [https://perma.cc/2QUJ-LHYN] (archived Aug. 10, 2021). The dissent stated explicitly that the war clause precluded operation of the FPS clause. *AAPL Dissent*, ICSID Case No. ARB/87/3, ¶¶ 29, 39.

9. *See, e.g.*, Sri Lanka-UK BIT, *supra* note 4, at art. 4(1).

[the state] adopts in relation to such losses."[10] This weakens the *lex specialis* argument and has the effect of imposing on states liability for failing to provide full protection and security to foreign investors, a difficult endeavor in the heat of armed conflict.[11] Troublingly, arbitral tribunals have largely failed to distinguish between the two distinct types of war-loss clauses and have rejected *lex specialis* arguments regarding both iterations. They have instead typically imposed an FPS duty on states during armed conflicts, creating additional burdens and uncertainty for regimes in already dire circumstances.[12] The various arbitral awards resulting from damage to investments incurred during the Libyan civil war exemplify this problematic situation.

In the absence of a special compensation regime for war losses, arbitrators and treaty terms often swing too far towards imposing heavy liability on states for damage caused by the various actors in an armed conflict. Arbitrators also engage in dubious post-hoc analyses of a states' military decisions.[13] Despite having no obligation to follow precedent, arbitrators often rely on previous decisions in order to avoid engaging in substantive analysis of treaty terms and states' defenses, as seen in their treatment of war-loss clauses.[14] Another concern under the current treaty regime is that arbitrators could theoretically move too far in the opposite direction, totally abrogating states' duties to protect investors which could discourage foreign investment important for economic development. It is critical that the international investment regime correct itself in order to balance these two interests,

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10. *See, e.g.*, Agreement Between the Republic of Turkey and the Great Socialist People's Libyan Arab Jamahiriya on the Reciprocal Promotion and Protection of Investments, art. 5, Libya-Turk., Nov. 25, 2009 [hereinafter Libya-Turkey BIT], https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5021/download (last visited Aug. 10, 2021) [https://perma.cc/8N3T-R9FE] (archived Aug. 10, 2021).

11. *See* Strabag SE v. Libya, ICSID Case No. ARB(AF)/15/1, Award, ¶¶ 229–33, 236 (June 22, 2020), https://www.italaw.com/sites/default/files/case-documents/italaw11829.pdf (last visited Aug. 10, 2021) [https://perma.cc/T2SR-ECRK] (archived Aug. 10, 2021) (applying a full protection and security provision to Libya's action, but finding that it was not breached in light of the circumstances); Cengiz v. Libya, Case No. 21537/ZF/AYZ, Final Award, ¶¶ 445, 449, 450–51 (ICC Int'l Ct. Arb. 2018), https://www.italaw.com/sites/default/files/case-documents/italaw11275.pdf (last visited Aug. 10, 2021) [https://perma.cc/2Y6K-FNNN] (archived Aug. 10, 2021) (evaluating Libya's actions in light of its circumstances, and finding that even in the midst of civil war it had breached its obligation to provide full protection and security).

12. The arbitral tribunals in *Strabag v. Libya* and *Cengiz v. Libya* both concluded that the war-loss clauses in the Austria–Libya BIT and Turkey–Libya BIT did not constitute a *lex specialis* regime, despite the fact that the former required compensation for investors only on a national treatment or most-favored-nation basis. *See Strabag*, ICSID Case No. ARB(AF)/15/1, ¶¶ 221–28; *Cengiz*, Case No. 21537/ZF/AYZ, ¶¶ 350–58, 370.

13. *See Cengiz*, Case No. 21537/ZF/AYZ, ¶¶ 288–309.

14. *See, e.g.*, *id.* ¶¶ 350–58, 370 (ICC Int'l Ct. Arb. 2018), https://www.italaw.com/sites/default/files/case-documents/italaw11275.pdf (last visited Aug. 10, 2021) [https://perma.cc/6D86-W3JM] (archived Aug. 10, 2021); *Strabag*, ICSID Case No. ARB(AF)/15/1 ¶¶ 229–33, 236.

while also striving to create legal certainty in order to aid state decision-making in wartime.

This Note aims to show that the prevailing arbitral interpretation of war-loss clauses harms states by creating excessive liability and uncertainty, how these harms can be avoided through proper interpretation of current BITs or the negotiation of new treaties, and why a proper balance between investor and sovereign rights is critical in the context of armed conflict. Part II will discuss BITs generally, the various iterations of war-loss clauses, and the more standardized full protection and security clause. Part III explores arbitral tribunals' treatment of the interplay between war-loss and full protection and security clauses by discussing several classic decisions before turning to the modern doctrine as applied in the context of the Libyan civil war. Part IV will discuss three potential solutions: first, an interpretive solution that encourages arbitrators and scholars to recognize the *lex specialis* compensation regime created by certain war-loss clauses contained in treaties currently in force; second, a piecemeal solution that adopts more balanced iterations of war-loss clauses into new BITs; and third, a new multilateral instrument for the treatment of investments in armed conflict that would supersede BITs in extreme circumstances while still leaving room for investors to make claims when they have suffered intentional harm at the hands of host states.

II. BILATERAL INVESTMENT TREATY TERMS AND INVESTOR WAR LOSSES

Bilateral Investment Treaties (BITs) have exploded in number since first being created in the mid-twentieth century, with approximately 2,342 in force today according to the United Nations Commission on Trade and Development (UNCTAD).[15] BITs are agreements between two states wherein each state agrees to give a certain level of protection and treatment to investors of the other state.[16] The substance of these standards is contained in the treaty's terms. Critically, BITs nearly always afford individual investors or companies the ability to bring a claim directly against host states when they feel a state has breached its treaty obligations. These claims are heard by arbitral tribunals established for the purpose of hearing that individual claim. This procedure, known as investor state dispute settlement (ISDS), has moved the world away from the "diplomatic

15. *Investment Policy Hub*, UNCTAD [hereinafter UNCTAD], https://investmentpolicy.unctad.org/international-investment-agreements (last visited Mar. 18, 2021) [https://perma.cc/GQ5D-NR5K] (archived July 29, 2021). International Investment Agreements and trade agreements with investment provisions often operate in a similar manner to BITs, but are concluded between more than two states.

16. *See* Legal Info. Inst., *Bilateral Investment Treaty*, CORNELL L. SCH., https://www.law.cornell.edu/wex/bilateral_investment_treaty (last visited May 6, 2021) [https://perma.cc/GFA4-NYSY] (archived July 29, 2021).

assurance" system that preceded it, in which an investor's only recourse was to beseech their own government to negotiate compensation with a host state on their behalf.[17] BITs and ISDS have led to an exponential rise in the number of claims against states, which have in turn led to the development of a rich, if inconsistent and fragmented, web of international investment law. While international investment law has been criticized as favoring investors and capital exporting countries to the detriment of developing nations,[18] it is an important reality of the international legal fabric in the modern world.

While BITs contain a number of important, substantive provisions, two are especially relevant in the context of armed conflict[19] and will be discussed here. First are "full protection and security" clauses, which obligate a host state to provide a certain level of protection for foreign investments. Second are "war loss" clauses, which set standards of compensation for investors in times of armed conflict.[20]

A. *Full Protection and Security Clauses*

FPS clauses generally require that host states afford investors protection from physical violence perpetrated by state organs or third parties. The scope of protection is judged by a "modified objective standard," which takes into account the state's circumstances (such as the existence of an armed conflict).[21] The FPS clause was present at the genesis of the bilateral investment treaty[22] and appears in nearly

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17. For a discussion of diplomatic assurance, the ISDS system, and other methods of resolving disputes between foreign investors and host states, see generally Christoph Schreuer, *Investment Protection and International Relations*, *in* THE LAW OF INTERNATIONAL RELATIONS 345, 345 (A. Reinisch & U. Kriebaum eds., 2007).

18. *See, e.g.*, Mavluda Sattorova, *Do Developing Countries Really Benefit from Investment Treaties? The Impact of International Investment Law on National Governance*, INT'L INST. FOR SUSTAINABLE DEV. (Dec. 21, 2018), https://www.iisd.org/itn/en/2018/12/21/do-developing-countries-really-benefit-from-investment-treaties-the-impact-of-international-investment-law-on-national-governance-mavluda-sattorova/ [https://perma.cc/3J5C-642G] (archived July 30, 2021).

19. The most commonly cited definition of "armed conflict" comes from the International Criminal Tribunal for the Former Yugoslavia's decision in *Prosecutor v. Tadic* which stated, "[A]n armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State." Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

20. A third type, the "non-precluded measures" clause, absolves state liability for measures taken for security purposes. Although potentially applicable to armed conflict, they are relatively recent, few in number, and untested against actions taken by states in times of armed conflict.

21. ANDREW NEWCOMBE & LLUÍS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES 310 (2009).

22. The first BIT, signed by Germany and Pakistan in 1959, states: "Investments by nationals or companies of either Party shall enjoy protection and security in the

every modern BIT.[23] Similar clauses could be found in the predecessors of BITs—the friendship, commerce, and navigation treaties of the nineteenth and early twentieth centuries[24]—and some scholars have traced their origins to treaties concluded as far back as the seventeenth century.[25] Article 2(2) of the Sri Lanka-UK BIT exemplifies the typical wording of the modern FPS clause:

> Investments of nationals or companies of either Contracting Party shall at all times . . . enjoy full protection and security in the territory of the other Contracting Party.[26]

FPS clauses have some textual differences between treaties,[27] but the effect of each variation on the scope of protection is unclear and "full protection and security" remains standard.

Investors suffering losses in armed conflict often claim breach of a BIT's FPS clause. Indeed, tribunals have found FPS clauses to operate both within and without armed conflict.[28] At its core, the FPS clause requires a state to protect investors from some kind of harm committed by somebody. Thus, two aspects of an FPS clause are critical for evaluating state liability: first, the scope of protection required, and second, the standard by which to judge the protection provided. When a state fails to provide full protection and security to an investment, it breaches its FPS duty and must compensate the investor for harms which occur. As this Note will argue below, a BIT's war-loss clauses displace a state's duty to compensate investors for the breach of an FPS clause during an armed conflict.

1. Scope of Protection

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territory of the other Party." Treaty between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments, Ger.-Pak., art. 3(1) [hereinafter German-Pakistan BIT], Nov. 25, 1959, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1387/download (last visited Aug. 10, 2021) [https://perma.cc/FU2F-E47Y] (archived Aug. 10, 2021).

23. JURE ZRILIČ, THE PROTECTION OF FOREIGN INVESTMENT IN TIMES OF ARMED CONFLICT 90 (2019); NEWCOMBE & PARADELL, *supra* note 21, at 308. UNCTAD's Investment Policy Hub has found full protection and security clauses in 1,976 out of the 2,576 international investment agreements it has "mapped," UNCTAD, *supra* note 15.

24. *See* ZRILIČ, *supra* note 23, at 89; NEWCOMBE & PARADELL, *supra* note 21, at 307–09; Facundo Pérez-Aznar, *Investment Protection in Exceptional Situations: Compensation-for-Losses Clauses in IIAs*, 32 ICSID REV. 696, 700–03 (2017).

25. *See* ZRILIČ, *supra* note 23, at 89.

26. Sri-Lanka-UK BIT, *supra* note 4, at art. 2(2).

27. *See* ZRILIČ, *supra* note 23, at 90; NEWCOMBE & PARADELL, *supra* note 21, at 308.

28. *See, e.g.*, AAPL v. Sri Lanka, ICSID Case No. ARB/87/3, Final Award, ¶¶ 65–67 (June 27, 1990), 6 ICSID Rev. 526 (1991) https://www.italaw.com/sites/default/files/case-documents/ita1034.pdf (last visited Aug. 10, 2021) [https://perma.cc/4WDN-RAFB] (archived Aug. 10, 2021).

The question of the scope of an FPS clause's protection typically comprises two parts: from which actor and from what harm must the investor be protected. Tribunals and scholars are in agreement that FPS requires protection from physical harm.[29] While there is some interesting conversation on whether protection from *legal* harms is required,[30] for the purposes of this Note the uncontroversial proposition that FPS requires protection from physical harm suffices because this is the type of harm typically at issue in an armed conflict.[31]

Regarding from whom protection is required, there has been at least one opinion that explicitly stated that FPS clauses *only* require protection from physical harms committed by third parties.[32] However, the consensus amongst scholars and tribunals is that FPS clauses apply to harms perpetrated by both third parties and state organs.[33] Thus, at a minimum, the modern FPS clause requires that states protect investors from *physical harm* committed by *both third parties and state organs*.

2. The Standard of Protection

Having established what protection is required, a tribunal then must discern the standard by which to judge such protection. Some claimants have argued that FPS requires strict liability, or an absolute guarantee of protection from injury.[34] However, this interpretation has been soundly rejected, and tribunals have instead opted to impose a

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29. *Id.* ¶ 85; ZRILIČ, *supra* note 23, at 93–94.

30. For further discussion on whether FPS clauses require protection from legal harms, see ZRILIČ, *supra* note 23, at 91–95.

