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Chapter 5: Expropriation

Treaty clauses and customary international law on expropriation clearly state that sovereigns have a right to expropriate. However, this right is not without limits. To be legitimate, the taking has to be for a public purpose, of a non-discriminatory nature, respectful of due process, and on payment of prompt and adequate compensation. These conditions seek to protect foreign investors' property against arbitrary expropriation and are omnipresent in modern public international law.

International law distinguishes direct expropriation from indirect expropriation. In the first case, the investor is dispossessed of its property; in the second, the investor keeps its property, but the value of the investment is severely affected by measures adopted attributable to the State.

While investors may legitimately expect that the State will not deprive them of the value of their investment, those expectations have to evaluate States' fundamental right to regulate for a public purpose. The tension between indirect expropriation, and the exercise of regulatory power is at the forefront of legal debate. The distinction between the two is not straightforward, and arbitral tribunals, as well as academic commentators, proceed on a case-by-case basis.

Different criteria have been put forward as helpful when distinguishing indirect expropriation and non-compensable regulation. This chapter will discuss these criteria, which include the effects of the measure on the value of investment, investors' legitimate expectations, the purpose of the measure, and proportionality of the regulation to its objectives. Generally, a variety of the aforementioned factors is pondered, but the ultimate goal is to distinguish whether the government took a measure that specifically targeted the investor who claims to have been expropriated, or whether it was a regulation of general application, which has negatively affected the investment.

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§5.01 INTRODUCTION

Investing in any industry or sector can be a bet against the unknown. There are many risks associated with allocation of funds, especially concerning foreign investments. Indeed, many investors (1) seek to maximize the value of their investments and their assets by taking risks in their business decision-making. When dealing with foreign investment, that is, the investment of capital from a source which is not originated in the host State receiving the capital injection through investment, the risk of losing private property or part of its value due to measures taken by the State may be even greater than it is for domestic investments.

The need for international economic cooperation and the importance of free capital flow in the economy is requisite to increase foreign investment worldwide. Thus, investment treaties, whether bilateral or multilateral, seek to provide investors with security, confidence and market transparency while leveraging the economic interests of the signatory countries. However, one of the risks faced by foreign investment is the risk of expropriation of tangible and intangible rights through the adoption of one or more governmental measures. Matters such as environmental and health issues, control of the markets, and the investments' impact on the country's culture are some of the factors which may drive States to interfere with the investors' freedom.

Certainly, countries have an imperative to regulate for the general welfare of their citizens. Moreover, certain State actions may be driven by the political and financial environment of the country. However, host States are called to respect and honor the legal protections provided in investment treaties and relied upon by foreign investors.

The widespread phenomenon of privatization of certain industries in the twentieth century went hand in hand with the conclusion of new BITs. (2) In addition to selling off publicly owned or managed companies, States recognized a need to create a stable regulatory environment for the development of the private industry. (3) As a consequence, the drafters included among other protections, clauses that prohibit expropriation, or the taking of the investor's property by the State, without prompt and adequate compensation. In the modern world, it was rare for a State to nationalize a whole industry or directly appropriate an asset that belonged to a private business. As it will be analyzed later in this chapter, Venezuela is the exception. Under the Chavez regime, Venezuela nationalized many industries which prompted investor-State disputes under ICSID.

This chapter will begin by giving a definition of expropriation (§5.02). It will then examine the different types of expropriatory measures (§5.03) and the calculation of compensation when State breaches its obligation (§5.04).

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§5.02 DEFINITION OF EXPROPRIATION

The protection of foreigners has been incorporated into the law of nations since the nineteenth century. (4) The minimum standard of treatment of aliens has two essential elements: the protection of the person and of his or her property. The fundamental right to property is widely recognized and protected by such instruments as the European Convention on Human Rights. (5) It is no surprise that public international law has also sought to protect more specifically the right of foreigners not to have their property taken or expropriated by the State where they have decided to invest. (6)

One of the defining elements of investment may be risk, but investors may not want to invest in a country where the government arbitrarily decides at a given moment to appropriate their assets. Hence, all States generally include a provision regulating expropriation in the bilateral and multilateral treaties they have signed. The treaty clauses on expropriation coexist with customary international law, and arbitral awards all seeking to clarify when precisely a taking occurs, such that it gives rise to a claim for compensation.

At the other end of the spectrum is the State's right to regulate in the public interest. Many developing States have signed treaties guaranteeing investors protection from expropriation to attract foreign investment for economic development purposes. However, some of these countries are also attractive to foreign investors, because their legislation is less stringent and allows the investors more liberties with their business. Yet, an important part of the economic development is sustainability; therefore, the States have been increasingly aware of the environmental issues, public health, etc. When States enact legislation aiming to improve the state of the environment and social welfare, often the investor's rights are affected in a negative manner. This is due to the fact that it may be more costly to comply with the new, more stringent legislation.

When addressing issues germane to expropriation, there is a tension between a government's right to regulate for a public purpose and the investor's legitimate expectations that its investment will not suffer from governmental measures. When deciding whether a governmental measure amounts to a taking which would give rise to compensation, tribunals have to weigh these competing interests to determine on a case-by-case basis the relevant outcome.

What is Expropriation?

Expropriation is a taking by the host State of an investor's rights or properties. Some expropriations may be clear and imminent; others are achieved by depriving the investor of rights which result in the investor's loss of control, use, enjoyment or value of its property.

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Important terminological clarifications must be made regarding the distinction between expropriation and nationalization (A). Moreover, direct expropriation should be distinguished from indirect or creeping expropriation (B).

[A] Nationalization

Although many investment treaties would define the terms 'expropriation or nationalization' under the 'Expropriation' article or chapter, these two are different terms and should not be used interchangeably. While nationalization does involve losing proprietary rights of individual owners, the object behind the action is to provide for the domestication of the expropriated activity as a whole, without exceptions. As UNCTAD put it: '[n]ationalization usually refers to massive or large-scale takings of private property in all economic sectors or on an industry – or sector-specific basis.' (7) Expropriation, by contrast, has a narrower scope, and tends in most cases to be more directed towards one specific investor's interests.

One of the most famous cases of nationalization took place in Libya in 1973–1974, when the el-Qaddafi government took over the interests and properties in oil business located on its territory, owned by private companies. (8) Politically motivated, the acts of nationalization were carried out, first, in response to the UK's lack of action when Iran occupied three islands in the Persian Gulf, which were nominally under British patronage. (9) The second wave of takings was in retaliation to the US supporting Israel in the Arab-Israeli conflict. (10)

These actions by the Libyan Government led to three arbitrations, in which some of the most important principles of customary international law on nationalization were enounced. (11) In the *Texaco/Calasiatic* case, the sole arbitrator Jean-René Dupuy declared that the UN Resolution 1803 of December 1962 reflects the state of the customary international law in the field. (12) This conclusion has generally been accepted
P 119 by other academics since. (13) Resolution 1803 confirmed the States' right of permanent sovereignty over natural resources, and its corollary, the sovereign right to nationalize. (14) However, it also set out the bounds for nationalization, which should be based on public interest and provide for prompt and adequate compensation. (15)

All three arbitrators agreed that, while nationalization is a sovereign right, it is by no

means an absolute right. (16) More specifically, all three arbitrators separately concluded that a sovereign could bind itself when making commitments in international law. (17) They restated another basic principle of international law, *pacta sunt servanda* – agreements must be complied with. This principle also found support in Libyan law. (18) Libya had included stabilization clauses that limited its recourse to nationalization in all concession contracts entered into with the foreign oil companies. (19) The arbitrators held that by nationalizing in spite of those commitments, Libya breached its international obligations and had to pay compensation to the oil companies. (20)

In the more recent years, Venezuela carried out multiple nationalizations, taking over the steel and oil industries. This led to numerous ICSID arbitrations fueling the law on expropriation. (21)

[B] Direct and Indirect Expropriation

[1] Direct Expropriation

Direct expropriation or taking of property by a State occurs when it takes a measure, which aims to deprive the investor of the value of its investment. (22) Direct expropriation may come in the form of a decree or by physical force. The 2012 US Model BIT refers to interference 'with a tangible or intangible property right or property interest
P 120 in an ● investment'. (23) There is also a general consensus among tribunals that revocation of a permit or concession constitutes direct expropriation. (24)

While distinguishing it from indirect expropriation, the arbitral tribunal in *Metalclad Corp. v. Mexico* described certain characteristics of direct expropriation, such as the 'open, deliberate, and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State'. (25) The most classic example of direct expropriation would be the government sending military to take over a factory owned by the foreign investor. This notion is also referred to as expropriation de jure. In the *Feldman v. Mexico* case, the tribunal stated: '[r]ecognizing direct expropriation is relatively easy: governmental authorities take over a mine or factory, depriving the investor of all meaningful benefits of ownership or control.' (26)

Direct expropriations are not as common in the modern times, but there are some examples following nationalizations carried out by some Latin American countries, such as Venezuela. For example, in *Tidewater v. Venezuela*, the government promulgated a law (Reserve Law) that reserved hydrocarbon activities to the State. (27) Pursuant to this law, the day it was published, a State-owned company called PDVSA (Petróleos de Venezuela, S.A.) took over the operations and assets of a number of companies, among which was Tidewater. The investor's vessels were physically seized as well. (28) In another case, *Venezuela Holdings v. Venezuela*, Mobil's interests in Venezuela were automatically transferred to an affiliate of PDVSA following a failure to reach an agreement with regard to creation of new mixed companies, where PDVSA or one of its affiliates would hold at least a 60% interest. (29)

In both of these cases, there was no dispute that direct expropriation had occurred. The issues raised in arbitration concerned the lawfulness requirement and the compensation to which investors should be entitled to in such a situation.