31. *See, e.g.*, *AAPL*, Case No. ARB/87/3 ¶ 85.

32. E. Sugar B.V. v. Czech Rep., Case No. 088/2004, Partial Award, ¶¶ 203–04 (Stockholm Chamber of Comm. 2007), https://www.italaw.com/sites/default/files/case-documents/ita0259_0.pdf (last visited Aug. 10, 2021) [https://perma.cc/U8F7-7A7B] (archived Aug. 10, 2021) ("[The FPS clause] concerns the obligation of the host state to protect the investor from *third* parties . . . Thus, where a host state fails to grant full protection and security, it fails to act to *prevent* actions by third partied that it is required to prevent. In the present case . . . [the claimant] complains about acts committed by the Czech Republic itself, not acts of third parties.") (emphasis in original).

33. *See* ZRILIČ, *supra* note 23, at 95; Christoph Schreuer, *The Protection of Investments in Armed Conflicts*, *in* INVESTMENT LAW WITHIN INTERNATIONAL LAW 1, 8–10 (2013); NEWCOMBE & PARADELL, *supra* note 21, at 308–09.

34. *See, e.g.*, Tecnicas Medioambientales TECMED S.A. v. Mexico, ICSID Case No. ARB(AF)/00/2, Award, ¶¶ 175–77 (2003) [hereinafter TECMED], https://www.italaw.com/sites/default/files/case-documents/ita0854.pdf (last visited Aug. 10, 2021) [https://perma.cc/K75G-ZQSY] (archived Aug. 10, 2021); *AAPL*, Case No. ARB/87/3 ¶¶ 45–53. *But see* Strabag SE v. Libya, ICSID Case No. ARB(AF)/15/1, Award, ¶ 335 (June 22, 2020), https://www.italaw.com/sites/default/files/case-documents/italaw11829.pdf (last visited Aug. 11, 2021) [https://perma.cc/4T3G-Q7JF] (archived Aug. 11, 2021) (both claimant and respondent agreeing that FPS requires only due diligence).

standard of "due diligence" on a host state's duty to protect investors from harm.[35] The tribunal in *AAPL v. Sri Lanka* considered due diligence to require "nothing more nor less than the reasonable measures of prevention which a well-administered government could be expected to exercise under similar circumstances."[36] The tribunal went on to find that, because the government had not taken any reasonable measures to prevent the harm that befell the claimant's investment, it was in breach of its obligation to provide full protection and security.[37]

The considerations of a state in "similar circumstances" does leave the door open to some degree of subjectivity in considering whether an FPS clause has been breached. The arbitrator in *Pantechniki v. Albania* adopted the standard put forward by Andrew Newcombe and Lluís Paradell, namely, that "the standard of due diligence . . . [is] a modified objective standard – the host state must exercise the level of due diligence of a host state in its particular circumstances," which considers a state's "level of development and stability."[38] Most tribunals have followed this approach and have imposed a lower standard when judging the actions of unstable states in times of armed conflict.[39]

B. *War-Loss Clauses*

War-loss clauses have not been litigated to the same extent as FPS clauses, perhaps because they are explicitly applicable only in rare contexts.[40] However, because of their specific applicability to armed conflicts, tribunals' interpretations of war-loss clauses are critical to assessing investors' claims and host states' defenses in these

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35. *See, e.g.*, *TECMED*, ICSID Case No. ARB(AF)/00/2, ¶ 177; *AAPL*, Case No. ARB/87/3 ¶¶ 53, 68.

36. *AAPL*, Case No. ARB/87/3 ¶ 77.

37. *Id.* ¶ 85. *See infra* Part III.A.1 for an in-depth discussion.

38. Pantechniki S.A. Contractors & Eng'rs v. Albania, ICSID Case No. ARB/07/21, Award, ¶ 81 (July 28, 2009), https://www.italaw.com/sites/default/files/case-documents/ita0618.pdf (last visited Aug. 11, 2021) [https://perma.cc/Q56R-5NFZ] (archived Aug. 11, 2021) (quoting NEWCOMBE & PARADELL, *supra* note 21, at 310).

39. *See Strabag*, ICSID Case No. ARB(AF)/15/1 ¶ 236 (finding Libya not liable for breach of an FPS clause because, in light of the "[violence and disorder], it was not reasonably possible for the Libyan authorities to take consistent and effective measure to protect [the investment]"). *But see* Cengiz v. Libya, Case No. 21537/ZF/AYZ, Final Award, ¶¶ 445–52 (ICC Int'l Ct. Arb. 2018), https://www.italaw.com/sites/default/files/case-documents/italaw11275.pdf (last visited Aug. 10, 2021) [https://perma.cc/AXJ5-2SNY] (archived Aug. 10, 2021) (performing a searching inquiry into Libya's ability to deploy troops in certain areas during the civil war and finding it breached its duty to "provide static protection" to the claimant's investment).

40. *See, e.g.*, UNCTAD, U.S. MODEL INVESTMENT AGREEMENT art. 5(4) (2012), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2870/download (last visited Aug. 10, 2021) [https://perma.cc/5Z5C-EBNU] (archived Aug. 10, 2021) (limiting applicability to "armed conflict or civil strife").

extraordinary circumstances. War-loss clauses can be broken down into two clauses, a "basic" war-loss clause and an "advanced" war-loss clause.[41] Understanding of the former is especially critical to the question of whether a *lex specialis* regime is created by war-loss clauses' operation, abrogating a duty to compensate investors for breach of an FPS clause. This Note also distinguishes between two distinct categories of basic war-loss clauses that have proliferated in BITs: a general war-loss clause applicable to all compensation for war losses and a measures-linked war-loss clause applicable only to compensatory measures a state adopts in relation to those losses.

1. Basic War-Loss Clauses: General and Measures-Linked

Basic war-loss clauses are present in most BITs[42] and mandate when a state must compensate investors for losses incurred due to certain enumerated circumstances. These enumerated circumstances commonly include some combination of war, armed conflict, civil strife, national emergency, and revolution. Variation among treaties has led to two iterations of the basic war-loss clause[43]—the general war-loss clause and the measures-linked war-loss clause. Arbitral tribunals have typically read general and measures-linked war-loss clauses as the same. This Note, however, argues that general war-loss clauses are broader in scope than measures-linked clauses—broad enough, in fact, to totally abrogate a state's duty to compensate investors for breach of an investment treaty during armed conflict.[44] Subpart IV.A sets out this Note's interpretation of general war-loss clauses in greater detail.

An example of a general war-loss clause can be found in Article 4(1) of the UK-Sri Lanka BIT:

> Nationals or companies of one Contracting Party whose investments in the territory of the other Contracting Party suffer losses owing to war or other armed conflict, revolution, a state of national emergency, revolt, insurrection or riot in the territory of the latter Contracting Party shall be accorded by the latter Contracting Party treatment, as regards restitution, indemnification, compensation or other settlement, no less favourable than that which the latter

41. *See* ZRILIČ, *supra* note 23, at 107.

42. According to UNCTAD, they *slightly* edge out the prevalence of FPS clauses at 2,383. UNCTAD, *supra* note 15 (click on "Mapping of IIA Content," expand the "Standards of Treatment" section, expand the "Protection from Strife" section, expand the "Specifications" section, expand the "Relative Right to Compensation (Comparator)" section, select "MFN Only," "MFN and NT," and "NT Only," and then click the "Search" button). Like FPS clauses, an example can be found in the very first BIT concluded between Germany and Pakistan. *See* Germany-Pakistan BIT, *supra* note 22, at art. 3(3).

43. *See* NEWCOMBE & PARADELL, *supra* note 21, at 315; *see also* ZRILIČ, *supra* note 23, at 107–09.

44. *See infra* Part IV.A.

> Contracting Party accords to its own nationals or companies or to nationals or companies of any third State.[45]

When an investor suffers losses during an armed conflict, the general war-loss clause *only requires* that an investor be compensated by the state on the basis of a "national treatment" or "most-favored-nation" standard. "National treatment" requires that the treatment accorded to the foreign investor by the state is better than or equal to the treatment given to domestic investors. "Most-favored-nation" requires that the foreign investor be given treatment better than or equal to treatment provided to foreign investors of other nationalities.[46] This indicates that an investor has a right to compensation for war losses when a state has compensated domestic investors or investors from a third nation for such losses. General war-loss clauses do not include any other source from which an investor has a right to compensation for war losses, including a right to compensation when a state breaches FPS or other treaty terms.

A general war-loss clause thus seems to dictate that when an investor suffers losses during an armed conflict, compensation depends on whether the state has compensated other investors, not on whether the state has breached another treaty term.[47] This special standard for the compensation of war losses is at odds with the compensatory standard that is typically applicable. In normal circumstances, an investor is entitled to compensation when its investment has incurred damage due to a state's breach of its duties under a BIT (by, for example, failing to provide full protection and security). Conversely, when compensation is determined by the operation of a general war-loss clause, an investor need only be compensated for damage when a state has provided compensation to other investors. As will be shown, scholars and tribunals have typically disagreed with this interpretation and have declined to find that general war-loss clauses create a special compensation regime.[48]

The measures-linked iteration of the basic war-loss clause is quite different from the general war-loss clause. A measures-linked war-loss clause, intuitively, links its most-favored-nation and national treatment standards only to "measures [the host state] adopts in

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45. Sri Lanka-UK BIT, *supra* note 4, at art. 4(1).

46. *See* NEWCOMBE & PARADELL, *supra* note 21, at 148–49, 195.

47. *But see* ZRILIČ, *supra* note 23, at 111–12 (finding that general war-loss clauses only include measures adopted by a state and does not exclude general liability for the breach of other treaty provisions).

48. *See, e.g., id.*; NEWCOMBE & PARADELL, *supra* note 21, at 500; Strabag SE v. Libya, ICSID Case No. ARB(AF)/15/1, Award, ¶¶ 230–32, 236 (June 22, 2020), https://www.italaw.com/sites/default/files/case-documents/italaw11829.pdf (last visited Aug. 10, 2021) [https://perma.cc/D8T9-VA74] (archived Aug. 10, 2021); BG Group Plc. v. Rep. of Argentina, Final Award, ¶ 370 (UNCITRAL 2007) [hereinafter BG Group], https://www.italaw.com/sites/default/files/case-documents/ita0081.pdf (last visited Aug. 10, 2021) [https://perma.cc/BNU2-U5P8] (archived Aug. 10, 2021).

relations to such losses."[49] The measures-linked war-loss clause requires only that if a state voluntarily adopts measures to compensate investors for war losses, it must do so without discriminating against foreign investors protected by the BIT.[50] For example, a state passing legislation compensating domestic investors for damage to their businesses incurred during a civil war would breach a measures-linked war-loss clause because the state has adopted discriminatory compensatory measures that favor domestic investors over their foreign counterparts.[51] Thus, while measures-linked and general war-loss clauses have some textual similarities, their applicability and operation is in fact incredibly different. A general war-loss clause limits a state's duty to compensate investors while a measures-linked war-loss clause imposes an additional duty.[52]

The prevailing practice amongst scholars and arbitral tribunals is to interpret general and measures-linked war-loss clauses as having the same meaning. They typically consider that both variations only require that if a state voluntarily compensates investors for damage sustained in wartime (or, put another way, when a state adopts compensatory measures), payments must be afforded on a nondiscriminatory basis.[53]

There are textual and contextual reasons, however, for interpreting the two types of war-loss clauses as different. Figure 1 provides a side-by-side comparison of typical treaty language:

Figure 1: General and Measures-Linked War-Loss Clauses

General War-Loss Clause	Measures-Linked War-Loss Clause

49. *See, e.g.*, Libya-Turkey BIT, *supra* note 10, at art. 5.

50. *See* ZRILIČ, *supra* note 23, at 110–12.

51. *See id.* at 111–12.

52. It is arguable whether this is really an *additional* duty, because national treatment and most-favored-nation clauses in BITs already proscribe a state from taking discriminatory action.

53. *See* ZRILIČ, *supra* note 23, at 109 ("a basic armed conflict clause . . . imposes on a host state a specific non-discrimination obligation, typically with respect to the payment of indemnities for losses sustained by investors in a situation of conflict"); *see also* NEWCOMBE & PARADELL, *supra* note 21, at 315–16; BORZU SABAHI, NOAH RUBINS, & DON WALLACE, INVESTOR-STATE ARBITRATION 686 (2nd ed. 2019). The explanation most often quoted was given by the tribunal in *CMS v. Argentina*. CMS Gas Transmission Co. v. Argentine Rep., ICSID Case No. ARB/01/8, Award, ¶ 375–76 (ICSID 2005) [hereinafter CMS], https://www.italaw.com/sites/default/files/case-documents/ita0184.pdf (last visited Aug 10, 2021) [https://perma.cc/WK4H-D26K] (archived Aug. 10, 2021). For further discussion of CMS see infra Part II.A.3. However, at least one scholar and several recent tribunals have pushed against this prevailing view and followed a *lex specialis* interpretation. *See* Perez-Aznar, *supra* note 24, at 713; L.E.S.I. v. Algeria, Case No. ARB/05/3, ¶ 177 (CIRDI 2008), https://www.italaw.com/sites/default/files/case-documents/ita0457.pdf (last visited Aug. 10, 2021) [https://perma.cc/PP4T-ZSFD] (archived Aug. 10, 2021).

[Investors suffering losses during armed conflict] shall be accorded by the [state] treatment, **as regards restitution, indemnification, compensation or other settlement,** no less favourable than that which the latter Contracting Party accords to its own nationals or companies or to nationals or companies of any third State.[54]	[Investors suffering losses during armed conflict] shall be accorded by [the state] 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.**[55]

The bolded text shows the textual differences in the clauses' applicability. The general war-loss clause links the national treatement and most-favored-nation standards to compensation generally. Compensation, without any other limitation, can be fairly read to encompass any type of compensation paid by a state, whether provided involuntarily as damages for breach of a treaty term or voluntarily as a compensatory measure.[56] The measures-linked clause, however, excludes involuntary compensation from its scope by explicitly attaching the most-favored-nation and national treatment standards only to measures adopted by the state.

The context of the clauses also supports interpreting "compensation" in a general war-loss clause more broadly than "voluntary measures" in a measures-linked war-loss clause. Discriminatory compensation measures would likely run afoul of a treaty's generally applicable most-favored-nation or national treatment provisions. Thus, a provision that bans discriminatory compensatory measures is essentially redundant. The text of measures-linked war-loss clauses makes explicit their applicability to voluntary compensatory measures alone. Interpreting general war-loss clauses into redundancy, however, should be avoided without a compelling reason for doing so.[57]

That the two types of war-loss clauses have been treated as identical is crucial to understanding arbitrators' disfavor of the *lex specialis* argument. A measures-linked war-loss clause provides a much weaker argument for the creation of a *lex specialis* regime because of the explicit link to compensatory measures. General war-loss clauses, however, have no such limitation and can be fairly read as applying to any compensation paid to investors for losses due to armed conflict. The argument that general war-loss clauses create a

54. Sri Lanka-UK BIT, *supra* note 4, at art. 4(1) (emphasis added).
55. Libya-Turkey BIT, *supra* note 10, at art. 5 (emphasis added).
56. *See infra* Part IV.A.1 for a more detailed discussion.
57. *See infra* Part IV.A.2 for a more detailed discussion.

special compensation regime is thus much stronger.[58] By conflating the two different clauses, scholars and tribunals have unfairly muddied states' duties under the different treaties and terms and discounted valid arguments that general war-loss clauses displace states' duties to compensate investors for war losses.

2. General War-Loss Clauses as *Lex Specialis*

When facing investor claims arising out of losses incurred in times of war and other national emergencies, states often argue that a BIT's basic war-loss clause creates a *lex specialis* regime that governs compensation for these losses.[59] The concept of *lex specialis* is a canon of treaty interpretation stemming from the Latin maxim *lex specialis derogate legi generali*, or "[s]pecial law repeals general laws."[60] In essence, *lex specialis* holds that because a specific rule was intended by the drafters of a treaty to apply in specific, enumerated circumstances, when those circumstances arise the *lex specialis* rule overrides potentially conflicting general rules.[61]

Applied to armed conflicts, *lex specialis suggests* that the war-loss clauses present in the treaty should govern a state's duty to compensate investors for war losses,[62] rather than the more generally applicable FPS clause (or other provisions, as the case may be).[63] The two standards of compensation under FPS and general war-loss clauses cannot coexist. A general war-loss clause holds that an investor is only entitled to compensation for war losses when the state has

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58. *See infra* Part IV.A.

59. *See infra* Part III.

60. AARON X. FELLMETH & MAURICE HORWITZ, GUIDE TO LATIN IN INTERNATIONAL LAW 177 (2009).

61. *Id.* The interpretive cannon may apply between separate treaties or, relevant here, specific and general terms within a single treaty or regime. *See* Michaels & Pauwelyn, *supra* note 5, at 363–67.

62. As noted, the vast majority of BITs include some variation of a basic war-loss clause and many include an advanced war-loss clause. *See supra* notes 42, 47 and accompanying text.

63. *See, e.g.*, CMS v. Argentine Rep., ICSID Case No. ARB/01/8, Award, ¶ 375–76 (ICSID 2005), https://www.italaw.com/sites/default/files/case-documents/ita0184.pdf (last visited Aug. 10, 2021) [https://perma.cc/6HY8-JDKM] (archived Aug. 10, 2021); L.E.S.I. v. Algeria, Case No. ARB/05/3, ¶¶ 166–68 (CIRDI 2008), https://www.italaw.com/sites/default/files/case-documents/ita0457.pdf (last visited Aug. 10, 2021) [https://perma.cc/76AF-7DP2] (archived Aug. 10, 2021); AAPL v. Sri Lanka, ICSID Case No. ARB/87/3, Final Award, ¶ 72 (June 27, 1990), 6 ICSID Rev. 526 (1991) https://www.italaw.com/sites/default/files/case-documents/ita1034.pdf (last visited Aug. 10, 2021) [https://perma.cc/34HZ-ZNZ8] (archived Aug. 10, 2021); Strabag SE v. Libya, ICSID Case No. ARB(AF)/15/1, Award, ¶¶ 235–36 (June 22, 2020), https://www.italaw.com/sites/default/files/case-documents/italaw11829.pdf (last visited Aug 10, 2021) [https://perma.cc/NW38-9LMV] (archived Aug. 10, 2021); Cengiz v. Libya, Case No. 21537/ZF/AYZ, Final Award, ¶ 683 (ICC Int'l Ct. Arb. 2018), https://www.italaw.com/sites/default/files/case-documents/italaw11275.pdf (last visited Aug. 10, 2021) [https://perma.cc/H8FP-FA6C] (archived Aug. 10, 2021).

compensated other investors.[64] An FPS clause requires that, in any situation, the state provide investments with full protection and security. Under an FPS clause, investors must be compensated when the provision is breached and damage to an investment results. The principle of *lex specialis* resolves this conflict by suspending the operation of the general FPS provision in favor of the specifically applicable war-loss clause.[65] Thus, in times of armed conflict, a state has no obligation to compensate investors for damage resulting from the breach of an FPS clause unless it has paid compensation to other investors.

3. "Advanced" War-Loss Clauses

While less common than basic war-loss clauses, advanced war-loss clauses are included in a significant number of BITs, generally in the same article as and following the basic clause.[66] Advanced war-loss clauses create a mandatory obligation for a state to compensate investors for certain losses caused by the national armed forces, usually requisition or destruction not required by military necessity. A typical advanced war-loss clause can be found in Article 13(2) of the Dutch model BIT:

> Without prejudice to [the basic war-loss clause], investors of a Contracting Party who, in any of the situations referred to in that paragraph [e.g., armed conflict], suffer losses in the territory of the other Contracting Party resulting from:
>
> (a) requisitioning of their investment or a part thereof by the latter's armed forces or authorities; or
>
> (b) destruction of their investment or a part thereof by the latter's armed forces or authorities, which was not required by the necessity of the situation;
>
> shall be accorded prompt, adequate and effective restitution or compensation by the other Party.[67]

Advanced war-loss clauses toe a fine line. On the one hand, they mandate explicit compensation in situations where many would agree it is warranted—when property is requisitioned by a state or damaged by wanton or unnecessary destruction. On the other, they require arbitral tribunals to perform searching evaluations of complex factual scenarios to determine which party to a conflict caused damage to an

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64. *See supra* Part II.B.1.

65. *See L.E.S.I.*, Case No. ARB/05/3, ¶ 175.

66. UNCTAD lists 856 out of 2,576 "mapped" international investment agreements as containing advanced war loss provisions. UNCTAD, *supra* note 15.

67. UNCTAD, NETHERLANDS MODEL INVESTMENT AGREEMENT art. 13(2) (2019), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5832/download [hereinafter Netherlands Model BIT].

investor.[68] Discerning which party is responsible for harm within the fog of war is difficult for tribunals, although some have endeavored to do so.[69]

Advanced war-loss clauses serve an important purpose if general war-loss clauses are interpreted as creating a *lex specialis* compensation regime. FPS clauses normally provide investors with protection from physical harm, yet a general war-loss clause abrogates a state's duty to compensate investors under the FPS clause during an armed conflict. This presents a problem because it would preclude compensation for investor harm even when perpetrated directly by the state.[70] Advanced war-loss clauses solve this problem. Because it operates simultaneously with general war-loss clauses,[71] an advanced war-loss clause requires a state to compensate investors for intentional harms perpetrated by its armed forces even if it is no longer obligated to provide compensation under a treaty's general FPS clause. Advanced war-loss clauses are therefore vital for preserving investor rights to compensation for harm when a state is particularly culpable, helping to balance state and investor rights in wartime.

III. ARBITRAL JURISPRUDENCE ON WAR-LOSS CLAUSES

Basic war-loss clauses are most often litigated when a state raises the *lex specialis* argument to defend against investor claims that the state breached its FPS duties in times of war or crisis.[72] Following the discussion above,[73] states typically argue that for any losses which occur within a context enumerated in the provision (war, civil strife, etc.), they are only required to pay compensation on a most-favored-nation or national treatment basis.[74] Thus, even if a state's obligation

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68. *See AAPL*, Case No. ARB/87/3, ¶¶ 63–64 (judging the necessity of Sri Lanka's actions taken in wartime).

69. *See, e.g.*, *id.*; Strabag SE v. Libya, ICSID Case No. ARB(AF)/15/1, Award, ¶¶ 303–04 (June 22, 2020), https://www.italaw.com/sites/default/files/case-documents/italaw11829.pdf (last visited Aug. 11, 2021) [https://perma.cc/5KE5-ECXE] (archived Aug. 11, 2021).

70. *See supra* Part II.A.1.

71. *See, e.g.*, Netherlands Model BIT, *supra* note 67, at art. 13.

72. *See, e.g.*, CMS v. Argentine Rep., ICSID Case No. ARB/01/8, Award, ¶ 375–76 (ICSID 2005), https://www.italaw.com/sites/default/files/case-documents/ita0184.pdf (last visited Aug. 11, 2021) [https://perma.cc/FC4R-45SX] (archived Aug. 11, 2021); L.E.S.I. v. Algeria, Case No. ARB/05/3, ¶ 170 (CIRDI 2008), https://www.italaw.com/sites/default/files/case-documents/ita0457.pdf (last visited Aug. 11, 2021) [https://perma.cc/5U75-4GQF] (archived Aug. 11, 2021); *AAPL*, Case No. ARB/87/3, ¶ 23; *Strabag*, ICSID Case No. ARB(AF)/15/1, ¶¶ 229–33, 236; *see Cengiz*, Case No. 21537/ZF/AYZ, Final Award, ¶ 3 (ICC Int'l Ct. Arb. 2018), https://www.italaw.com/sites/default/files/case-documents/italaw11275.pdf (last visited Aug. 10, 2021) [https://perma.cc/437E-TX95] (archived Aug. 10, 2021).

73. *See supra* Parts II.B.1 and 2.

74. See, for example, arguments of respondent states in *Strabag*, ICSID Case No. ARB(AF)/15/1, ¶ 221; *Cengiz*, Case No. 21537/ZF/AYZ, ¶ 351; BG Group v. Rep. of Arg., Final Award, ¶ 370 (UNCITRAL 2007), https://www.italaw.com/sites/default/files/case-

to provide full protection and security is breached, it is not necessary to pay compensation to a harmed investor unless it has done the same for others.[75] In other words, host states contend that in times of armed conflict, a basic war-loss clause acts as a *lex specialis* regime governing these losses.[76]

What follows is an analysis of arbitral tribunals' treatment of this *lex specialis* argument from its genesis through modern times. It shows that the early understanding of war-loss clauses, evidenced by *AAPL v. Sri Lanka*, considered the *lex specialis* interpretation to be correct.[77] However, the analysis shows that a break occurred during the litigation resulting from the Argentine economic crisis that shifted scholars' and tribunals' opinions toward the prevailing interpretation that all basic war-loss clauses—whether general or measures-linked—serve only to ensure that voluntary compensatory measures are nondiscriminatory.[78] This break is possibly the result of two factors: first, tribunals have engaged in a dubious misinterpretation of the award in *AAPL v. Sri Lanka*; and second, the US-Argentina BIT at issue in most of the arbitrations contained a measures-linked war-loss clause, which significantly weakened the *lex specialis* argument. Finally, analysis of the modern doctrine as applied in the various tribunals arising out of the crisis in Libya will be discussed, finding that tribunals have continued to dismiss the *lex specialis* argument, leading to expansive liability for states.[79] This Part also explores how the outcomes could have been different under a special war-loss compensation regime.

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documents/ita0081.pdf (last visited Aug. 10, 2021) [https://perma.cc/8AMJ-S9FY] (archived Aug. 10, 2021). *See also* Perez-Aznar, *supra* note 24, at 713.

75. *See supra* Part II.B.3.