[2] Indirect Expropriation

Most treaties in the expropriation clause also make a reference to indirect expropriation, or measures tantamount to expropriation. (30) This type of expropriation may be defined
P 121 as 'covert or incidental interference with the use of property which has the ● effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State'. (31) This concept includes de facto expropriation, where the main or ostensible aim of the measure is to regulate a certain sector in the public interest. For example, in *Metalclad*, the government revoked a permit to operate a hazardous waste plant ostensibly for reasons of environmental protection, but the arbitral tribunal, nevertheless, found that there was expropriation. (32)

Treaties and arbitral tribunals also refer to 'creeping expropriation', or a 'measure tantamount to expropriation', (33) which is a sub-category of indirect expropriation. (34) What sets creeping expropriation apart is that it consists of multiple actions carried out over a period of time. (35) While the first act does not violate the investor's rights, the cumulative effect of the measures taken by the State leads to the deprivation of the investment's value. (36) As clarified by the Iran-US Claims tribunal, 'the Tribunal prefers the term "deprivation" to the term "taking", although they are largely synonymous, because the latter may be understood to imply that the Government has acquired something of value, which is not required'. (37) The *Starrett v. Iran* tribunal went further to clarify that: 'it is recognized in international law that measures taken by a State can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated, even though the State does not purport to have expropriated then and the legal title remains in with the original owner'. (38)

The 2012 US Model BIT defines indirect expropriation as one of the two types of situations

that give rise to valid expropriation claims. In this case, 'an action or series of actions by a Party has an effect equivalent to indirect expropriation without formal transfer of title or outright seizure'. (39) Although this determination is to be made on a case-by-case basis, some of the factors that must be taken into account, as per the 2012 US Model BIT, Annex B, are: (1) the economic impact of the government action; (2) the ● extent to which the government action interferes with distinct, reasonable investment-backed expectations; and (3) the character of the actions by the government. (40)

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Generally speaking, when States act, they do so through the adoption of regulatory decisions by government agencies or by the adoption of laws from the legislative power. Many times, State action can be drafted and executed in a way that will not have an automatic direct effect on investment, but rather will start creating situations such that will make it more onerous or costly for an investor to keep or sell its investment. As will be further explained below, regulatory measures that are discriminatory and directed at specific investments or investors, may be an expropriation.

The US-Egypt BIT of 1986, which entered into force in June 1992, provides a series of examples of what actions may constitute expropriation, such as:

> the levying of taxation, the compulsory sale of all or part of such investment, or impairment or deprivation of management, control or economic value of such an investment by the national or company concerned... (41)

Often, certain measures could potentially constitute both expropriation and denial of equal protection under the law or a violation of national treatment clauses.

Special Issues Relating to Indirect Expropriation

The line between indirect expropriation and non-compensable regulation has not been clearly defined and will be determined on a case-by-case basis, depending on the pertinent facts and circumstances. States are sovereigns and as such have the right and duty to regulate within their territories. Thus, not all measures constitute indirect expropriation and therefore subject to compensation.

Basically, all treaties address indirect expropriation, but are silent on non-compensable regulatory measures. Only a limited few actually address non-compensable regulatory measures, including the European Convention on Human Rights, US-Free Trade Agreements, and US and Canada Model BITs. (42) Arbitral tribunals have not been consistent in applying the criteria to determine which measures qualify as expropriation requiring compensation and which emanate from a non-discriminatory regulatory measure of the State that does not require compensation. Many doctrines, standards or theories have been developed for dissecting the indirect expropriation non-compensable regulation conundrum. The principal theories that have been developed in this area include the 'sole effects' doctrine (a), the legitimate expectations of the investor (b), the police powers doctrine (c), substantial deprivation test (d), and proportionality (e).

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[a] 'Sole Effects' Doctrine

The 'sole effects' doctrine focuses on 'the effect on the owner' (43) as its main criterion. The doctrine is sometimes attributed to the *Metalclad v. Mexico* tribunal, which held that it need not 'consider the motivation or intent of the adoption' of the government measure and that deprivation effect on the investor was sufficient to characterize expropriation. (44) In other words, intent is less important than the effect, as clearly stated in the *Tippetts* case: '[t]he intent of the government is less important than the effects of the measure on the owner, and the form of the measures of control or interference is less important than the reality of their impact.' (45)

In the same vein, the *Santa Elena v. Costa Rica* tribunal refused to hear the State's submissions on its international obligations to preserve the unique ecological land in question when considering the State's obligation to compensate. (46) According to the arbitral panel, 'the purpose of protecting the environment for which the property was taken does not alter the legal character of the taking for which adequate compensation must be paid'. (47) Other tribunals have also demonstrated their support for the sole effects doctrine, such as *Tokios Tokelès v. Ukraine* and *Telenor Communications v. Hungary*. (48)

The importance of the effect on the owner as a criterion for finding expropriation does not appear to be controversial. (49) However, the question of whether it should be the sole factor has raised debates over the years. More specifically, States and academics have vindicated the sovereign right to regulate in the public interest. (50) A case on point is *Saluka* where the tribunal stated that State intent will be considered: '[i]t is now established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner bona fide regulations that are aimed at the general welfare.' (51)

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[b] Investor's Legitimate Expectations

The purpose of investment treaties is to encourage investment while countries provide minimum guarantees of security to prospective investors. Thus, the treaty is the first source to determine what the expectations of the investors are.

Investors' expectations are not only limited to the end result of their businesses, these also include, among other things, the host States' compliance with minimal protections granted by the international agreement. Such protections are FET, FPS, NT, MFN and, for our purposes, protection from expropriation.

Multiple BITs include compliance with investors' legitimate expectations as one of the factors to be taken into account when determining whether there has been indirect expropriation. (52) Investors' expectations must be based on reasonable and concrete facts to yield a reasonable expectation. (53) One of the aspects to consider when determining whether the investor has reasonable expectations is the negotiation with the government, as well as the factors that played a role as a basis for the written contract among the parties under which the investment was made. As Professor Schreuer noted in the context of FET, 'the investor's legitimate expectations [are] based on [a] clearly perceptible legal framework and on any undertakings and representations made explicitly or implicitly by the host State'. (54)

Some arbitral tribunals have explicitly stated that treaties should not be used to protect the investor from bad business decisions. (55) In *Methanex v. USA*, the panel highlighted the fact that the investor had entered a market notorious for monitoring 'the use and impact of chemical compounds and commonly prohibit[ing] or restrict[ing] the use of some of those compounds for environmental and/or health reasons'. (56) Methanex itself had participated in these processes by hiring lobbyists to represent its interests. As such, the investor could not have legitimately expected the government not to intervene with its use of certain chemicals.

However, the *Methanex* tribunal reserves the hypothesis, in which the host State would have offered 'specific commitments' to induce the investment. (57) It does seem logical that an investor's expectations would be legitimate if he relies on express assurances
P 125 given by the government. (58) It should be noted that legitimate expectations ● alone do not justify compensation by the State, and it merely constitutes one of the factors that an arbitral tribunal will take into account when determining whether indirect expropriation occurred. However, in the absence of expropriation, the breach of legitimate expectation may justify compensation when it held to amount to breach of the FET due to the investor.

[c] Police Powers Doctrine

Academic commentators and arbitrators alike have remarked on the harsh impact of the sole effects doctrine on the ability of States to regulate. The arbitral practice seems to have moved away from this theory by adopting the police powers doctrine. (59) Initially developed in the US, this theory has particularly influenced NAFTA tribunals. According to this doctrine, when the State is acting in the interests of public policy, measures taken in furtherance of such goals or interests will not necessarily constitute expropriation and thus, do not require compensation.

At first, the public purpose criterion was merely accepted as one of the factors to be considered when establishing indirect expropriation. The *Azurix* tribunal referred to and criticized the *S.D. Myers v. Canada* award for holding that 'Parties [to the Bilateral Treaty] are not liable for economic injury that is the consequence of bona fide regulation within the accepted police powers of the State.' (60) The arbitrators pointed out that public purpose is one of the requirements for the expropriation to be lawful, which does not obviate the need for the prompt, adequate and effective compensation. As such, it cannot be the sole distinguishing criterion for whether there is indirect expropriation and may only be contemplated among other factors, including the effects of the measure and the investor's expectations. (61)

However, multiple other tribunals have since then given the full effect to the police powers theory, which is clearly established today. (62) The first award to formally rely on the doctrine was rendered in the *Methanex v. USA* case. (63) The tribunal stated that, 'as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, *inter alios*, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation'. (64)

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As seen in the above excerpt from the *Methanex* award and other arbitral practice, tribunals consider that the police powers doctrine is part of customary international law and, hence, rely on it even if the BIT in question does not refer to it. (65) Note, however, that treaties are expressly including the language of the police powers exception. For example, the 2012 Model US BIT provides that:

> An uncompensated taking of an alien property or a deprivation of the use or enjoyment of property of an alien which results from the execution of tax laws; from a general change in the value of currency; from the action of the competent authorities of the State in the maintenance of public order, health or morality; or from the valid exercise of belligerent rights or otherwise incidental to the normal operation of the laws of the State shall not be considered wrongful. (66)

One would surmise that, in light of general acceptance of the measures exercised on the basis of the States' police powers not requiring compensation, that the arbitral practice has abandoned the *Santa Elena v. Costa Rica* and *Azurix* positions.

[d] Substantial Deprivation Test

As mentioned above, the sole effects doctrine is no longer a stand-alone method used to determine whether an indirect expropriation has occurred. The effects on the investor will of course play an important role in finding a compensable taking, but the definition of indirect expropriation would be too broad if it included any situation where a State measure had a negative impact on the value of the investment. As such, many tribunals have adopted a 'substantial deprivation test' to limit meritless claims.