76. *See supra* Part II.B.3.

77. The majority of the tribunal in *AAPL v. Sri Lanka* found it necessary to import liability for breach of FPS into the war-loss clause in order to hold Sri Lanka liable, rather than finding liability under the FPS alone. *See AAPL*, Case No. ARB/87/3 ¶¶ 53, 65–67. The dissent stated explicitly that the war clause precluded operation of the FPS clause. Asian Agric. Prods. Ltd. V. Sri Lanka, ICSID Case No. ARB/87/3, Dissenting Opinion of Samuel K.B. Asante, ¶¶ 29, 39 (June 15, 1990) 6 ICSID Rev. 574 (1991) https://www.italaw.com/sites/default/files/case-documents/ita1035.pdf (last visited Aug. 10, 2021) [https://perma.cc/8V3M-4HFM] (archived Aug. 10, 2021).

78. *See, e.g.*, *BG Group*, Final Award, ¶¶ 383–87; CMS v. Argentine Rep., ICSID Case. No. ARB/01/8, Award, ¶ 375–76 (ICSID 2005), https://www.italaw.com/sites/default/files/case-documents/ita0184.pdf (last visited Aug. 10, 2021) [https://perma.cc/WLB6-2CKT] (archived Aug. 10, 2021).

79. *Compare Strabag*, ICSID Case No. ARB(AF)/15/1, ¶ 228, *and Cengiz*, Case No. 21537/ZF/AYZ, ¶ 370 (finding that war-loss clauses do not create a *lex specialis* regime), *with* Oztas Constr. v. Libyan Inv. Dev. Co., Case No. 21603/ZF/AYZ, Final Award, ¶ 167 (ICC Int'l Ct. Arb. 2018), https://www.italaw.com/sites/default/files/case-documents/italaw11415.pdf (last visited Aug. 10, 2021) [https://perma.cc/2MCK-HERG] (archived Aug. 10, 2021), *and* L.E.S.I. v. Algeria, Case No. ARB/05/3, ¶ 182 (CIRDI 2008), https://www.italaw.com/sites/default/files/case-documents/ita0457.pdf (last visited Aug. 10, 2021) [https://perma.cc/AL5C-T4RS] (archived Aug. 10, 2021) (finding that the claimant's only viable claim for recovery would be under the war-loss clause).

A. *The Historical Trajectory of War-Loss Clauses: Sri Lanka and Argentina*

1. *AAPL v. Sri Lanka*

AAPL v. Sri Lanka arose in the context of the Sri Lankan government's civil war with the Tamil Tigers in the 1980s and 1990s.[80] During the conflict, a government military operation against the rebels destroyed the claimant investor's shrimp farm and caused the deaths of several employees.[81] The arbitration was not only the first to interpret a general and advanced war-loss clause, but it was also the first arbitration constituted on the basis of a BIT.[82]

The claimants contended that they were entitled to mandatory compensation under the advanced war-loss clause,[83] but the tribunal held that the claimant failed to prove that the combat operation did not necessitate the destruction.[84] With compensation under the advanced war-loss clause unavailable, the tribunal turned to the basic war-loss clause. The tribunal first found that the general war-loss clause was applicable to all losses "which materializ[ed] due to any type of hostilities enumerated in the text (owing to war or other armed conflict, revolution, a state of national emergency, revolt, insurrection or riot in the territory) . . . not covered by the [advanced war-loss clause]."[85] In other words, the tribunal held that the basic war-loss clause was to be the source of compensation for losses incurred due to armed conflict.

Having established the applicability of the basic war-loss clause, the tribunal went on to interpret the general war-loss clause. Rather than finding that compensation was only required on a most-favored-nation or national treatment basis (i.e., when it has been afforded to other investors suffering losses in the conflict), the tribunal held that the article "does not include any substantive rules for establishing direct solutions," and the mention of most-favored-nation treatment "effect[ed] a reference . . . towards other sources" from which a method for compensation could be derived.[86] For the tribunal, "other sources" meant importing the treaty's FPS clause into the war-loss clause.[87] It then found that Sri Lanka had breached its obligation to provide full

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80. *AAPL*, Case No. ARB/87/3 ¶¶ 3, 8.
81. *Id.* ¶¶ 3–7.
82. The BIT at issue was between the United Kingdom and Sri Lanka and contained an FPS clause as well as general basic and advanced war-loss clauses. Sri Lanka-UK BIT, *supra* note 4, at arts. 2(2), 4(1), 4(2).
83. *AAPL*, Case No. ARB/87/3 ¶ 23.
84. *Id.* ¶¶ 57–64.
85. *Id.* ¶ 65.
86. *Id.* ¶ 66.
87. *Id.* ¶¶ 66–67, 70.

protection and security, and thus it was liable for the claimant's losses.[88]

The tribunal's reasoning here is not altogether invalid—importing standards of treatment *vis-à-vis* a most-favored-nation clause is indeed the very purpose of those provisions.[89] However, the tribunal does not address the fact that its reading of the general war-loss clause essentially renders it superfluous.[90] The UK-Sri Lanka BIT already contained a general most-favored-nation clause.[91] The most-favored-nation clause would ostensibly operate during times of peace or armed conflict and would import the duty to provide investors with full protection and security through its operation. Reading the general war-loss clause as having precisely the same effect renders it meaningless. Given the unlikelihood that treaty negotiators would have intended two different provisions to operate in the same way, a more plausible understanding of the provision would be that the general war-loss clause was meant to create a special regime for compensating investors for losses incurred in times of armed conflict. By the text of the provision, this would mean that compensation is only necessary when a state has provided it to other investors.[92]

Notwithstanding the redundancy resulting from its interpretation of the general war-loss clause, it is a critical point that the panel did not call for compensation through operation of the FPS clause alone. The tribunal found it necessary to import an FPS standard into the BIT's war-loss clause.[93] Thus, the majority of the tribunal implicitly found (essentially in agreement with the dissent's explicit assertion) that the general war-loss clause operated as a *lex specialis* regime for the payment of compensation to investors during armed conflict. In other words, the tribunal found that compensation for war losses must come by operation of the war-loss provision rather than by breach of the FPS clause alone. Ironically, panels have continuously cited *AAPL*'s majority opinion to support arguments against *lex specialis* reasoning.[94]

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88. *Id.* ¶ 85.

89. A most-favored-nation provision typically imports standards of treatment from customary international law or other investment treaties because it is based on a comparison between the treatment provided to the investor and the treatment of investors of other nationalities. *See* NEWCOMBE & PARADELL, *supra* note 21, at 195–96. The tribunal's importation of a provision in the same treaty is quite irregular.

90. Why the tribunal in *AAPL* interpreted the general war-loss clause in this way will likely never be known, but one might reasonably suspect that having concluded the war-loss clause to be the only source of compensation available to the investor, the majority felt the need to perform its questionable interpretation of the clause as a last resort method of awarding compensation.

91. Sri Lanka-UK BIT, *supra* note 4, at art. 3.

92. *See* Parts II.B.1, II.B.2, IV.A.

93. *See AAPL*, Case No. ARB/87/3, ¶ 70.

94. *See, e.g.*, Strabag SE v. Libya, ICSID Case No. ARB(AF)/15/1, Award, ¶¶ 313–16 (June 22, 2020), https://www.italaw.com/sites/default/files/case-documents/italaw11829.pdf (last visited Aug. 10, 2021) [https://perma.cc/MUR3-TBTJ]

2. The Argentine Tribunals

While war-loss clauses are often explicitly applicable only to armed conflicts, they may also mention other situations, such as "state[s] of national emergency."[95] Relying on this state of national emergency language, Argentina invoked war-loss clauses as defenses in several ISDS arbitrations arising over measures adopted during its acute financial crisis in the late 1990s and early 2000s.[96] The investors in these disputes typically claimed violation of fair and equitable treatment and indirect expropriation in response to the Argentine government's rollback of statutes, incentives, and regulations aimed at inducing investment and privatizing the gas industry.[97] In response, the Argentine government argued that violent protests, social unrest, and dire economic circumstances had created a national emergency, activating the war-loss clauses in its BITs and creating a *lex specialis* regime limiting investor compensation to a most-favored-nation or national treatment standard. Because it had not offered compensation to other parties affected by the crisis, Argentina claimed it was not liable to compensate investors for harms resulting from its breach of other treaty terms.

The tribunal's ruling on the *lex specialis* defense in *CMS v. Argentina* has been oft repeated by subsequent tribunals and scholars.[98] With little substantive analysis, the tribunal opined:

> The plain meaning of the Article is to provide a floor treatment for the investor in the context of the *measures adopted* in respect of the losses suffered in the emergency, not different from that applied to nationals or other foreign investors. The Article does not derogate from the Treaty rights but rather ensures that any

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(archived Aug. 10, 2021); Cengiz v. Libya, Case No. 21537/ZF/AYZ, Final Award, ¶¶ 353–56 (ICC Int'l Ct. Arb. 2018), https://www.italaw.com/sites/default/files/case-documents/italaw11275.pdf (last visited Aug. 10, 2021) [https://perma.cc/9TX8-GD72] (archived Aug. 10, 2021). While arbitral tribunals are not obliged to follow precedent, that so many have misinterpreted and misapplied the award in *AAPL* is a blow to the legal reasoning against a *lex specialis* interpretation.

95. *See, e.g.*, Treaty Concerning the Reciprocal Encouragement and Protection of Investment, with Protocol, Arg.-U.S., art. 4(3), Nov. 14, 1991, T.I.A.S. No. 94-1020 [hereinafter Argentina-US BIT]; Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the Promotion and Protection of Investments, Arg.-U.K., art. 4. Dec. 11, 1990 [hereinafter Argentina-UK BIT], https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/126/download (last visited Aug. 10, 2021) [https://perma.cc/CS7C-6FDU] (archived Aug. 10, 2021).

96. *See* CMS v. Argentine Rep., ICSID Case No. ARB/01/8, Award, ¶ 98–99 (ICSID 2005), https://www.italaw.com/sites/default/files/case-documents/ita0184.pdf (last visited Aug. 10, 2021) [https://perma.cc/LJ69-RKR3] (archived Aug. 10, 2021); BG Group v. Rep. of Arg., Final Award, ¶ 370 (UNCITRAL 2007), https://www.italaw.com/sites/default/files/case-documents/ita0081.pdf (last visited Aug. 10, 2021) [https://perma.cc/W92R-YVQS] (archived Aug. 10, 2021).

97. *See CMS*, ICSID Case No. ARB/01/8 ¶ 88; *BG Group*, Final Award, ¶ 85.

98. *See, e.g.*, ZRILIČ, *supra* note 23, at 110; Perez-Aznar, *supra* note 24, at 710; NEWCOMBE & PARADELL, *supra* note 21. at 58; *BG Group*, Final Award ¶ 239.

> measures directed at offsetting or minimizing losses will be applied in a non-discriminatory manner.[99]

To understand why such minimal treatment was given to the provision, it is important to consider the tribunal's conclusion in the light of the BIT it was interpreting. The Argentina-US BIT, under which the claim was brought, contained a measures-linked war-loss clause, explicitly requiring only that most-favored-nation and national treatment be afforded "as regards any measures [the host state] adopts in relation to such losses [resulting from a state of national emergency]."[100] Thus, there was a much clearer basis, textually, to limit the clause's application only to instances where the state had adopted measures to compensate investors for losses, rather than applying it to all compensation due to investors in the context of the emergency.

While the treaty at issue in *CMS* contained a measures-linked war-loss clause, the Argentina-UK BIT utilized a general war-loss clause. Arbitrating a dispute brought under the Argentina-UK BIT, the tribunal in *BG v. Argentina* declined to find that the general war-loss clause created a *lex specialis* regime limiting investor compensation for harms incurred during the national emergency.[101] Despite the textual differences between the terms, the *lex specialis* argument was given little more analysis than in *CMS* and other tribunals.[102] The tribunal only provided the conclusory statement that Article 31 of the Vienna Convention on the Law of Treaties (VCLT) guided it to determine that the war-loss clause simply provided "a specific expression of the national treatment and most favored nation standard in relation to the compensation of losses resulting from certain actions."[103] However, no specific reasoning under the VCLT is given, nor does the tribunal state *why* a "specific expression" of the national treatment standard is necessary considering that a generally applicable national treatment

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99. *CMS*, ICSID Case No. ARB/01/8 ¶ 375 (emphasis added).

100. Argentina-US BIT, *supra* note 95.

101. *BG Group*, Final Award, ¶ 387. The general basic war-loss clause in the UK-Argentina BIT reads:

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

Argentina-UK BIT, *supra* note 95, at art. IV.

102. *See BG Group*, Final Award, ¶¶ 369–87.

103. *Id.* ¶ 382.

and most-favored-nation clause appeared in the treaty.[104] There is no reason to believe that the generally applicable clause would *not* apply to situations where a state compensated some investors but not others for such losses. Thus, as with the panel's reasoning in *AAPL*, the *BG* tribunal's interpretation of the war-loss clause essentially renders it superfluous. Implicitly reading two provisions to have the same meaning puts the tribunal at odds with the VCLT's requirement that treaties be interpreted in light of their context, including the text of other provisions.[105]

The *BG* arbitrators reinforced their interpretation by noting that other tribunals have interpreted the "similar" provision in the US-Argentina BIT as merely mandating compensation on a most-favored-nation or national treatment basis.[106] As noted, however, there is a crucial difference between the war-loss clauses in the two treaties—the US version is "measures-linked" while the UK BIT contains a general war-loss clause. That is, the provision in the US-Argentina BIT specifically limits its operation to "*measures* [adopted by the state] in relation to such losses,"[107] while the UK-Argentina BIT is applicable to any "restitution, indemnification, compensation, or other settlement" for losses incurred by the investor.[108] The tribunal disregarded this important textual difference and chose to view the two provisions as identical in operation.

Following the crisis in Argentina, ISDS jurisprudence swung the interpretation of war-loss clauses decidedly in favor of investors. Most of the claims arose under the US-Argentina BIT, which utilizes a "measures-linked" war-loss clause, perhaps reasonably read as only creating an obligation for states to compensate investors on a most-favored-nation or national treatment basis in cases where a state chooses to adopt such measures and defeating a *lex specialis* argument. Possibly due to an overabundance of measures-linked war-loss clause jurisprudence, when the tribunal in *BG* considered a claim arising out of a treaty with a general war-loss clause, it treated the provisions as identical rather than distinct and rejected Argentina's *lex specialis* argument. In each instance, the arbitral tribunals showed an unwillingness to seriously consider Argentina's defenses under the general war-loss clause, summarily dismissing them with little in the way of substantive legal reasoning.

3. A Brief Reprieve: *L.E.S.I. v. Algeria*

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104. Argentina-UK BIT, *supra* note 95, at art. 3(1).

105. *See* Vienna Convention on the Law of Treaties arts. 31(1)–(2), *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

106. *BG Group*, Final Award, ¶ 383.

107. Argentina-US BIT, *supra* note 95, at art. IV(3) (emphasis added).

108. Argentina-UK BIT, *supra* note 95, at art. 4.

The tribunal in the 2008 arbitration *L.E.S.I. v. Algeria* is one of the few to accept that a general war-loss clause operates as a *lex specialis* regime.[109] Two Italian companies initiated an arbitration against Algeria after construction on a dam project they had contracted to build in the country was halted due to an armed conflict between the government and Islamic Guerillas.[110] Interestingly, the general basic war-loss clause in the Algeria-Italy BIT, under which the claim was brought, does not link its operation to compensation as is typical in similar clauses.[111] Instead, it states only that investors suffering losses due to war or other armed conflict will benefit from treatment no less favorable than the host country's own nationals or nationals of a third country.[112] Accordingly, the tribunal read this as modifying the actual standard of protection set forth in the BIT's FPS clause rather than affecting an obligation to provide compensation for breach. For the Tribunal, as long as Algeria provided protection to the claimants no less favorable than it had provided to other investors, it fulfilled its obligations under this unique general war-loss clause.[113]

The tribunal found that the general FPS clause and the war-loss clause could not be applied cumulatively—one offered constant, full, and complete protection and the other offered protection only on a most-favored-nation or national treatment basis. Thus, the principle of *lex specialis* suspended operation of the general FPS clause when the conditions set forth in the general war-loss clause (the presence of an armed conflict) were met.[114] The tribunal went on to find that the clause was not breached because the protection offered to the state was not less favorable than that provided to other parties.[115]

While the text of the BIT's war-loss clause is somewhat unique, the tribunal's reasoning lends credence to the argument that other general war-loss clauses should be read as *lex specialis*, abrogating the duty to compensate investors when an FPS clause is breached. When damage results from a state's breach of its duty under a general FPS clause, it has a duty to compensate the harmed investor. However, a

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109. L.E.S.I. v. Algeria, Case No. ARB/05/3, ¶ 182 (CIRDI 2008), https://www.italaw.com/sites/default/files/case-documents/ita0457.pdf (last visited Aug. 10, 2021) [https://perma.cc/24W9-SVNA] (archived Aug. 10, 2021).

110. Asha Kaushal, *Algeria Not Liable for Treaty Breaches Related to Dam Project that Foundered During Civil war with Islamist Guerrillas*, INT. ARB. REP. (Nov. 25, 2008).

111. *See* Tra il governo della repubblica Italiana ed il governo della Repubblica Algerina Democratica e Popolare sulla promozione e protezione degli investimenti, Alg.-It., May 18, 1991 [hereinafter Algeria-Italy BIT], https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/50/download (last visited Aug. 10, 2021) [https://perma.cc/LL6G-NWPG] (archived Aug. 10, 2021); *see also supra* Part II.B.1.

112. *Id.*; *see also* ZRILIČ, *supra* note 23, at 121–22.

113. *See L.E.S.I.*, CIRDI No. ARB/05/3 ¶ 175.

114. *See id.* ¶ 174.

115. *Id.* ¶¶ 181–82.

typical general war-loss clause only requires compensation for losses in armed conflict when compensation has been provided to other parties for their war losses.[116] These two standards of compensation—one absolute and one on a most-favored-nation or national treatment basis—cannot operate simultaneously. Following the tribunal's reasoning in *L.E.S.I.*, the principle of *lex specialis* dictates that the duty to compensate under a general FPS clause is suspended in favor of the more specifically applicable standard contained in a general war-loss clause during times of armed conflict.

B. *The Modern Application of War-Loss Clauses: Libya*

The Libyan revolution and subsequent civil war began with the overthrow of Dictator Muammar Gaddafi in 2011. Gaddafi's forty-two-year rule came to a violent end following protracted, violent protests, which arose during the Arab Spring popular uprising against dictators across the Middle East. The Gaddafi regime's violent response to these protests led to an intense bombing campaign by NATO and the uprising of various militias against Gaddafi's rule.[117] The country disintegrated into violence in the power vacuum that ensued after Gaddafi's death, and the civil war continues today.[118] Today, Libya remains divided between two opposing factions.[119] The violence ebbs and flows, and prospects for peace under UN-brokered talks are uncertain given that a similar agreement foundered in 2015.[120]

In 2003, however, Libya's prospects were bright. After the United Nations Security Council voted to lift sanctions on the oil-rich state, national coffers swelled with oil revenue, and foreign investment boomed.[121] It was during this period, between 2003 and 2010, that Libya signed the majority of its BITs.[122] Although a boon at the time, this influx of foreign investment and investment treaties sowed the

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116. *See also supra* Part II.B.3.

117. *Death of a Dictator*, HUMAN RIGHTS WATCH (Oct. 16, 2012), https://www.hrw.org/report/2012/10/16/death-dictator/bloody-vengeance-sirte [https://perma.cc/9UDB-LZQZ] (archived Jul. 27, 2021).

118. *See* Zia Weise, *The Libyan Conflict Explained*, POLITICO (Jan. 17, 2020, 4:00 AM), https://www.politico.eu/article/the-libyan-conflict-explained [https://perma.cc/4H6C-BGJL] (archived Jul. 27, 2021).

119. *See id.*

120. *See* Nate Wilson, *Libya: Peace Talks Advance, but Will Need Local Support*, U.S. INST. PEACE (Nov. 19, 2020), https://www.usip.org/publications/2020/11/libya-peace-talks-advance-will-need-local-support [https://perma.cc/3RFR-RUQ8] (archived July 27, 2021).

121. Press Release, Security Council, Security Council Lifts Sanctions Imposed on Libya After Terrorist Bombings of Pan Am 103, UTA 772, U.N. Press Release SC/7868 (Sept. 12, 2003).

122. Libya has 39 total BITs, and Libya signed 25 of them between 2003 and 2010. UNCTAD, *supra* note 15 (click on the "Select Country" drop down arrow and choose "Libya").

seeds for the dozens of arbitrations that have arisen since the beginning of the conflict in Libya.[123]

1. Libyan Liability for Investors' War Losses

Argentine ISDS tribunals were reluctant to accept that war clauses create a *lex specialis* regime for governing the compensation of investors in times of national emergency,[124] and this view has largely continued in the Libyan context. At least three separate tribunals have heard claims for compensation for breach of war-loss and FPS clauses brought under two separate BITs.[125]

a. *Strabag v. Libya*

Strabag v. Libya exemplifies the skepticism in which panels continue to hold the *lex specialis* argument as applied to general war-loss clauses. The tribunal in *Strabag v. Libya* heard claims brought by a construction company under the Austria-Libya BIT.[126] The Austria-Libya BIT contains a general war-loss clause,[127] an advanced war-loss clause,[128] and an FPS clause.[129] The claimant demanded compensation for equipment and property stolen and destroyed by various factions

123. *See* Heather L. Bray, *SOI – Save Our Investments! International Investment Law and International Humanitarian Law*, 14 J. WORLD INV. & TRADE 578, 593–94 (2013); Luke Eric Peterson, *Investigation: As Fight Continues Over $1Bil Award, Libya Facing at Least a Dozen Investment Treaty Arbitrations – Possibly More – in Aftermath of Arab Spring*, INV. ARB. REP. (Mar. 31, 2017), https://www.iareporter.com/articles/investigation-as-fight-continues-over-1bil-award-libya-facing-at-least-a-dozen-investment-treaty-arbitrations-possibly-more-in-aftermath-of-arab-spring/ [https://perma.cc/ULE6-GK5T] (archived Jul. 27, 2021).

124. *See* Part III.A.3.

125. *See generally* Strabag SE v. Libya, ICSID Case No. ARB(AF)/15/1, Award, ¶¶ 313–16 (June 22, 2020), https://www.italaw.com/sites/default/files/case-documents/italaw11829.pdf (last visited Aug. 10, 2021) [https://perma.cc/FTG6-MBEW] (archived Aug. 10, 2021); Oztas Constr. v. Libyan Inv. Dev. Co., Case No. 21603/ZF/AYZ, Final Award, (ICC Int'l Ct. Arb. 2018), https://www.italaw.com/sites/default/files/case-documents/italaw11415.pdf (last visited Aug. 10, 2021) [https://perma.cc/G7E2-F5FH] (archived Aug. 10, 2021); Cengiz v. Libya, Case No. 21537/ZF/AYZ, Final Award, (ICC Int'l Ct. Arb. 2018), https://www.italaw.com/sites/default/files/case-documents/italaw11275.pdf (last visited Aug. 10, 2021) [https://perma.cc/98U5-GSCD] (archived Aug. 10, 2021).

126. *Strabag*, ICSID ARB(AF)/15/1, ¶ 1.

127. Agreement Between the Republic of Austria and the Great Socialist People's Libyan Arab Jamahiriya for the Promotion and Protection of Investments, Austria-Libya, art. 5(1), June 18, 2002, 2333 U.N.T.S. 411 [hereinafter Austria-Libya BIT], https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/199/download [https://perma.cc/3QUE-XB9G] (archived Jul. 27, 2021); *see supra* Part II.B.1 for a thorough treatment of basic war-loss clauses.

128. Austria-Libya BIT, *supra* note 127, at art. 5(2); *see supra* Part II.B.2 for a thorough treatment of advanced war-loss clauses.

129. Austria-Libya BIT, *supra* note 127, at art. 3(1); *see supra* Part II.A for a thorough treatment of FPS clauses.

during the civil war, and the arbitrators analyzed these claims under the advanced war-loss and FPS clauses.[130]

The tribunal was quick to dispense with Libya's argument that the article containing the war-loss clauses established a *lex specialis* regime for investor compensation for war losses.[131] Following the lead of past tribunals,[132] the award in *Strabag* gives little in the way of analysis before its conclusory statement that "nothing in [the article] or in other provisions of the treaty indicates that it operates in the limiting manner urged by respondents" and was thus "unambiguous."[133] The tribunal went on to reason that the principle of *lex specialis* is considered a "supplemental means of interpretation," which under Article 32 of the VCLT is applicable only when ambiguity exists.[134] There being no ambiguity here, the tribunal decided further consideration of Libya's *lex specialis* defense was unnecessary. The tribunal did not justify its reasoning for finding that *lex specialis* is a "supplemental means of interpretation" under Article 32. This is surprising given that *lex specialis* is typically understood to be "a relevant rule of international law" under VCLT Article 31 rather than a "supplemental means of interpretation."[135] Under the VCLT, relevant rules of international law are viable tools of interpretation as a primary consideration and are applicable whether or not a term is ambiguous.[136]

The claimant alleged that it suffered damage at the hands of multiple perpetrators: the regular Libyan forces, militia groups, rebels, and NATO. Article 5(2) of the Austria-Libya BIT contains an advanced war-loss clause. Like other advanced war-loss clauses, it applies when the state's armed forces requisition an investor's property or damage it outside of what is necessitated by combat. The tribunal found that portions of the damage and requisitions were attributable to the Libyan armed forces and awarded partial compensation under Article 5(2).[137]

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130. *See Strabag*, ICSID ARB(AF)/15/1 ¶¶ 213, 229.