Pope & Talbot v. Canada is often credited with the first application of the substantial deprivation test, where the arbitral tribunal suggested that there must be a deprivation of the investor's control over the day-to-day operations of its investment: 'the test is whether that interference is sufficiently restrictive to support a conclusion that the property has been "taken" from the owner'. (67) The arbitrators in *PSEG v. Turkey* further elaborated that 'there must be some form of deprivation of the investor in the control of the investment, the management of day-to-day operations of the company, interfering in the administration, impeding the distribution of dividends, interfering in
P 127 the appointment of officials and managers, or depriving the company of its property or control in total or in part'. (68)

Numerous other tribunals have relied on the substantial deprivation test and used similar terms to describe it. (69) The result is that a regulatory measure has to deprive the investment of almost all of its value, or the investor of control, in order to be equivalent to expropriation, and not merely diminish the profits. For example, in *CMS v. Argentina*, the investor's revenues decreased by almost 75%, but it was not sufficient to constitute substantial deprivation. (70) The tribunal in *Vivendi v. Argentina* suggested that there has to be a 'complete or near complete deprivation of value'. (71)

[e] Proportionality

Despite the ubiquity of the use of police powers theory, several commentators have noted that a more nuanced approach should be adopted. The public purpose justification is criticized for giving the States a *carte blanche* to freely take the investors' property as long as they can find a public interest for such taking. It is suggested that, in determining whether there has been compensable expropriation, the tribunals should adopt a more balanced approach. (72) Not only should the effect on the investor and the purpose of the measure be examined, but also the legitimate expectations of the investor and proportionality of the State actions. (73)

Applying the proportionality analysis to indirect expropriation would limit the acceptable measures to those taken pursuant to legitimate public interest objectives and exercised in a manner proportionate to those objectives. (74) The idea of assessing the proportionality of a State's measures, which have necessarily adverse effect on a party, is not new. It has notably been done by the European Court of Human Rights (ECHR)
P 128 in the context of human rights violations, one of the rights being the right to property. The proportionality test is traditionally seen as having three prongs: (75)

(1) Is the measure suitable to attain its ostensible objective?

(2) Is the measure necessary (are there less onerous ways to achieve the same goal)?

(3) Is the measure reasonable in view of the competing interests (strict proportionality test)?

The most well-known example of proportionality analysis carried out in determining whether there is expropriation is found in the *Tecmed v. Mexico* award. (76) Beginning by emphasizing the deference that the tribunal owes to the State to define its own public policy, the arbitral panel continues to accept the mission of examining the State's actions, stating that 'there must be a reasonable relationship of proportionality between the charge or weight imposed to the foreign investor and the aim sought to be realized by any expropriatory measure'. (77) The tribunal in this case cited several ECHR decisions and adopted its definition of proportionality, such as reproduced above. Some commentators, however, have criticized the application of the analysis to Mexico's actions. The tribunal considered that Mexico denied the renewal of permit based primarily on political unrest in the country and not the environment protection. As such, it examined the proportionality of this denial against the suitability, necessity and reasonableness of the political circumstances and not environmental concerns. (78)

The tribunal in *Tecmed* concluded that public pressure on the government did not

constitute a situation of necessity or crisis, which would have legitimized Mexico's actions. (79) Albeit some have commended this decision as going beyond the ostensible aim offered by a State to justify its actions and assessing the true purpose behind it, other commentators have expressed their reservations. (80)

§5.03 LAWFULNESS OF EXPROPRIATION

As mentioned previously, the State has the right to expropriate provided the expropriation satisfies the conditions of the customary international law or the applicable treaty. When the measures in question do not satisfy these conditions, the expropriation is considered unlawful and gives rise to a compensation obligation for the State (*see* below §5.04).

The protection treaty will define the lawfulness conditions, and it is always important to
P 129 look at the precise language of the treaty. In general, most BITs refer to the ● following requirements, which will now be examined in more detail: public purpose or interest (A), due process (B), non-discriminatory nature (C) and compensation (D).

[A] Public Purpose or Interest

The notion of public purpose or interest has already been discussed in the context of defining indirect expropriation. Given that it is examined at the stage of verifying the existence of indirect taking when using the police powers test, the tribunals will generally not consider it for the second time when examining lawfulness. However, this requirement will still be examined in the context of direct expropriation.

Tribunals have noted that there has to be an actual public purpose behind the measure, which is to be demonstrated by the State. According to *ADC Affiliate Limited v. Hungary*, 'if mere reference to "public interest" can magically put such interest into existence and therefore satisfy this requirement, then this requirement would be rendered meaningless since the Tribunal can imagine no situation where this requirement would not have been met'. (81)

[B] Due Process

Most treaties indicate the necessity to respect the due process of law when expropriating. (82) This notion is familiar to American lawyers, who have seen the Due Process clause in the US Constitution. (83) It refers to a minimum level of procedural fairness, which should be followed in carrying out the expropriation.

The condition of due process was analyzed in the *Venezuela Holdings v. Venezuela* case. (84) The investor had alleged that its property had been expropriated by coercion and without following 'any established legal procedure'. (85) Venezuela had reserved the oil production activities in its territory to the State, and private companies were only allowed to participate in those activities through mixed enterprises, in which the State would hold a majority interest. The Orinoco Oil Belt, where Claimants operated, was an exception to this legal regime. However, in 2007 Venezuela decided to subject the Orinoco Oil Belt to the same framework as all other oil production. The State enacted a law requiring private companies to change their structure and become mixed enterprises by a certain date, after which the State would nationalize their holdings. In particular,
P 130 the law provided for a four-month negotiation period, during ● which companies could change their structure to comply with the oil production regime. The tribunal held that the negotiation provision, which was successfully used by other oil companies, was sufficient to comply with the due process requirement, making the nationalization carried out at the end of the four months lawful. (86)

[C] Non-discriminatory Nature

The condition that the expropriatory measure cannot discriminate against a specific investor seems relatively straightforward. It means that the measure is applied in the same way to the investor in question and other investors. 'Discriminatory taking is one that singles out a particular person or group of people without a reasonable basis.' (87)

The tribunal in *LIAMCO v. Libya* considered that a political motive does not itself 'constitute sufficient proof of a purely discriminatory measure'. (88) Noting that LIAMCO was not the first company to be nationalized, neither the only oil nor American company, the arbitral panel held that Libya's actions were not discriminatory. (89)

[D] Compensation

Countries signatories to investment treaties vow to provide the nationals of the other contracting party with minimum substantive protection, which have been agreed to under the treaty. One of the most common protections, which comes, as recognition of the right to property is that the foreign national has a right to be compensated for expropriation in a fair way. (90) Countries can expropriate inasmuch as adequate compensation, as defined by the treaty in question, is given.

Under the CAFTA-DR, the expropriation must be accompanied by the payment of 'prompt, adequate and effective compensation', which is also referred to as the Hull formula and

is widely used in protection treaties. (91) The CAFTA-DR also sets forth four minimum requirements of a prompt, adequate and effective compensation. Therefore, compensation shall:

(a) be paid without delay;

(b) be equivalent to the fair market value (FMV) of the expropriated investment immediately before the expropriation took place ('the date of expropriation');

(c) not reflect any change in value occurring because the intended expropriation had become known earlier; and

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(d) be fully realizable and freely transferable. (92)

Compensation is awarded on the basis of public international law principles, not according to national law. (93) In this context, the question is what constitutes FMV. Pursuant to the International Glossary of Business Valuation Terms of the American Society of Appraisers, FMV is:

> The price, expressed in terms of cash equivalents, at which property would change hands between a hypothetical willing and able buyer and a hypothetical willing and able seller, acting at arms length in an open and unrestricted market, when neither is under compulsion to buy or sell and when both have reasonable knowledge of the relevant facts. (94)

The above definition, which some arbitral tribunals have echoed, indicates that a payment of the compensation at a FMV must be agreed on based on negotiations at arms' length and free of coercion from the paying State, which is in a more powerful position. The *Vivendi v. Argentina* tribunal held that words 'actual value' in a protection treaty may be interpreted as FMV. (95)

Other methods of valuation of FMV, including replacement value, book value, discounted cash flow (DCF) analysis will be dealt with in Chapter 9 on Damages and Costs more thoroughly. Suffice it to say that the DCF analysis is most used now by arbitral tribunal when dealing with a going concern for which there is no comparable market. As such, the DCF analysis evaluates a company based on its future earnings and not the value of its assets.

Compensation, however, is not without limits. At the core of investor-State arbitration is the protection of investors' interests when dealing with a country as counterparty, which by definition is politically and financially stronger than the investor. Thus, while evaluating the measure of compensation, the arbitral tribunal's goal is also to avoid a double repayment in the favor of the investor, among other potential inequalities, while mitigating the losses and damages to which it can be exposed. Compensation for lawful and unlawful expropriation is discussed in detail in Chapter 9.

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§5.04 CONCLUSION

This chapter builds on the premise that investment treaty clauses and customary international law on expropriation recognize the sovereigns' right to expropriate. Nevertheless, the right to expropriate is subject to the requirement that it be for a public purpose, of a non-discriminatory nature, respectful of due process, and on payment of prompt and adequate compensation.

Customary international law distinguishes direct expropriation from indirect expropriation. When a host State takes the investor's property title, it directly expropriates. When a host State adopt measures that do not directly affect the investor's property title but severely affect the value of the investment.

The tension between indirect expropriation and the legitimate exercise of regulatory power is clear. Because distinction between the two is not straightforward, different criteria have been put forward to help distinguishing indirect expropriation and non-compensable regulation. These criteria include the effects of the measure on the value of investment, investors' legitimate expectations, the purpose of the measure, and proportionality of the regulation to its objectives.

Questions

(1) What are the differences between NAFTA Article 1110 and the expropriation provision in the 2012 US Model BIT?

(2) What criteria should be used to tell the difference between a regulatory action that does not give rise to expropriation and one that does?

(3) What role, if any, should the government's purpose in enacting a measure play in a tribunal's decision?

(4) Are some public purposes permissible, whereas others are not?

(5) Should the measure of compensation differ if the purpose of the expropriation is to meet a public purpose, or if the expropriation is wrongful?

(6) When/where is the line between a regulatory act that diminishes the value of an investment and an expropriation?

(7) How much deprivation is 'substantial deprivation'? How can it be measured?