131. *See id.* ¶ 228.

132. *See generally, e.g.*, CMS v. Argentine Rep., ICSID Case No. ARB/01/8, Award, (ICSID 2005), https://www.italaw.com/sites/default/files/case-documents/ita0184.pdf (last visited Aug. 10, 2021) [https://perma.cc/4GRX-H34Q] (archived Aug. 10, 2021); BG Group v. Rep. of Arg., Final Award, ¶ 370 (UNCITRAL 2007), https://www.italaw.com/sites/default/files/case-documents/ita0081.pdf (last visited Aug. 10, 2021) [https://perma.cc/KNF8-Z3A6] (archived Aug. 10, 2021).

133. *Strabag*, ICSID ARB(AF)/15/1 ¶ 224.

134. *Id.* ¶ 225; VCLT, *supra* note 105, at art. 32.

135. *See* Int'l Law Comm'n, Rep. on the Work of Its Fifty-Eighth Session, U.N. Doc. A/61/10, at 178–80 (2006); VCLT, *supra* note 105, at art. 31(c)(3).

136. VCLT, *supra* note 105, at art. 31.

137. *Strabag*, ICSID ARB(AF)/15/1, ¶¶ 257 (finding Libya liable for the full amount of damages sought), 263 (liable for one third of the damages sought), 304 (not liable for any of the damages sought), 320–21 (liable for one third of the damages sought).

In the tribunal's view, compensation for the remaining damage that could not be attributed to the regular armed forces would have to come from one of two sources: the general war-loss clause—if the state compensated other investors for such losses—or the FPS clause—because the tribunal had already rejected that the war clauses operate as a *lex specialis* compensation regime. Libya adopted no measures for compensation, so liability under the former was not considered. Examining Libya's liability under the latter for failing to investigate the theft of construction equipment by third parties, the panel applied a modified objective standard, taking into account the circumstances of the state.[138] Given the wholesale disintegration of Libyan society at the time of the reported theft, the tribunal found that the claimant had not carried its burden to prove that Libya failed to provide due diligence in accord with its FPS obligations.[139]

The tribunal's decision is important for two primary reasons. First, because compensation was awarded only under the advanced war-loss clause (declining to hold Libya liable under the FPS clause), the panel's ruling that the war-loss clauses did not constitute a *lex specialis* regime for wartime compensation was of little practical effect in terms of Libya's liability for damages. However, it is worth considering that if the panel had found the state liable for breach of FPS, Libya's liability would have been significantly more burdensome.

Second, one might speculate that because of the advanced war-loss clause in the treaty, which allowed the tribunal to find Libya liable for damages wrought at the hands of actors directly under its control, the tribunal did not feel the need to pursue additional damages for the actions of third parties. In this way, the advanced war-loss clause could have acted as a kind of "safety valve"—giving the tribunal latitude to strike a balance between the interests of Libya and the claimant by only holding the state liable for the actions of the actors most under its control.

b. *Cengiz v. Libya*

Cengiz v. Libya is notable not so much for the tribunal's interpretation of the measures-linked war-loss clause, but because it illustrates the burdensome liability that can be imposed on states subject to BITs without a *lex specialis* wartime compensation regime. In *Cengiz*, a Turkish construction company brought a claim under the Libya-Turkey BIT for damage and theft that occurred at several

138. *Id.* ¶¶ 236, 343–45.

139. *Id.* ¶¶ 343–45. This contrasts to other situations where tribunals have regularly held states liable for investor losses incurred at the hands of third parties, even in times of war. *See, e.g.*, *Cengiz*, Case No. 21537/ZF/AYZ; AAPL v. Sri Lanka, ICSID Case No. ARB/87/3, Final Award, (June 27, 1990), 6 ICSID Rev. 526 (1991) https://www.italaw.com/sites/default/files/case-documents/ita1034.pdf (last visited Aug. 10, 2021) [https://perma.cc/R7Q8-KM47] (archived Aug. 10, 2021).

construction camps in the remote southeast of the state.[140] The Libya-Turkey BIT contained a measures-linked war-loss clause[141] and an FPS Clause.[142] This differs from the Austria-Libya BIT at issue in *Strabag*, which contained a general war-loss clause, an advanced war-loss clause, and an FPS clause. The tribunal's decision is notable for three primary reasons. First, it provides a relatively thorough explanation of its reasoning in rejecting Libya's *lex specialis* defense. Second is the broad swathe of actors whose actions Libya was held liable for through the FPS clause. Third, and most troubling, is the unconvincing, searching analysis the tribunal performed of Libya's failure to utilize its military forces to protect the claimant's investment. These last two aspects could have been avoided had the applicable BIT created a *lex specialis* wartime compensation regime.

Although the war-loss clause at issue in *Cengiz* was measures-linked (significantly weakening a *lex specialis* argument), the tribunal performed an analysis of the *lex specialis* defense, which was slightly more thorough than other panels.[143] The tribunal first posited that the principle of *lex specialis* did not apply because the provisions covered different subject matter—the FPS clause set a standard of protection and the measures-linked war-loss clause required nondiscrimination when adopting compensatory measures.[144] If two terms can operate together, there is no conflict for *lex specialis* to resolve. The tribunal then discussed two commentators who share its view, several of the Argentina cases, and *AAPL*, noted above.[145] Although the tribunal's reasoning here was an improvement on past arbitral performance, it still leaves much to be desired: it failed to utilize the VCLT in its interpretation and gave only passing mention to arbitral jurisprudence supporting the *lex specialis* argument.[146] In any event, the measures-linked clause at issue in *Cengiz* provided a much weaker argument for a special compensation regime than a general war-loss clause.

The award is notable for imposing liability on Libya for the actions of nearly every party involved in the civil war. The claimant in the case alleged that the thefts were carried out by three primary perpetrators: various militia groups loyal to the opposition National Transitional Council (NTC), militia groups and regular Libyan military units loyal to the Gaddafi regime, and mobs of civilians.[147] After finding that the war-loss clause did not create a *lex specialis* regime for compensation, the tribunal went on to analyze the claims under the FPS clause, finding Libya liable for damages caused by all three classes of alleged

140. *See generally Cengiz*, Case No. 21537/ZF/AYZ.
141. Libya-Turkey BIT, *supra* note 10, at art. 5.
142. *Id.* at art. 2(1).
143. *See Cengiz*, Case No. 21537/ZF/AYZ ¶¶ 350–70.
144. *Id.* ¶¶ 357–58.
145. *Id.* ¶¶ 363–64, 367–68.
146. *See id.* ¶ 368.
147. *See id.* ¶ 409.

perpetrators. Had the BIT contained a general war-loss clause, Libya's duty to compensate investors for damage resulting from its breach of the FPS clause would have been displaced. An advanced war-loss clause would have mandated investor recovery for the intentional acts of the Libyan armed forces. These two clauses together create a special wartime compensation regime that properly balances investor and state interests; *Cengiz* shows how without this regime the state shoulders the entire burden alone.

The tribunal first determined that the FPS clause comprises two duties: a duty for the state to refrain from harming foreign investments and a duty to actively protect foreign investments.[148] The tribunal held that Libya breached the first duty to refrain from harm because of the thefts and destruction perpetrated by both the Libyan Army forces supporting Gaddafi and the militia supporting the NTC (which were on opposite sides of the conflict).[149] For the tribunal, the actions of the NTC-backed militia were attributable to the state because the NTC eventually prevailed and, for a time, became the legitimate government.[150] When the NTC became the sovereign, the actions of the militia it controlled during the conflict became attributable to the state.[151] The actions of the Libyan Army, loyal to Gaddafi, were also attributed to the state because they still nominally comprised the Libyan regular armed forces.[152]

If present, a special war-loss compensation regime would have relieved some of the liability in this case. Although the actions of both groups were attributed to the state, the tribunal only found that the Libyan Army troops, not the NTC militia, were considered the "regular armed forces" of Libya.[153] Because an advanced war-loss clause requires that the harm is perpetrated by a state's armed forces,[154] it is likely that Libya would only have been liable for the harm caused by the Libyan Army under the advanced war-loss clause. Had a general war-loss clause been present in the treaty, Libya would not have had an obligation to compensate investors for its breach of an FPS clause.[155] The damage caused by the NTC militia, which did not act as part of the regular armed forces, would be judged as a breach of the

148. *Id.* ¶¶ 405–06.
149. *Id.* ¶ 431.
150. *Id.* ¶ 430.
151. *Id.*
152. *See id.* ¶ 428.
153. *Id.* ¶¶ 428–31.
154. *See* Netherlands Model BIT, *supra* note 67. The author recognizes that advanced war-loss clauses typically require compensation for harms committed by both a state's "armed forces" and "authorities." It is possible that "authorities" could be broad enough to include a militia group, but there is neither commentary nor precedent considering the scope of "authorities" envisioned by an advanced war-loss clause. It is plausible that "authorities" includes only the leadership, in which case unless the NTC leadership specifically ordered the theft there may be no liability for the state.
155. *See supra* Parts II.B.1 and II.B.2.

FPS clause, and thus no compensation could be required under a special war-loss compensation regime.

The tribunal also found that Libya breached its FPS obligation to protect investors from civilians through a troubling post-hoc analysis of its military decisions. This analysis would have been avoided had the treaty contained a *lex specialis* compensation regime, which would displace the payment of compensation for a state's breach of FPS. The tribunal found that the presence of certain Libyan troops in the vicinity of the damaged construction site meant that these troops could have been deployed in order to protect the investment.[156] It also found it convincing that troops in another region of the country had been deployed by Libya to protect a separate construction project.[157] Protecting one site and not the other when—in the tribunal's view—it could have done so constituted a breach of Libya's duty to provide full protection and security to the claimant.[158]

The justifications the tribunal gave are concerning. First, mere proximity does not necessarily equate to ability to deploy troops to a particular area in the context of armed conflict. Perhaps the troops were positioned strategically in anticipation for an attack or as a reserve force. The tribunal disregarded these potential factors and found that the unit's proximity alone created a duty for Libya to deploy them to protect the site.[159] The comparison drawn between the site at issue in *Cengiz* and the other site elsewhere in the country is also problematic. There are myriad legitimate military reasons why one site would be chosen for protection over another—for example, one might have been more strategically useful if completed on time. Comparing two different sites is like comparing apples and oranges, especially in conditions as fluid and unstable as those experienced by Libya at the height of its civil war.

The searching analysis of Libya's military decisions by the tribunal poses serious concerns for states acting in an armed conflict. It forces military commanders in the field to consider the nationality of the owner of a particular site or building when making decisions about where to deploy troops, muddying what should have been the primary consideration in such decisions—military strategy. An arbitral tribunal is also ill-suited to make such military judgments or to adequately consider the multitude of factors that must be balanced by military commanders making decision on troop movements. Like in *Cengiz*, arbitrators may resort to simplistic notions such as proximity to determine whether troops are capable of being deployed. Had a general basic armed-conflict clause been present in the treaty, such broad liability could have been avoided, while an advanced war-loss

156. *Cengiz*, Case No. 21537/ZF/AYZ, ¶ 449.
157. *Id.* ¶ 450.
158. *See id.* ¶¶ 449–52.
159. *See id.* ¶ 449.

clause could have allowed the tribunal to impose liability on the state only for the intentional destruction and theft committed by the regular army.

IV. STRIKING THE BALANCE: INVESTOR RIGHTS AND STATE SOVEREIGNTY IN WARTIME

Turning to a normative analysis of how and when states should be held accountable to investors for losses suffered during an armed conflict, it is critical to keep the context in mind. In times of war and the period after, states suffer great hardships and resources are scarce. The risk of overly burdensome liability could serve to both limit a state's military decisions ex-ante—jeopardizing the ability of state forces to prevail in a conflict—and subject a state to paying exorbitant compensation to foreign investors—hindering its efforts to rebuild society and create lasting peace.[160] To this end, tempering state liability is critical. At the same time, foreign investors have chosen to invest their time, money, and effort in a state, often relying on protections afforded by BITs. Their investments make important contributions to a state's development and economic growth.[161] A total abrogation of state liability could do a disservice to the potentially positive effects of foreign investments in the least-developed and least-stable countries that may need it most.

Taking these considerations into account, creating a regime of reasonable liability is a balance that is vital for the international investment regime to strive towards. Such a regime must have three crucial aspects. First, it must not overextend state liability to harm caused by parties to a conflict who are not under a state's control and minimize post-hoc analysis of a state's military decisions. Second, it *should* hold a state liable for intentional and unnecessary damage caused by those under its direct control, namely the state's armed forces. Last, it must create certainty so that states can make informed decisions during wartime. Achieving these objectives would mean giving states a duty to protect investors from intentional harm while

160. *See* ZRILIČ, *supra* note 23, at 211–16.