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5) Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, http://www.refworld.org/docid/3ae6b3b04.html (accessed 23 May 2018).
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9) *Ibid.*, pp. 484–485.
10) *Ibid.*, p. 485.
11) *BP Exploration Co. (Libya) Ltd. v. The Government of the Libyan Arab Republic*, Award on the Merits, 53 ILR 297 (1979); *Texaco Overseas Petroleum Co./California Asiatic Oil Co. v. The Government of the Libyan Arab Republic*, Award on the Merits, 53 ILR 389 (1979); *Libyan American Oil Co. v. The Government of the Libyan Arab Republic* 20 ILM 1 (1981).
12) Professor Jean-René Dupuy stated: 'Resolution 1803 (XVII) seems to this Tribunal to reflect the state of customary law existing in this field. Indeed, on the occasion of the vote on a resolution finding the existence of a customary rule, the States concerned clearly express their views. The consensus by a majority of States belonging to the various representative groups indicates without the slightest doubt universal recognition of the rules therein incorporated, i.e., with respect to nationalization and compensation the use of the rules in force in the nationalizing State, but all this in conformity with international law.' *Texaco Overseas Petroleum Co./California Asiatic Oil Co. v. The Government of the Libyan Arab Republic*, Award on the Merits, 53 ILR 389 (1979), para. 87.
13) Robert B. von Mehren & P. Nicholas Kourides, *International Arbitrations Between States And Foreign Private Parties: The Libyan Nationalization Cases*, 75 Am. J. Intl. L. 476, 526 (1981).
14) *Ibid.*, p. 522.
15) *Ibid.*
16) *Ibid.*, pp. 516–518.
17) *Ibid.*, pp. 520–521.
18) *Ibid.*, pp. 517–518.
19) *Ibid.*, pp. 519–520.
20) *Ibid.*, p. 513.
21) *See*, for example, *Venezuela Holdings, B.V., et al (case formerly known as Mobil Corporation, Venezuela Holdings, B.V., et al.) v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Award (9 Oct. 2014); *Tidewater Inc., Tidewater Investment SRL, Tidewater Caribe, C.A., et al. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Award (13 Mar. 2015); *Tenaris S.A. and Talta – Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/26, Award (29 Jan. 2016).
22) *Copper Mesa Mining Corporation v. Republic of Ecuador*, PCA No. 2012-2, Award (15 Mar. 2016), paras 6.58–6.59.
23) 2012 US Model BIT, Annex B Expropriation, https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf (accessed 23 May 2018).
24) *See Antoine Goetz et consorts v. République du Burundi*, ICSID Case No. ARB/95/3, Award (10 Feb. 1999).
25) *Metalclad Corporation v. United Mexican* States, ICSID Case No. ARB(AF)/97/1, Award (30 Aug. 2000).
26) *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1 (also known as *Marvin Feldman v. Mexico*), Award (16 Dec. 2002), p. 36.
27) *Tidewater Inc., Tidewater Investment SRL, Tidewater Caribe, C.A., et al. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Award (13 Mar. 2015), p. 33.
28) *Ibid.*, pp. 34–35.

29) *Venezuela Holdings, B.V., et al. (case formerly known as Mobil Corporation, Venezuela Holdings, B.V., et al.) v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Award (9 Oct. 2014), pp. 45–47.
30) *See*, for example, US Model BIT 2012, Art. 6; France Model BIT 2006, Art. 6; Energy Charter Treaty 34 ILM 360 (1995), Art. 13.
31) *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (30 Aug. 2000), p. 28.
32) *Ibid.*, p. 29.
33) NAFTA Art. 1110(1). *See also* NAFTA, Art. 1110(8): 'For purposes of this Article and for greater certainty, a non-discriminatory measure of general application shall not be considered a measure tantamount to an expropriation of a debt security or loan covered by this Chapter solely on the ground that the measure imposes costs on the debtor that cause it to default on the debt.'
34) The tribunal in Waste Management noted that NAFTA Art. 1110 seems to make a distinction between direct or indirect expropriation and measures tantamount to expropriation. However, other tribunals appear to support the view that such measures are subsumed under the definition of indirect expropriation.
35) *See Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award (16 Sep. 2003), pp. 87–88.
36) *Ibid.*: 'Creeping expropriation is a form of indirect expropriation with a distinctive temporal quality in the sense that it encapsulates the situation whereby a series of acts attributable to the State over a period of time culminate in the expropriatory taking of such property.' *See also* Art. 15 of ILC Draft Convention on State responsibility: Breach consisting of a composite act.
37) Iran-US Claims Tribunal, *Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA*, 6 Iran–US CTR 219, 225.
38) Iran-US Claims Tribunal, *Starrett Housing Corp. v. Iran* (Interlocutory Award dated 19 Dec. 1983), 4 Iran–US CTR 122 (1983).
39) 2012 US Model BIT, Annex B.
40) *Ibid.*
41) Treaty Between the United States of America and the Arab Republic of Egypt Concerning the Reciprocal Encouragement and Protection of Investments (as modified) (11 Mar. 1986), Art. III.
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43) Sebastián López Escarcena, *Indirect Expropriation in International Law*, 79 (Edward Elgar 2014).
44) *See Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (30 Aug. 2000), p. 30.
45) *See* Iran-US Claims Tribunal, *Starrett Housing Corp. v. Iran* (Interlocutory Award dated 19 Dec. 1983), 4 Iran–US CTR 122, 225–226 (1983).
46) *Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award (17 Feb. 2000), p. 192.
47) *Ibid.*
48) *See Tokios Tokelès v. Ukraine* (2005) 20 ICSID Review-FILJ 205, para. 120; *Vivendi Universal SA v. Argentina*, ICSID Case No. ARB/97/3, Award (20 Aug. 2007), para. 7.5.20; *Telenor Mobile Communications AS v. Hungary*, ICSID Case No. ARB/04/15, Award (13 Sep. 2006), paras 67, 70: '[T]he test the Tribunal has to apply is whether, viewed as a whole, the investment has suffered substantial erosion of value.'
49) *See* Sebastián López Escarcena, *Indirect Expropriation in International Law*, 79 (Edward Elgar 2014).
50) *See*, for example, *Renée Rose Levy de Levi v. Republic of Peru*, ICSID Case No. ARB/10/17, Award (26 Feb. 2014).
51) *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award (17 Mar. 2006), p. 52.
52) For example, 2012 US Model BIT: 'The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by- case, fact-based inquiry that considers, among other factors: … the extent to which the government action interferes with distinct, reasonable investment-backed expectations.'
53) *See Consortium RFCC v. Royaume du Maroc*, ICSID Case No. ARB/00/6, Award (22 Dec. 2003), p. 45.
54) Christoph Schreuer, *Fair and Equitable Treatment in Arbitral Practice,* 6(3) J. World Inv. & Trade 357, 374 (2005).
55) *See Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award (17 Mar. 2006), p. 172: '[N]o investment treaty is an insurance or guarantee of investment success, especially when the investor makes bad business decisions.'
56) *Methanex Corporation v. United States of America*, UNCITRAL, Final Award on Jurisdiction and Merits (3 Aug. 2005), Part IV, Ch. D, p. 5.
57) *Ibid.*

58) *See Revere Copper & Brass, Inc. v. OPIC*, 17 ILM 1321, 1340 (1978); *see also Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/98/2, Award (2 Jun. 2000).
59) *See*, generally, *Methanex Corporation v. United States of America*, UNCITRAL, Final Award on Jurisdiction and Merits (3 Aug. 2005).
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61) *Ibid.*
62) For example, *see Tidewater Inc., Tidewater Investment SRL, Tidewater Caribe, C.A., et al. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Award (13 Mar. 2015).
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64) *Ibid.*, Part IV, Ch. D, p. 4.
65) *See also Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award (17 Feb. 2000), p. 52; *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Liability (30 Jul. 2010); Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens: 'An uncompensated taking of an alien property or a deprivation of the use or enjoyment of property of an alien which results from the execution of tax laws; from a general change in the value of currency; from the action of the competent authorities of the State in the maintenance of public order, health or morality; or from the valid exercise of belligerent rights or otherwise incidental to the normal operation of the laws of the State shall not be considered wrongful.'
66) 2012 US Model BIT, Annex B Expropriation; *see also* 205 Norway Model BIT; Canada Model BIT.
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78) *Ibid.* pp. 50–51.
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80) *Ibid.*
81) *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award (2 Oct. 2006), p. 79.
82) *See*, for example, 2012 US Model BIT, Art. 6: 'Neither Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization ("expropriation"), except: … in accordance with due process of law and Article 5 [Minimum Standard of Treatment] (1) through (3)'; Norway Model BIT.
83) US Constitution, Amend. V and XIV.
84) *See Venezuela Holdings, B.V., et al. (case formerly known as Mobil Corporation, Venezuela Holdings, B.V., et al.) v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Award (9 Oct. 2014).
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Chapter 6: Standards of Protection

Investment treaties provide a wide range of protections to investors. These include fair and equitable treatment (FET), full protection and security (FPS), most-favored-nation (MFN), and national treatment (NT). Each of these protections has been the subject of many debates and controversies focusing on investor protection on the one hand, and the role of a State in regulating its affairs on the other.

The interpretation of each of the clauses would depend on the actual language used in the investment treaty. There is a wide range of formulations that exists and the differences in interpretation in some cases could be attributed to the precise language in the investment treaty.

The FET clause is the most frequently invoked treaty provision and is also the most controversial one. First, there is controversy based the precise scope of the FET clause. Commentators and tribunals have shed some light in this regard and have explained the various elements in the FET clause, there is still room for inconsistent application because the terms are malleable and fact dependent. The legitimate expectations of an investor, in particular, have assumed specific significance although some critics point out that it is subjective and one-sided. Thus, there is a growing trend to focus on 'reasonably backed investor expectations'. Second, there is also debate on the precise scope of FET clause and on whether it is restricted to the customary international law minimum standard of treatment as famously expounded in the *Neer v. Mexico* case. Further, there is also a debate as to whether the customary international law minimum standard applies or whether it would be the standard as expounded in the Neer case or whether the standard has evolved. Finally, there appear to be two strands of analysis when it comes to the FET clause: a broad interpretation and a narrow interpretation. The difference often boils down to the extent to which deference must be accorded to a State's regulatory powers.

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The FPS clause protects the integrity of the investment. Almost all tribunals would agree that it extends to the physical integrity of the investment. Several arbitral tribunals following the ICJ's ruling in the *ELSI* case have noted that the obligation would be on of due diligence and would not impose a strict liability on the host State (*see*, e.g., the *AAPL v. Sri Lanka* case). However, some tribunals such as the *Azurix v. Argentina* have gone further and have ruled that the clause would not merely extend to physical security of an investment but would also cover legal security.