161. While inducing foreign direct investment (FDI) is in an important objective for developing countries entering into BITs, whether BITs have been successful is subject to much debate. It has been difficult for commentators to connect the proliferation of BITs with increases in FDI, perhaps because of the many factors that contribute to businesses' decisions to invest in a particular country. *See* Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties, in* THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT 109, 131–145 (Karl P. Sauvant & Lisa E Sachs eds., 2009). Still, FDI can make important contributions to the economic development of nations. *See* Prakash Loungani & Assaf Razin, *How Beneficial is Foreign Direct Investment for Developing Countries?*, 38 FIN. & DEV. 6, 6–7 (2001).

simultaneously allowing them latitude to make military decisions without the fear of exorbitant liability following the conflict.

The current investment regime fails, or often fails, in nearly all of these respects. In *Cengiz*, the tribunal found the state liable for damage caused by, literally, everyone in Libya—both sides of the conflict and the population at large. This was excessive, especially considering the circumstances Libya has faced during its civil war. The *Cengiz* tribunal also performed a questionable review of Libya's military decisions. It found that the mere presence of Libyan forces in the region meant that the state *could* have deployed them to protect the claimant's investment, breaching its duty to provide full protection and security to the investment. Giving the complexity of conflict and the multitude of considerations that must be accounted for when making military decisions, this is a judgment that the tribunal was ill-suited to make. Ex-post second-guessing of this sort creates a heavy burden on military commanders in the field who are attempting to ensure the survival of the state to which they owe loyalty.

The nature of the international investment regime as it exists also creates vast amounts of uncertainty. Claims were brought against Libya under multiple instruments, each with textual differences that served to create different substantive duties. These textual differences have served to muddle proper arbitral interpretation of the differing standards of duty, as seen in the messy treatment of measures-linked and general war-loss clauses. Tribunals are also not bound by precedent, further confusing the standards by which duties are measured. This uncertainty impedes the ability of states to make informed decisions during wartime and properly consider the consequences when balancing the risks and benefits of a particular course of action.

This Note proposes three solutions to this problem. First, scholars and tribunals should do more to properly analyze the difference between general and measures-linked war-loss clauses and the *lex specialis* regime for war-loss compensation created in BITs. Tribunals have relied on scholarship when analyzing the meaning of war-loss clauses in various circumstances,[162] and thus increased scholarship giving serious consideration to the *lex specialis* proposition could serve to guide tribunals in mitigating state liability during future conflicts.

Second, states should advocate for the inclusion of a general and an advanced war-loss clause as they negotiate new BITs moving forward. When combined, these provisions reach the proper balance of state liability. Thus, treaty negotiators already have the framework to create a compensation regime that achieves the considerations

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162. *See Cengiz*, Case No. 21537/ZF/AYZ, ¶¶ 402–03, 405–06; CMS v. Argentine Rep., ICSID Case No. ARB/01/8, Award, ¶ 276 (ICSID 2005), https://www.italaw.com/sites/default/files/case-documents/ita0184.pdf (last visited July 27, 2021) [https://perma.cc/Z8KM-6QUS] (archived July 27, 2021).

discussed above. Over time, a web of new BITs with improved war-loss clauses will create incremental change in the fragmented investment regime that currently exists.

Third, states should negotiate a multilateral instrument that would supersede BITs between the signatories in times of war and create the parameters for investor compensation on the basis of the provisions discussed above. Although several attempts to create a multilateral investment regime have failed in the past,[163] negotiations focused on only one aspect—state duties to compensate investors in wartime—could be more successful than previous attempts. While the multilateral approach is the only one of the three that reaches all of the considerations discussed above, the first two piecemeal options have the advantage of slow, manageable change that does not have to rely on a large plurality of states parties coming to an agreement.

A. *An Interpretive Solution: Arbitral and Scholastic Recognition of a Lex Specialis War-Loss Compensation Regime*

The first potential fix for the problems facing state liability in wartime is for scholarship and tribunals to give more serious analysis when interpreting whether general war-loss clauses in BITs operate as a *lex specialis* regime. As discussed at length above, the few tribunals that have discussed war-loss provisions have dismissed the *lex specialis* argument with little substantive interpretation.[164] While a few scholars have undertaken in-depth discussion of war-loss clauses,[165] none have performed a thorough analysis of whether war-loss provisions function as a *lex specialis* compensation regime. Generally, they accept that both general and measures-linked war-loss clauses only apply to compensatory measures adopted by the state.[166] Scholarship is important because the tribunals that have rejected the *lex specialis* argument have often relied on academic works to support their interpretation.

This Part will seek to add to the conversation by arguing that it is plausible that a *lex specialis* war-loss compensation regime exists in treaties currently in force that contain general war-loss clauses when those provisions are interpreted under the Vienna Convention on the Law of Treaties (VCLT). Discussion will then turn to the potential benefits and risks of interpreting general war-loss clauses as creating such a regime within the current investment treaty framework.

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163. *See generally* Peter T. Muchlinski, *The Rise and Fall of the Multilateral Agreement on Investment: Where Now?*, 34 INT'L L. 1033 (2000) (discussing in-depth why a multilateral investment agreement has failed to materialize).

164. *See supra* Part III.

165. *See, e.g.*, ZRILIČ, *supra* note 23.

166. *See, e.g.*, *id.* at 110–12; NEWCOMBE & PARADELL, *supra* note 21.

Article 31 of the Vienna Convention on the Law of Treaties requires that treaty terms are to be interpreted in accordance with their "ordinary meaning" in light of their context, object, and purpose.[167] It also mandates that other "relevant rules of international law" should guide the interpretation.[168]

1. The Ordinary Meaning of the Terms

Ordinary meaning is often derived from dictionary definitions, unless the parties have agreed that a special meaning exists.[169] General basic war-loss clauses typically apply when "nationals or companies . . . whose investments in the territory of the [host state] . . . suffer losses owing to war [and other enumerated circumstances]."[170] As the tribunal in *AAPL* stated, this provision is broad, covering any losses incurred by a foreign investor during a conflict, regardless of the perpetrator.[171] The articles typically mandate that the investor "shall be afforded [by the host state] treatment, as regards [to] restitution, indemnification, compensation or other settlement, no less favorable than . . . its own nationals or companies [("national treatment")] or to nationals or companies of any third State [("most-favored-nation treatment")].[172] As stated, tribunals and scholars generally contend that the compensation discussed here only applies to voluntary measures adopted by states.[173] However, the "ordinary meaning" of compensation is not necessarily so restrictive.[174] The Oxford English Dictionary defines compensation as "amends or recompense for loss or damage."[175] Similarly, Black's Law dictionary gives the definition of "payment of damages."[176] The ordinary meaning of the terms thus does not limit the application of general war-loss clauses to voluntary compensatory measures, but to any payment at all for damages incurred during wartime.[177]

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167. VCLT, *supra* note 105, at art. 31(1).

168. *Id.* at art. 31(3).

169. *See, e.g.*, Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, ¶¶ 354–55, WTO Doc. WT/DS363/AB/R (adopted Dec. 21, 2009); *see also* VCLT, *supra* note 105, at art. 31(4).

170. Sri Lanka-UK BIT, *supra* note 4, at art. 4(1).

171. AAPL v. Sri Lanka, ICSID Case No. ARB/87/3, Final Award, ¶ 65 (June 27, 1990), 6 ICSID Rev. 526 (1991) https://www.italaw.com/sites/default/files/case-documents/ita1034.pdf (last visited Aug. 10, 2021) [https://perma.cc/SS3Z-4JAF] (archived Aug. 10, 2021).

172. *See, e.g.*, Sri Lanka-UK BIT, *supra* note 4, at art. 4(1).

173. *See supra* Part III.

174. VCLT, *supra* note 105, at art. 31.

175. *Compensation*, OXFORD ENGLISH DICTIONARY (2d ed. 1989).

176. *Compensation*, BLACK'S LAW DICTIONARY (11th ed. 2019).

177. *But see* IRMGARD MARBOE, CALCULATION OF COMPENSATION AND DAMAGES IN INTERNATIONAL INVESTMENT LAW 8–41 (2d ed., 2017) (exploring distinctions between

These damages are to be paid on a national treatment or most-favored-nation basis, which means that they are only required when compensation has been paid to other investors. Under normal conditions, if an investor incurs damage for, say, a state's breach of a full protection and security clause, it is entitled to *compensation.* However, the ordinary meaning of a general basic war-loss clause under the VCLT indicates that the payment of this compensation is only mandated if it has been paid by the state to other investors.

2. The Context of the Provisions

The VCLT also requires that the *context* of the treaty be used to interpret terms, and this context includes the text of other provisions.[178] Nearly all investment treaties already contain national treatment and most-favored-nation provisions.[179] These clauses require that investors from one of the states parties be provided with the same treatment that the host state accords to domestic and other foreign investors.[180] Under a most-favored-nation clause, if a host state compensated an investor from State A for its wartime losses and refused to compensate an investor from State B, it will have violated the duty to provide MFN treatment to the investors of state B by providing *worse* treatment to the investors of State B than it provided to the investors of State A.[181] In light of a national treatment of most-favored-nation provision, reading a general war-loss clause as only applying to voluntary compensatory measures renders it essentially surplusage. This violates Article 31 of the VCLT by not taking the "context," the text of other provisions, into account. However, if general basic war-loss clauses are interpreted as creating a special compensation regime, they are no longer surplusage but an integral part of the treaty framework governing investor compensation for war losses. This further strengthens the argument that the clauses operate to create a special compensation regime for war losses.

The same could be said for an advanced war-loss clause. If there is no special compensation regime, compensation for intentional damage by a state's armed forces would be required under a BIT's FPS clause.[182] Thus, an advanced war-loss clause is essentially meaningless. However, if general war-loss clauses do create a

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compensation and damages for unlawful acts in international investment law, but also noting that these distinctions are not uniformly recognized).

178. VCLT, *supra* note 105, at art. 31.

179. UNCTAD, *supra* note 15.

180. *See* JESWALD W. SALACUSE, THE LAW OF INVESTMENT TREATIES 332–42 (3d ed. 2021).

181. *See id.* at 445–47. *But see* ZRILIČ, *supra* note 23, at 112 (arguing that general national treatment and MFN clauses would not necessarily apply to compensatory measures adopted by states).

182. *See supra* Part II.A.

compensation regime that relieves states of the duty to compensate investors for damages resulting from their breach of an FPS clause, the advanced war-loss clause still entitles an investor to compensation for intentional damage and retains an investor's right to just compensation.[183] Taking the relationship of the different BIT provisions into account, the context shows that the creation of a *lex specialis* compensation regime is the most reasonable reading of the provisions. To do otherwise renders both general and advanced war-loss clauses redundant.

3. *Lex Specialis* as a Relevant Rule of International Law

The consideration of "other relevant rules of international law" under Article 31 of the VCLT also pushes interpretation in favor of the *lex specialis* argument. The *lex specialis* cannon is widely understood to be one of these "relevant rules."[184] If a treaty's FPS clause requires a state to pay compensation for investor damages when breached, but a general basic war-loss clause states that this compensation is only necessary when it has been paid to others (on a national treatment or most-favored-nation basis), there is a conflict between the two terms. As discussed above,[185] *lex specialis* dictates that when terms conflict, the standard in the specifically applicable term should take precedence over the general.[186] A general war-loss clause is applicable only in specifically enumerated situations[187] while the duty to compensate for breach of an FPS clause operates generally and at all times, whether a conflict exists or not.[188] *Lex specialis* resolves this conflict by displacing the operation of the generally applicable FPS clause in favor of the specially applicable war-loss clause.

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183. *See* ZRILIČ, *supra* note 23, at 122.

184. *See* Int'l Law Comm'n, Rep. on the Work of Its Fifty-Eighth Session, U.N. Doc. A/CN.4/SER.A/2006/Add.1 (Part 2), at 178–80 (2006). *But see* Strabag SE v. Libya, ICSID Case No. ARB(AF)/15/1, Award, ¶ 225 (ICSID 2020), https://www.italaw.com/sites/default/files/case-documents/italaw11829.pdf (last visited July 27, 2021) [https://perma.cc/W54X-WLH2] (archived July 27, 2021) (stating that *lex specialis* is a supplemental means of interpretation under article 32 of the VCLT).

185. *See supra* Part II.B.3.

186. FELLMETH & HOROWITZ, *supra* note 60.

187. *See, e.g.*, Argentina-UK BIT, *supra* note 95, at art. 4 (limiting application of the provision to "losses owing to war or other armed conflict, revolution, a state of national emergency, revolt, insurrection or riot . . . .").

188. *See, e.g.*, AAPL v. Sri Lanka, ICSID Case No. ARB/87/3, Final Award, ¶ 69 (June 27, 1990), 6 ICSID Rev. 526 (1991) https://www.italaw.com/sites/default/files/case-documents/ita1034.pdf (last visited Aug. 10, 2021) [https://perma.cc/B4EK-TSWX] (archived Aug. 10, 2021) (deciding that a foreign investor would be entitled to due diligence protection from the host state regardless of whether the investor's national state had a BIT containing an FPS provision with the host state because the due diligence standard in an FPS provision incorporates the customary international law standard).