The MFN and NT clauses are both examples of non-discrimination clauses: the MFN clause prohibiting discrimination between foreign investors while the NT prohibiting discrimination between foreign investors and national investors.

The MFN clause permits an investor to rely on the clause to 'import' a more favorable provision from another BIT. This has posed no problem when it comes to 'substantive' protections in a treaty but has led to considerable debates when it comes to procedural or jurisdictional matters. The question here is whether an MFN clause can permit an investor to overcome jurisdictional or procedural prerequisites such as waiting periods, cooling-off periods, or selection of particular arbitral forums. The jurisprudence is famously split in this regard with the *Maffezini v. Spain* case seemingly permitting a broader interpretation on the one hand, while the *Plama v. Bulgaria* case adopting a more narrow formulation. The Argentinean cases present an interesting case study in this regard because the jurisprudence has been wholly inconsistent.

A breach of the NT clause involves a three-prong analysis: (1) determining whether a domestic and foreign investor that are in 'like circumstances', (2) determining whether the treatment to the foreign investor is at least as favorable as the treatment accorded to domestic investors, and (3) if the treatment was less favorable, determining whether less favorable treatment was justified.

§6.01 INTRODUCTION

Standards of protection are substantive obligations that bind States toward investors, usually under BITs or MITs such as NAFTA or the ECT. Those standards are usually the same in every treaty, but the wording used may change.

To implement and enforce those protections, investors must prove that a State infringed them under the applicable treaty in order to have a valid claim before an arbitral tribunal. The difficulty comes from the different possible interpretations of those standards of protection and their diverse application by arbitral tribunals. Therefore, the precise content and scope of a given protection is decided on a case-by-case basis when an issue arises. The protections due to foreign direct investment by host countries are of two kinds: (1) absolute and non-contingent standard of treatment, i.e., the treatment – or breach thereof of the standard of treatment – to be accorded is to be determined by reference to specific circumstances of application; FET is an absolute standard of protection (1) and (2) relative standard of treatment, i.e., the treatment to be accorded is to be defined by reference to the treatment accorded to other investments. (2) National treatment and MFN are relative standards of protection.

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This chapter intends to provide an overview of some of the key protections offered and will focus on FET (§6.02), FPS (§6.03), MFN (§6.04), and NT (§6.05).

A few preliminary remarks are important in this regard. First, the wording of the clause in any instrument might be of some special significance and may result in different treatment. Second, in some instances, even where the clauses might be similar, there may be different outcomes that could be attributed either to the facts in the case or to the views of the particular arbitrators. The latter is troubling because it results in an inconsistent jurisprudence. Finally, it must be borne in mind that arbitral awards do not have binding precedential value and therefore the cases used herein as for illustrative purposes and gauging relevant jurisprudence.

§6.02 FAIR AND EQUITABLE TREATMENT

The FET standard is one of the most, invoked standard by investors. There is no precise definition of FET. If the words composing the standard have to be defined, it would be suggested that 'fair' brings to mind words such as 'just', 'unbiased', and, 'in accordance with rules or laws'. If the word 'equitable' is considered, it evokes terms such 'balanced', 'impartial', 'egalitarian'. Accordingly, anything that is not fair and equitable violates the FET standard accorded to a foreign investor. Not surprisingly, the violation of the FET standard is centered on the facts of the pertinent case.

Investment treaties vary in their drafting of FET clauses. Some expressly define the standard by reference to international law, e.g., treaties concluded by France, US and Canada. Others do not refer to it, e.g., treaties concluded by the Netherlands, Sweden, Switzerland and Germany. (3)

[A] Examples of FET Clauses

- Article 2(2) of the German Model BIT 2008 provides that '[e]ach contracting State shall in its territory in every case accord investments by investors of the other contracting State Fair and Equitable Treatment as well as full protection under this Treaty.'
- Article 10(1) of the ECT provides that '[e]ach contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favorable and transparent conditions for Investors of other contracting Parties to make
P 136 Investment in its Area. Such conditions shall include a ● commitment to accord at all times to Investments of Investors of other contracting Parties fair and equitable treatment.'
- Article 1105 of the NAFTA provides that '[e]ach Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and FPS. 2. Without prejudice to paragraph 1 and notwithstanding Article 1108(7)(b), each Party shall accord to investors of another Party, and to investments of investors of another Party, non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife.'

Some States have attempted to establish an exhaustive definition of the content of the FET standard as demonstrated by Article 9, Chapter 10 of the CETA between Canada and the European Union:

> Section 4: Investment Protection
>
> Article X.9: Treatment of Investors and of Covered Investments
>
> 1. Each Party shall accord in its territory to covered investments of the other Party and to investors with respect to their covered investments fair and equitable treatment and Full Protection and Security in accordance with paragraphs 2 to 6.
> 2. A Party breaches the obligation of fair and equitable treatment references in paragraph 1 where a measure or series of measures constitutes:
>   a. Denial of justice in criminal, civil or administrative proceedings;
>   b. Fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings.
>   c. Manifest arbitrariness;
>   d. Targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief;
>   e. Abusive treatment of investors, such as coercion, duress and harassment; or
>   f. A breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article.
> 3. The Parties shall regularly, or upon request of a Party, review the content of the obligation to provide fair and equitable treatment. The

Committee on Services and Investment may develop recommendations in his regard and submit them to the Trade Committee for decision.

4. When applying the above fair and equitable treatment obligation, a tribunal may take into account whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated. ... (4)

FET is meant to protect investors against serious instances of arbitrary, discriminatory or
P 137 abusive conduct by States. They can result in arbitrary cancellation of ● licenses, harassment of investor through unjustified fines and penalties, denial of justice, among others. In turn, the host State may feel these measures justified in some circumstances such as when a new government accuse their predecessors of selling 'national assets' at a discount and want to get them back or renegotiate agreements, or when the host State feels that the investor is getting a 'windfall' in profits due to significant increases in market prices, or even more when an economic crisis hit the country and so on.

The obligation to provide investments FET has been given various interpretations by government officials, arbitrators and scholars, depending on whether the standard of treatment is measured against the customary international law minimum standard, a broader international law standard, i.e., including other sources such as investment protection obligations found in treaties and general principles, or whether the standard is 'an autonomous self-contained concept in treaties which do not explicitly link it to international law'. (5)

The precise meaning and content of the FET standard is therefore determinative of what will constitute a violation.

[B] FET as Developed by Reference to the Minimum Standard of Treatment

The international minimum standard of treatment is commonly defined as a norm of customary international law:

> which governs the treatment of aliens, by providing for a minimum set of principles which States, regardless of their domestic legislation and practices, must respect when dealing with foreign nationals and their property. While the principle of national treatment foresees that aliens can only expect equality of treatment with nationals, the international minimum standard sets a number of basic rights established by international law that States must grant to aliens, independent of the treatment accorded to their own citizens. Violation of this norm engenders the international responsibility of the host State and may open the way for international action on behalf of the injured alien provided that the alien has exhausted local remedies. (6)

Although this definition has been challenged by arbitral tribunals, especially regarding rights to be accorded to aliens even if such treatment would be denied to nationals, it is now a generally recognized interpretation of the standard. (7)

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The *Neer Claim* (8) is the landmark case on minimum standard of treatment. In this case, the US Mexico Claim Commission held that:

> the propriety of governmental acts should be put to the test of international standards ... The treatment of an alien, in order to constitute an international delinquency should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognized its insufficiency. Whether the insufficiency proceeds from the deficient execution of a reasonable law or from the fact that the laws of the country do not empower the authorities to measure up to international standards is immaterial. (9)

The NAFTA Free Trade Commission (FTC) decided to remedy the level of uncertainty surrounding the FET standard and issued in 2001 a binding determination of the content of FET. It considered that Article 1105(1) of the NAFTA prescribes the customary international law minimum standard of treatment of aliens as:

> the minimum standard of treatment to be afforded to investments of investors of another Party. The concepts of 'fair and equitable treatment' ... do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens. (10)

However, the NAFTA Tribunal in the *Mondev* case considered that FET needed to be interpreted according to 'current international law'. (11) As such, one can surmise that that FET standard has evolved since the *Neer* decision.

The main influences in the development of the content of the FET standard are

investment treaties and arbitral tribunals' decisions. The FET notion is continuously developing and thrives through arbitral tribunals' tendency to refer to, and discuss earlier awards, although under no obligation to do so or in any way bound by them.

Over time, arbitral tribunals have identified recurrent elements that are acknowledged as constituting the normative content of the FET standard, on a case-by-case basis. Treaties are the basis of the interpretation, but normally contain little indication as to the substantive content of the standard.

In early decisions, FET and FPS standards were examined together by tribunals because many treaties included FET and FSP under the same clause. FPS is now included in most treaties as a separate obligation and considered a separate issue from FET by arbitral tribunals.

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[C] Examples of Minimum Standard of Treatment Clauses

NAFTA

Article 1105: Minimum Standard of Treatment

1. Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and FPS.

NAFTA Interpretative Note issued on 21 July 2011

Having reviewed the operation of proceedings conducted under Chapter Eleven of the North American Free Trade Agreement, the Free Trade Commission hereby adopts the following interpretations of Chapter Eleven in order to clarify and reaffirm the meaning of certain of its provisions: ...

2. Minimum Standard of Treatment in Accordance with International Law

1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.

2. The concepts of 'fair and equitable treatment' and 'FPS' do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.

3. A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).

DR-CAFTA

Article 10.5: Minimum Standard of Treatment

1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and FPS.

2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of 'fair and equitable treatment' and 'FPS' do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:

(a) 'fair and equitable treatment' includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and ...

3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.

2015 India Model BIT

Article 3 Treatment of investments

3.1 No Party shall subject investments made by investors of the other Party to measures which constitute a violation of customary international law through:

(i) Denial of justice in any judicial or administrative proceedings; or

(ii) fundamental breach of due process; or

(iii) targeted discrimination on manifestly unjustified grounds, such as gender, race or religious belief; or

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(iv) manifestly abusive treatment, such as coercion, duress and harassment.

[D] FET as Developed by Arbitral Tribunals

[1] Denial of Justice and Due Process

Compliance with the most basic due process requirements is necessary to avoid a denial of justice. In principle, host States are under the obligation to establish a judicial system that allows the effective exercise of the substantive rights granted to foreign investors.

The violation of FET for 'miscarriage of justice' has been upheld by arbitral tribunals in numerous cases, one of the most emblematic being the *Loewen* case (12) where the trial process, the verdict, the denial of an appeal and what Loewen refers to in its pleadings as the 'coerced settlement' all amounted to a denial of substantive and procedural justice, contrary to applicable requirements of NAFTA Chapter 11 and international law protecting FET.

The principle of denial of justice encompasses both procedural and substantive wrongdoings by the courts, i.e., improper procedural irregularities and deficiencies as well as unjust decisions and defects in the substances of judgments. (13)

Only gross or manifest instances of injustice are usually considered a denial of justice and denial of justice is very difficult to establish in practice. Simple error, misinterpretation or misapplication of domestic law is not per se a denial of justice. (14)

The following instances are likely to be considered a denial of justice: (15)

- Denial of access to justice and the refusal of courts to decide.
- Unreasonable delay in proceedings. (16)
- Lack of a court's independence from the legislative and the executive branch of the State. (17)
- Failure to execute final judgments or arbitral awards. (18)
- Corruption of a judge.
- Discrimination against the foreign litigant. (19)

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- Breach of fundamental due process guarantees, such as failure to give notice of the proceedings and failure to provide an opportunity to be heard. (20) , (21)

The 2012 US Model Treaty in Article 5(2)(a) clearly States that the FET standard includes the obligation 'not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world', illustrating the broader definition of denial of justice.

[2] Manifest Arbitrariness in Decision-Making and Discrimination

Arbitrary conduct has been defined as 'founded on prejudice or preference rather than on reason or fact' (22) or where 'prejudice, preference or bias is substituted for the rule of law'. (23) Thus, a measure that inflicts damage on the investor without serving any legitimate purpose and without a rational explanation, but that instead rests on prejudice or bias, would be considered arbitrary. (24)

In *CMS v. Argentina*, the tribunal found violations of the FET as 'any measure that might involve arbitrariness or discrimination is in itself contrary to the Fair and Equitable Treatment'. (25) In the case of NAFTA tribunals, arbitrary treatments are considered as violation of the FET standard, even though NAFTA does not contain any explicit prohibition of arbitrary treatment. (26)

In a comprehensive definition of arbitrariness, the *LG&E* tribunal (27) defined arbitrary measures as "measures that affect the investments of nationals of the other Party without engaging in a rational decision-making process. Such process would include a consideration of the effect of a measure on foreign investments and a balance of the interests of the State with any burden imposed on such investments." (28) Establishing some rational relationship to the alleged objective of a measure should be sufficient for a measure to be considered non-arbitrary, even if it is "unwise, inefficient or not he best course of action in the circumstances." (29)

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In treaty practice, the rule against arbitrariness is often combined with the prohibition of discrimination: 'shall not impair investments by arbitrary or discriminatory measures'. The ICJ in the *ELSI* case had to apply this standard and found that '[a]rbitrariness is not so much something opposed to a rule of law ... It is a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety.' (30)

Discrimination can take a number of forms but in the context of the treatment of foreign investment, the most frequent problem is discrimination based on nationality. Two standards specifically address those types of issues: NT and MFN. Those standards will be addressed later on in this chapter.

[3] Abusive Treatment of Investors, Including Coercion, Duress and Harassment

Some arbitral tribunals have recognized abusive conducts in the form of coercion, (31)

duress (32) and harassment (33) involving unwarranted and improper pressure, abuse of power, persecution, threats, intimidation and use of force as FET violations. Many different situations can be considered as abusive conduct on the part of the host State: arresting or jailing of executives or personnel; threats of or initiation of criminal proceedings; deliberate imposition of unfunded tax assessments, criminal or other fines; arresting or seizing of physical assets, bank accounts and equity; interfering with, obstructing or preventing daily business operations; and deportation from the host State or refusal to extend documents that allow a foreigner to live and work in the host State. (34)

FET violations are all the more likely to be found if instances of harassment and coercion are 'repeated and sustained', (35) amount to a 'deliberate conspiracy … to destroy or frustrate the investment' (36) or a 'conspiracy to take away legitimately acquired rights'. (37)

[4] Investors' Legitimate Expectations

The notion of legitimate expectations means that the legal and business framework in which the investment was made should not change to investor's disadvantage.

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Investors' legitimate expectations are based on the host State's legal framework and, at times, may be based on specific undertakings and representations made explicitly by the host State, i.e., legislation and treaties, assurances contained in decrees, licenses and similar executive assurances as well as contractual undertakings. Arbitral decisions suggest that an investor may derive legitimate expectations either from specific commitments addressed to it personally, e.g., in the form of a stabilization clause, or rules that are not specifically addressed to a particular investor, but which are put in place with a specific aim to induce foreign investments and on which the investor relied in making his investment. (38)

Thus, key qualifying elements identified by arbitral tribunals are the following:

- 'Legitimate expectations may arise only from a State's specific representations or commitments made to the investor, on which the latter has relied.
- The investor must be aware of the general regulatory environment of the host country.
- Investors' expectations must be balanced against legitimate regulatory activities of host countries.' (39)

Context and experience are factors taken into consideration as well as the fact that investors' expectations must be grounded in reality rather than frivolous and unrealistic. Therefore, some have considered that '[t]he assessment of the reasonableness or legitimacy [of investors' expectations] must take into account all circumstances, including not only the facts surrounding the investment, but also the political, socioeconomic, cultural and historical conditions prevailing in the host State.' Moreover, 'such expectations must arise from the conditions that the State offered the investor and the latter must have relied upon them when deciding to invest'. (40)

Although not typically considered a customary international law standard, some arbitral tribunals have identified transparency as a concept encompassed by the FET standard. (41) Transparency involves some level of stability of the host State's legal framework for the investor's operations and predictability of decisions affecting the investor based on that regulatory framework. These concepts can be joined together as being part of the legitimate expectations of the investors. These concepts focus on stability and predictability of the host State's legal and business framework but are also related to the good faith principle.

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Transparency is clearly interconnected to investors' legitimate expectations, especially in the way it has been defined by arbitral tribunal. In *Metalclad Corporation v. United Mexican States*, (42) the tribunal defined the obligation of transparency as the idea that 'all relevant legal requirements for the purpose of investing should be capable of being readily known to all investors'. In addition, in the event a Party would become aware of 'confusion or misunderstanding' concerning the legal requirements to be fulfilled by investors, the Party would have 'the duty to ensure that the correct position [would be] promptly determined and clearly Stated so that the investors can proceed with all appropriate expedition in the confident belief they are action in accordance with all relevant laws'. (43)

[5] Balance Between Investors' Legitimate Expectations and Reasonable Regulatory Actions of the Host State

The FET obligation does not have as its aim to prevent host States from acting in the public interest or to develop its legal, administrative and business frameworks. Therefore, some actions, even if they adversely affect investments, will not be considered a breach of the FET standard. (44) Indeed, arbitral tribunals recognized the need for host States to make legitimate changes to their legislation and to take actions for public

interest purposes. In *Saluka Investments BV (The Netherlands) v. Czech Republic*, the tribunal held that:

> No investor may reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged. In order to determine whether frustration of the foreign investor's expectations was justified and reasonable, the host State's legitimate right subsequently to regulate domestic matters in the public interest must be taken into consideration as well... (45)

A similar approach has been adopted in many other cases and is now considered a requirement to the characterization of a breach of legitimate expectations. (46)

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Several forces are therefore to be balanced by tribunals when identifying a breach of the FET standard based on legitimate expectations of the investors. Some cases are essential in this regard: *Saluka v. Czech Republic,* (47) *Tecmed v. United Mexican States,* (48) *Rompetrol v. Romania*, (49) and *Bayindir v. Pakistan*. (50)

§6.03 FULL PROTECTION AND SECURITY

States are not mandated nor obliged to allow foreign capital in their countries. However, if they provide the platform for foreign investments, they must also provide foreigners with at least the same protections they give to their nationals, not only in terms of the treatment of their investments, but more so with regards to their own physical protection.

The principles of international law seek to provide foreigners with certain standards of protection when dealing with sovereign States. The origin of this protection stems from older bilateral treaties of friendship, commerce and navigation, and is part of the
P 146 developing history of international business, trade and investment. Prior to establishing the provision of FPS, at the core of diplomatic protection was States' liability for the injuries to foreigners and their assets. (51) This meant that the acts of one host State which caused harm to a national of another State were dealt with by diplomatic intervention, whereby the home State of the foreign national would espouse the claim of the person. In many instances, actions of this kind also led to hostile relations between the intervening States, which was at times referred to as 'gunboat diplomacy'.

Article 2 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts (52) (ILC Articles on State Responsibility or ILC Articles) prescribes that in order for an internationally wrongful act to be attributable to a State, it must pass a two-prong test: (a) the actions must be attributable to a State under international law and (b) the act must constitute a breach of an international obligation of that State.

Although it is understood that public riots, insurrects, civil unrest, strikes and other types of public disorders can and do happen without government incitement, the host State has the obligation of providing investors with the minimum standard of FPS. However, despite violence being the most common pattern, this standard of protection is also triggered with non-violent situations. FPS seeks to ensure that host States take 'active and reasonable measures to protect a foreign investment from adverse effects or actions (of a physical or legal nature) of the host State, its organs, or third parties'. (53)

In the *Biwater v. Tanzania* case, the arbitral tribunal alluded to a definition of the duty of due diligence, where it said that 'a substantive failure to take reasonable, precautionary and preventive action is sufficient to engage the international responsibility of a State for damage to public and private property in that area'. (54)

FPS guarantees that the host State must provide investors with adequate protection to preserve its investments as well as the physical integrity of investors. Liability for the host State is triggered when the investors face losses or damages that could have been prevented if the government had provided adequate and timely protection for the investment or persons. This protection may be provided by the government, its legal authorities, or by means of law enforcement officials. Accordingly, the government's failure to act promptly to prevent losses or damages to the investment would trigger the application of the standard.