4. Benefits and Drawbacks of the Interpretive Solution

Arbitral and scholastic recognition of the *lex specialis* regime created by general war-loss clauses has both benefits and drawbacks. As a benefit, it protects states and avoids blanket liability like that which was imposed on Libya by the tribunal in *Cengiz*. There, Libya was found liable for all the acts perpetrated by the multitude of competing parties taking part in the conflict under an FPS clause, including the acts of parties completely outside of state control. The *lex specialis* interpretation also avoids a searching analysis of military decisions and speculation on whether a state could have used its military strength to protect investments. This allows states to prioritize for themselves what is important in making military decisions, rather than being forced to consider whether they will open themselves to a duty to compensate foreign investors. The interpretive solution is also simple to implement because it bypasses further negotiation between states.

For several reasons, however, the wider adoption of a *lex specialis* interpretation—on its own—is not an ideal solution. First, in terms of certainty, arbitral tribunals are not bound by precedent.[189] One tribunal could still find that a general war-loss clause creates a special compensation regime, and another tribunal could find that the same provision in the same treaty does not. Additionally, the interpretive solution has a minimal effect on treaties that contain measures-linked war-loss clauses, which have a significantly weaker textual argument for interpreting them to operate as a *lex specialis* regime.[190] A state may be bound by different treaties that contain both iterations and thus would still be forced to consider the nationality of the investor when making decisions on whether to utilize its military to protect an investment. This is not feasible to ask of military commanders acting in the heat of armed conflict.

In addition to not solving the certainty problem, this interpretation may swing too far in favor of state interests. If a treaty does not contain an advanced war-loss clause,[191] states in wartime ostensibly would not be liable for intentionally requisitioning or needlessly damaging investors' property. Not only is this unfair, but it may discourage foreign investment in a country. Even so, given the

189. *See* Paula Costa e Silva, Beatriz de Macedo Vitorino, & Filipa Lira de Almeida, *Arbitral Precedent: Still Exploring the Path*, KLUWER ARBITRATION BLOG (Oct. 28, 2018), http://arbitrationblog.kluwerarbitration.com/2018/10/28/arbitral-precedent-still-exploring-the-path/ [https://perma.cc/9CH8-2LS8] (archived July 25, 2021).

190. *But see* Oztas, Case No. 21603/ZF/AYZ, Final Award, ¶ 23 (ICC Int'l Ct. Arb. 2018), https://www.italaw.com/sites/default/files/case-documents/italaw11415.pdf (last visited July 26, 2021) [https://perma.cc/PZJ8-4BF7] (archived July 26, 2021) (finding that a measures-linked war-loss clause created a *lex specialis* compensation regime).

191. *See supra* Part II.B.2. As noted, advanced war-loss clauses are present only in about one third of BITs currently in effect. *See* UNCTAD, *supra* note 15.

destruction wrought in armed conflicts, the priority should be given to ending them as soon as possible by allowing states to make military decisions based on strategy, even at the expense of foreign investors. This consideration makes the special war-loss compensation regime the preferable option even in the absence of an advanced war-loss clause. Given the drawbacks, however, merely giving a voice to states' *lex specialis* defense in tribunal jurisprudence and scholarship is at best an incomplete solution.

B. *Future Treaty Approaches: Piecemeal and Multilateral*

In light of the above discussion, a goldilocks balance of sovereign and investor rights for compensation in armed conflict is found in treaties that contain a general war-loss clause—if interpreted to create a *lex specialis* compensatory regime—and an advanced war-loss clause. In these treaties, a general war-loss clause protects states from exorbitant liability under FPS clauses; avoids finding states liable for the actions of every actor participating in a conflict; and minimizes arbitral analysis of military decisions.[192] The advanced armed conflict clause protects the rights of investors by making states strictly liable when they requisition or needlessly damage an investor's property.[193] The terms which achieve an ideal balance are thus already available to treaty negotiators. A piecemeal approach simply means that states should aim to insert both of these provisions into new treaties as they are negotiated. Although the world is currently filled with BITs between states, new treaties are always being negotiated as old ones expire and states employ foreign policy to induce foreign investment.[194] A multilateral approach would require states to negotiate a new instrument that would supersede the application of BITs in states where there is an ongoing armed conflict.

1. The Improved General War-Loss Clause

The new treaties, bilateral or multilateral, should make explicit the existence of a *lex specialis* wartime compensation regime. This could be done by adjusting the treaty language of general war-loss clauses by use of an "improved" general war-loss clause. The potential language of an improved general war-loss clause could read as follows:

> Notwithstanding anything else in the Treaty, nationals or companies of one Contracting Party whose investments in the territory of the other Contracting Party suffer losses owing to war or other armed conflict, revolution, a state of national emergency, revolt, insurrection, or riot in the territory of the latter

192. *See, e.g.*, Argentina-UK BIT, *supra* note 95, at art. 4.

193. *See, e.g.*, Austria-Libya BIT, *supra* note 127, at art. 5(2).

194. Even with the pandemic raging, more than 20 new BITs were signed in 2020. *See* UNCTAD, *supra* note 15.

> Contracting Party shall only be owed compensation by the Contracting State to the extent that such compensation has been voluntarily afforded to investors from the Contracting Party or other nations. Such compensation shall be no less favorable than that which the Contracting State accords to own nationals or companies or to companies or nationals of any third State. This provision shall not prejudice compensation owed to the investor by the Contracting State under [the advanced war-loss clause].

This language clarifies that investors are *only* entitled to compensation for treaty breaches during armed conflict when a state has adopted measures which compensate other parties. It also ensures that the advanced war-loss clause remains in effect in order to protect investors from intentional harms perpetrated by states. It is critical that the language of general basic war-loss provisions is adjusted to become more clear in its goals. If the terms are not sufficiently clear, tribunals are still open to interpret the provisions in a way detrimental to states as they have in the numerous other circumstances discussed above.[195] The language of the improved general war-loss clause above goes a long way in solving this problem.

2. The Individual Treaty Approach

An approach that inserts an improved general and advanced war-loss clause into new BITs as they are negotiated is a manageable solution to the problem of state liability for investor war losses, but it does have drawbacks. First, its implementation would be slow. While new BITs are negotiated frequently, there is an incredible number already in effect and a piecemeal approach would not affect a state's duty to compensate investors under treaties already in force. Perhaps the slow implementation is somewhat mitigated by the relative rarity of the circumstances under which these provisions operate. If a state begins inserting these new provisions into new treaties as soon as possible, it may have adjusted its wartime obligations under enough treaties by the time it experiences an armed conflict to have a significant, positive effect on reducing potential liability. A piecemeal approach would still not completely solve the uncertainty problem because it would still subject states to potentially differing duties based on the nationality of the investor and the specific terms of the applicable BIT. This problem decreases, of course, as it renegotiates its BITs over time.

The nature of BITs may also make inserting a wartime compensation regime into new treaties difficult. Bilateral treaties are, obviously, bilateral, meaning that negotiations occur between two

195. *See supra* Part III.

states.[196] If a powerful state is negotiating a BIT with a weaker state, the negotiating position of the weaker state may make it difficult to insert such a term. Because a weaker state is more likely to experience unrest or armed conflict than a powerful, more stable state, these terms are less likely to be supported by stable, capital-exporting nations. Thus, when negotiating on a bilateral basis, an unstable state may lack the leverage necessary to insert such a provision into a BIT.

This problem is difficult to overcome but is far from insurmountable. If these provisions become more common, capital-exporting nations will become more comfortable with them. As the number of states insisting on wartime compensation regimes increases, there may become a point where such terms become standard in BITs. Another factor that may be considered in negotiations is the rarity of these events. While capital-exporting states may be averse to these terms, the rarity of armed conflict may allow stable states to calculate that these provisions are one area where they may give ground in treaty negotiations on in order to win protections from developing nations in other areas. Stable states will also be more likely to acquiesce to general war-loss clauses if the clause's applicability is limited: common sense dictates that an "armed conflict" is less likely to occur and less amorphous than a "national emergency." Limiting the applicability of provisions only to the most dire circumstances may make them more agreeable to stable states and still protect developing nations from liability when faced with exceptional circumstances.

3. The Multilateral Approach

A new, multilateral instrument would solve some of the problems presented by the piecemeal approach, but also presents its own challenges. On the positive side, a multilateral approach would supersede the terms of BITs between all of the parties, making implementation immediate once the instrument comes into force. The potential treaty language could read as follows:

> In the event of an armed conflict in one of the Contracting Parties, operation of applicable bilateral investment treaties between that party and the other contracting parties shall be suspended. Investors of the other Contracting Parties shall only be afforded compensation for damages incurred during armed conflict on the basis of [an improved general war-loss clause and an advanced war-loss clause].

Furthermore, the negotiating heft of countries more likely to benefit from a specialized war-loss compensation regime is likely greater if

196. *See* Jeswald W. Salacuse, *BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries*, 24 INT'L L. 655, 656 (1990).

aggregated in the multilateral context than it would be on a bilateral basis (although, the same could be said of countries which would oppose it).

While more comprehensive than the piecemeal approach, a multilateral approach may not completely solve the problem of uncertainty. If an insufficient number of states agree to the multilateral wartime compensation regime, those nations' BITs with the state experiencing armed conflict would remain in effect. One strategy for less stable states to mitigate a further fragmentation of treaty duties may be to refuse to negotiate BITs with states not party to the multilateral instrument. If enough states follow this strategy, it may be that capital-exporting nations have no choice but to join the instrument because it would become impossible to negotiate new BITs or renew expiring ones without doing so.

Relying on a multilateral instrument may be easier than negotiating an individual BIT with its own war-loss compensation provisions because the language of the agreement would already be set. Thus, the only question becomes whether a state will agree to be bound by the multilateral instrument rather than having to negotiate new treaty language, which significantly lowers negotiating costs. Standardized language also helps prevent the further proliferation of same-but-slightly-different treaty terms that occurred with general and measures-linked war-loss clauses.

Whether a multilateral agreement could be reached is unclear. There is no true multilateral investment instrument in existence today,[197] and attempts to create one in the past have not been successful.[198] However, a multilateral agreement focused only on states' duty to compensate investors in wartime is much more manageable than a complete multilateral instrument overhauling the entirety of investor rights worldwide. A multilateral wartime compensation agreement may also have better optics than a general investment instrument. A message of protecting unstable states from ruthless investors cashing in on strife likely plays well in the media of any country.

V. CONCLUSION

International investment law's problem of overly subjecting states to liability for investor war losses must be solved before the next armed conflict—the liability imposed detriments a state's ability to make military decisions during a conflict and its attempts to rebuild in the aftermath. Already, Syria has been subject to onerous liability to

197. However, some multilateral treaties contain investment provisions, and even war-loss clauses. *See, e.g.*, The Energy Charter Treaty art. 12, *opened for signature* Dec. 17, 1994, 2080 U.N.T.S. 95.

198. *See* Muchlinski, *supra* note 163, at 1037–49.

investors for war losses,[199] and its bloody civil war remains ongoing.[200] The recognition of a wartime compensation regime seems to be the only feasible solution. Although some BITs currently in force contain general war-loss clauses that should be construed as creating such a compensation regime, tribunals have repeatedly refused to see them as such. As has been shown, they have engaged in questionable interpretive tactics and have subjected states such as Sri Lanka, Argentina, Zaire, and Libya to substantial liability to investors for actions taken during armed conflicts occurring in their territories.

The uncertainty and substantial liability that tribunals have imposed on states experiencing armed conflict through BITs creates significant problems. It affects their ability to make properly considered military decisions and may inhibit the peace process. In order to create an effective regime, treaty provisions must balance the rights of both states and investors while creating certainty for states acting during conflict. This Note has proposed three potential solutions. First, it has shown that general war-loss clauses are properly interpreted, based on the VCLT, as creating a *lex specialis* war-loss compensation regime limiting states' duties to compensate investors. Second, it has discussed an improved basic war-loss clause that should be inserted into future bilateral treaties. Third, it has discussed a wholesale, multilateral approach that follows the bilateral method, albeit on a larger scale.

These three solutions needn't be exclusive. Tribunals and scholars should give serious thought to interpreting war-loss clauses in a way that promotes certainty, peace, and a balance of state sovereignty and investor rights. At the same time, states should zealously advocate for treaty terms that allow them to make proper military decisions during a conflict and help to heal their society in the aftermath. As scholars, arbitrators, and states implement and follow the first two proposals, perhaps the international investment regime will reach a critical mass of acceptance that makes the negotiation of a multilateral instrument possible. The international investment regime should not contribute to the problems facing war-torn states and their people. It can help solve them.

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199. *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*, INV. ARB. REP. (Nov. 13, 2020), https://www-iareporter-com.proxy.library.vanderbilt.edu/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/ (subscription required).

200. *See* Ruth Sherlock, Scott Neuman, & Nada Homsi, *Syria's Civil War Started a Decade Ago. Here's Where It Stands*, NPR (Mar. 15, 2021, 5:09 AM), https://www.npr.org/2021/03/15/976352794/syrias-civil-war-started-a-decade-ago-heres-where-it-stands [https://perma.cc/H6MA-CXMN] (archived July 25, 2021).

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