[A] The Extent of the FPS Provision

Article 10 on Promotion, Protection, and Treatment of Investments of the ECT establishes
P 147 that:

> [e]ach Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable, and transparent conditions for investors of other Contracting Parties to make Investments in its Area ... Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less

favourable than that required by international law, including treaty obligations... (55)

FPS imposes a two-tier obligation on host States. On the one hand, they are required to provide actively protection on foreign investments, and on the other one, they are also obliged to refrain from adopting any measure, whether direct or indirect, with consent or by assent, detrimental to foreign investments. The limits of this protection, however, have to be reasonable. Thus, a State is not obliged to provide protection against harm or threats of which it is not aware. Yet, when a host State becomes aware of potential threats directed exactly at foreign nationals or their investments, the duty to act is triggered and effective police protection within reasonable means must be provided.

Thus, in light of the ILC Articles on State Responsibility, '[t]here is a breach of an international obligation ... when an act of that State is not in conformity with what I required of it by that obligation, regardless of its origin or character.' (56) Generally speaking, this principle has always tied State responsibility to the preservation and care of investors' property, whether tangible or intangible.

The 2012 US Model BIT establishes that covered investments shall be given a treatment including FPS in accordance with the treatment as per customary international law, without creating 'additional substantive rights'. (57) In expanding the definition, FPS, under the 2012 US Model BIT requires 'each [host State] to provide the level of police protection required under customary international law'. (58)

There are several risks faced by foreign investments. One of them is the potential of local hostility by civilians in the host country geared towards the investors' physical security and their assets. FPS requires that the host State exercise a proper level of due diligence and care in preventing civil unrests that harm foreign investors' physical integrity and their properties. Host States thus have an obligation to adopt reasonable measures that fairly protect investors' interests. This means that they have the obligation to exercise police power in diligently procuring the safeguard and protection of investors' properties. This protection also extends to those direct or indirect foreign investments, such as in cases of recapitalization of already existing operations. Some of the general aspects that will be evaluated by the tribunal are the actions or inactions of the host State aimed at protecting the foreign investment, as well as the efforts and due diligence
P 148 conducted by the host State to preserve and prevent actual damages to the
investment property of the foreign investor. (59) FPS requires that host States adopt reasonable measures to prevent the 'physical destruction of an investor's property'. (60)

In the *Saluka* case, the arbitral tribunal emphasized that the standard of FPS is not one of strict liability on the host State. (61) This means that the host State's liability may be shielded by proving that it took reasonable precautionary measures in preserving and protecting the investors' physical and economic interests in the territory against attacks that threaten or may threaten foreigners in its territory. (62)

Additionally, the *AAPL v. Sri Lanka* case dealt in part with an investor's claims that the Sri Lanka government owed it strict liability to guarantee its FPS. The arbitral tribunal found that the duty was not of a strict liability but rather an obligation of means, thus requiring a link between the damages suffered and the causal responsibility of the State or its dependency for acting without due diligence. Thus, the principle is read to establish a reasonable duty of care to act with due diligence in protecting both the investor's physical integrity, as well as its corporeal or intangible investment property. (63)

§6.04 MOST-FAVORED-NATION

The MFN clause affords an investor from Country A investing in Country B the assurance that it will not be treated less favorably than an investor from a third country by Country B. UNCTAD has specified that in the international investment law context, the purpose of the MFN clause is '[to give] investors a guarantee against a certain forms of discrimination by host countries, and [to establish] equality of competitive opportunities between investors from different foreign countries'. (64)

Most investment agreements contain MFN clauses, although the wording, context and scope may differ. Despite its essentialness, the MFN clause brings debate as to its relation to the different provisions in treaties. While the general consensus is that the MFN clause can be applied to substantive rights, it is 'highly controversial as to whether the clause should equally apply to procedural rights'. (65)

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[A] Historical Background of the Development of the MFN Clause and Its Current Relevance

The MFN clause originated from the practices of international trade law. The clause first began as a unilateral form in which powerful nation states, predominantly European, would make the less powerful States promise to MFN treatment. (66)

Later in history, another form emerged (though no longer in use today): the conditional MFN clause. The clause was conditional because an economic concession was only

granted if some compensation was promised and the benefitting State had also to grant the same compensation to the other State. (67) The conditional MFN clause was based on the idea of reciprocity. (68)

MFN treatment is defined in Article 5 of the ILC Draft Articles on MFN Clauses as 'treatment accorded by the granting State to the beneficiary State, or to persons or things in a determined relationship with that State, not less favourable than treatment extended by the granting State to a third State or to persons or things in the same relationship with that third State'. (69)

MFN and NT go hand in hand to constitute the non-discrimination principle under international. While analyzing the MFN clause a few things should be borne in mind. First, the obligation to grant MFN treatment is a treaty obligation, and it does not arise from customary international law. Second, the MFN clause is a contingent or relative obligation as it will depend on what is granted to investors of other nationalities and their investments in the host state. Third, the MFN clause may only be pleaded when arising from the same sphere of relationship. In accordance with the *ejusdem generis* principle, the MFN clause can only apply to matters belonging the same subject matter of the clause.

[B] Examples of MFN Clauses

2012 US Model BIT

Article 4: Most-Favored-Nation Treatment

Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.

Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

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Bulgaria-Cyprus BIT, Article 3 (70)

1. Each Contracting Party shall apply to the investments in its territory by investors of the other Contracting Party a treatment which is not less favourable than that accorded to investments by investors of third States.

2. This treatment shall not be applied to the privileges which either Contracting Party accords to investors from third countries in virtue of their participation in economic communities and unions, a customs union or a free trade area.

Argentina-Spain BIT, Article IV(2) (71)

In all matters subject to this Agreement, this treatment shall not be less favorable than that extended by each Party to the investments made in its territory by investors of a third country.

[C] A Few Cases Dealing with MFN Clauses

Although there are no binding precedents in international arbitrational (commercial or investor-State), it is useful to see how arbitral tribunals have dealt with the application of the MFN clause. There are a number of cases where tribunals have struggled through the MFN legal quagmire, but only a few will be focused.

As stated in the beginning of this chapter, the application of the MFN clause has not given rise to much debate as to importing a more favorable provision in a BIT to 'substantive' protections but has brought about debate and much criticism as to its application with respect to procedural or jurisdictional matter. Thus, the question is whether an investor is allowed to use the MFN provision in the BIT that is applicable to its dispute for purposes of establishing jurisdiction in a more favorable way to the investor. An example of such an instance is where the investor does not want to comply with a requirement in the dispute resolution provisions of its applicable treaty – such as to refer a dispute to domestic procedures before commencing international arbitration – that does not exist under the host State's BIT with a third State. As will be addressed below, the *Maffezini* case grappled with this issue.

[1] Maffezini v. Spain (72)

This case involved a dispute between an Argentine claimant and the Kingdom of Spain as respondent. The claim was brought under the Argentina-Spain BIT. The BIT included an eighteenth-month condition precedent, which required that the dispute be submitted to
P 151 domestic litigation in Spain and, only if the matter was not resolved on the merits by

the domestic courts or no decision had been rendered within the eighteen-month period, would the investor be able to bring his claim under ICSID as a forum. (73) Maffezini resorted directly to international arbitration and argued, invoking the MFN clause in the Argentina-Spain BIT, that the Spain-Chile BIT did not have a similar provision requiring to resort to the local courts and allowed Chilean investors in Spain to go straight to arbitration. As such, Maffezini argued that he was receiving less favorable treatment than the Chilean investors were. (74)

Despite the fact that the Argentine-Spain BIT did not expressly state that the MFN clause covered dispute settlement, the tribunal ruled that dispute settlement mechanisms are 'inextricably related to the protection of the rights of the investors since they are related to the fair and equitable treatment promised by the MFN clause'. (75) The tribunal followed the *Ambatielos* (76) case regarding the relation of dispute settlement provisions to the category of matters encompassed by the MFN clause. It stated, 'if a third-party treaty contains provisions for the settlement of disputes that are more favorable to the protection of the investor's rights and interests than those in the basic treaty, such provisions may be extended to the beneficiary of the most-favored-nation clause as they are fully compatible with the *ejusdem generis* principle'. (77) Agreeing with the investor, the tribunal stated that if the situation had been such that the host State made the exhaustion of domestic remedies a condition for its consent to arbitration, the investor would not have been able to invoke a third party treaty that eliminated the waiting period. (78) Thus, if there were a specific provision laying out the contours of consent, the parties would not be able to refer to another treaty to bypass it.

The *Maffezini* tribunal basically agreed with the practice of importing dispute settlement provisions from a third-party treaty, but also highlighted four public policy considerations that would be exceptions to this practice. (79) First, if one country made its consent to arbitration only upon the exhaustion of local remedies, this condition cannot be bypassed by the MFN clause. (80) Second, if the treaty contained a 'fork-in-the-road' provision requiring an absolute choice between settling of disputes through the domestic court system or international arbitration, the MFN clause cannot help bypass this provision. (81) Third, if the treaty set forth a specific forum of arbitration, such as ICSID, the MFN clause would not be allowed to be invoked to argue for an entirely different system of arbitration. (82) The last scenario in which the tribunal would not allow the invocation of the MFN clause is when the parties have agreed to a 'highly institutionalized system of arbitration that incorporates precise rules of procedure'. (83)

P 152 It seems that the tribunal pointed out to these public policy considerations out of the concern of potential treaty shopping. It is important to note that the tribunal found that none of these four situations applied to Maffezini and thus, resulted in a liberal ruling allowing the claimant to invoke a different dispute mechanism.

***[2]* Siemens v. Argentina** (84)

Like in *Maffezini*, this case involved the provision of a requirement to resort to domestic litigation in Argentina under the Argentina-Germany BIT. The tribunal reached the same conclusion as the one in Maffezini and concluded that the MFN clause encompassed dispute settlement provisions. The *Siemens* tribunal had a more thorough explanation of its reasoning than in Maffezini and relied on the purpose of the Treaty – 'to protect' and 'to promote' investments. (85) Thus, the Tribunal interpreted the Treaty as to 'create favorable conditions for investments and to stimulate private initiative'. (86)

The *Siemens* tribunal also considered the issue of whether a claimant invoking the MFN clause had to import the allegedly more favorable third party treaty's provisions as a whole or only the provisions deemed beneficial to the claimant's situation. The tribunal concluded that parties can indeed select provisions that are favorable to them; if this practice was not allowed, according to the tribunal, the 'MFN clause would be of limited use'. (87) The arbitrators in this case did not think the holding would be that problematic since the BIT works in both ways: just as an Argentinean investor can receive benefits through an Argentinean BIT, a Chilean investor will be able to do the same through his own country's BIT. (88) The tribunal further asserted that 'claiming a benefit by the operation of an MFN clause does not carry with it the acceptance of all the terms of the treaty which provides for such benefit whether or not they are considered beneficial to the party making the claim; neither does it entail that the claiming party has access to all benefits under such treaty' and that it would be a case-by-case scenario based on the terms of the disputed MFN clause. (89)

***[3]* Salini v. Jordan** (90)

Salini rejected the liberal interpretation and application of MFN clauses to dispute

P 153 settlements set forth by *Siemens* and *Maffezini*. In this case, the Jordan-Italy BIT contained a provision laying out a specific dispute settlement procedure: ICSID arbitration for disputes arising from treaty violations and contractual dispute settlement procedures for investment contract disputes. (91) The case concerned a conflict over the final payment of the construction of a dam. Thus, the parties had to settle their dispute domestically in Jordanian courts, unless the parties had agreed to arbitrate instead. (92) Notwithstanding, the Italian investors attempted to bring their claim to ICSID on the theory that Jordan's BITs with other countries allowed contractual claims to be arbitrated and that the claimants were entitled to the same treatment. (93)

The *Salini* tribunal reached its decision on jurisdiction only around three months after the decision in *Siemens*. The tribunal first distinguished this case from *Maffezini* and the *Ambatielos* cases; it observed that Article 3 of the Jordan-Italy BIT did not provide for its application over dispute settlement and did not 'envisage all rights or all matters covered by the agreement'. (94) The tribunal further reasoned that Article 9(2) of the BIT was clear in that it wanted contractual disputes to be settled according to the terms of the particular investment agreement and thus, ICSID arbitration was not an available procedure. (95) Thus, unlike the *Maffezini* tribunal, the *Salini* arbitrators narrowed the scope of the application of the MFN clause to dispute settlements and deferred to the express condition set forth in the BIT.

[4] Plama v. Bulgaria (96)

Plama is a case that favors a narrower interpretation of MFN clauses. There, the claimant, a Cyprus corporation, brought the claim due to the Bulgarian government's treatment of its oil refinery. (97) *Plama* wanted to resolve the dispute through international arbitration rather than through Bulgarian courts through the operation of the MFN clause and resorted to the more generous Bulgaria-Finland BIT, as the Bulgaria-Cyprus BIT, provides for 'the possibility of ICSID arbitration'. (98)

The tribunal ruled, however, that the MFN clause cannot be applied to replace the dispute settlement system that had already been agreed to. (99) It endorsed the doctrine that, as a matter of domestic and international law, an agreement to arbitrate must be clear and unambiguous. (100) The Tribunal explained, '[i]n the framework of a BIT, the agreement to arbitrate is arrived at by the consent to arbitration that a state gives in advance in respect of investment disputes falling under the BIT, and the acceptance thereof by an investor if the latter so desires.' (101) According to the Tribunal, without the
P 154 ● specific language granting such forum, it cannot be understood that the MFN clause is to be read broadly as to import broad languages from other BITs. (102) The *Plama* Tribunal expressly rejected the interpretation held by the Siemens Tribunal that the phrase 'with respect to all matters' allows the MFN clause to be interpreted and applied broadly. (103)

§6.05 NATIONAL TREATMENT

According to UNCTAD, the NT standard can be defined as a principle whereby a host country extends to foreigners' treatment that is at least as favorable as the treatment that it accords to national investors in like circumstances. (104) NT is said to be a 'relative' standard of protection, which is comparable or dependent on the treatment accorded to domestic investors. As such, if the foreign and the domestic investor are both in like circumstances, both must be treated equally and no national or domestic investor shall be afforded privileges and protections denied to the foreign investor just on the basis of nationality.

In international law, the NT standard has been invoked in two different settings. First, under the Calvo Doctrine, (105) supported in the past by most Latin American countries, where the treatment of aliens and their property are entitled only to the same treatment accorded to nationals of the host country under its national laws. And, second, in opposition to the Calvo Doctrine, the doctrine of State responsibility for injuries to aliens and their property, which has been supported by developed countries, asserts that customary international law establishes a minimum international standard of treatment to which aliens are entitled, allowing for treatment more favorable than that accorded to nationals where this falls below the international minimum standard.

[A] Examples of NT Clauses

France Model BIT

Article 4: National treatment and most favored Nation treatment

Each Contracting Party shall apply on its territory and in its maritime area to the nationals and companies of the other Party, with respect to their investments and activities related to the investments, a treatment not less favorable than that granted to its nationals or companies, or the treatment granted to the nationals or companies of the most favored nation, if the latter is more favorable. In this respect, nationals authorized to work on the territory
P 155 and in the maritime area of ● one Contracting Party shall enjoy the material facilities relevant to the exercise of their professional activities.

This treatment shall not include the privileges granted by one Contracting Party to nationals or companies of a third party State by virtue of its participation or association in a free trade zone, customs union, common market or any other form of regional economic organization.

The provisions of this article do not apply to tax matters.

2012 US Model BIT:

Article 3: National Treatment

> Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.
>
> Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
>
> The treatment to be accorded by a Party under paragraphs 1 and 2 means, with respect to a regional level of government, treatment no less favorable than the treatment accorded, in like circumstances, by that regional level of government to natural persons resident in and enterprises constituted under the laws of other regional levels of government of the Party of which it forms a part, and to their respective investments."
>
> 2007 Colombia Model BIT (106)
>
> Article IV, Treatment of Investments
>
> 1. Each Contracting Party shall grant to the investments of investors of the other Contracting Party made in its territory, a not less favourable treatment than that accorded, in like circumstances, to investments of its own investors or to investors of any other third State, whichever is more favorable to the investor.
>
> 2. The most favourable treatment to be granted in like circumstances referred to in this Agreement does not encompass mechanisms for the settlement of investment disputes, such as those contained in Articles IX and X of this Agreement, which are provided for in treaties or international investment agreements.
>
> 3. The provisions of this Agreement concerning the granting of a no less favourable treatment than that accorded to investments of investors of any of the Contracting Parties or of any third state shall not be construed so as to bind a Contracting Party to extend to investments of investors of the other Contracting Party the benefit of any treatment, preference or privilege resulting from: Any existing or future free trade area, customs union, common market, economic union or any other kind of economic or regional organization or any international agreement intended at facilitating border trade, which a Contracting Party is or becomes a Party to.

In deciding whether a host State has discriminated against an investor for the purposes
P 156 of the NT standard, the tribunal must compare the State's treatment of the ● investor with its treatment of others in like circumstances. The tribunal's interpretation of 'like circumstances' is thus critical.

Rudolf Dolzer indicates that in order to find breach of NT, a tribunal must determine whether the investors are in like circumstances (A), then determine whether the treatment accorded to a foreign investor is less favorable than the one enjoyed by domestic investors (B). And, lastly, it must determine the host State's intent and whether there was a justification for this differentiation (C). (107)

[B] 'Like Circumstances'

Different tribunals have taken different approaches. The tribunal in *S.D. Myers v. Canada Myers v. Canada*, a case brought under NAFTA where the issue was whether Canada breached the NT protection accorded to Myers when it established that the disposal of the PCBs shall be done in Canada and by Canadians. The Tribunal said that:

> [t]he Tribunal considers that the interpretation of the phrase 'like circumstances' in Article 1102 must take into account the general principles that emerge from the legal context of the NAFTA, including both its concern with the environment and the need to avoid trade distortions that are not justified by environmental concerns. The assessment of 'like circumstances' must also take into account circumstances that would justify governmental regulations that treat them differently in order to protect the public interest. The concept of 'like circumstances' invites an examination of whether a non-national investor complaining of less favourable treatment is in the same 'sector' as the national investor. The Tribunal takes the view that the word 'sector' has a wide connotation that includes the concepts of 'economic sector' and 'business sector'. (108)

[C] 'Comparable'

The *Methanex v. United States* tribunal focused on whether the economic activities of the foreign investor were 'comparable' to those in the domestic sphere. (109)

[D] 'Like Situation'

In *Occidental v. Ecuador*, Occidental brought an action for breach of NT under the US-Ecuador BIT. The tribunal decided in favor of the petitioner holding thereby, in fact, 'in like situations' cannot be interpreted in the narrow sense advanced by Ecuador as the
P 157 purpose of NT is to protect investors as compared to local producers, and this ● cannot be done by addressing exclusively the sector in which the particular activity is undertaken.

In *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, (110) Bayindir was contracted to build a six-lane motorway between Islamabad and Peshawar by the National Highway Authority (NHA), an agency of the Pakistani government. The project was damaged by disagreements over delays in the construction schedule for a period of eight years. Bayindir, among other things, blamed the delays on factors outside of its control, including arguing the breach of NT. As such, Bayindir argued that it was expelled so that the highway project could be handed to local contractors on more favorable terms.

The tribunal decided whether Bayindir's investment was in a 'similar situation'. If so, Bayindir's investment was accorded less favorable treatment than the local contractor, PMC-JV, and the tribunal had to decide whether the difference in treatment was justified. In its Decision, the Tribunal did not rule out that the contracts with PMC-JV and Bayindir may be similar, as they both related to the same project, but the tribunal found that the terms and circumstances of the contractual relationships between, on the one hand, NHA and Bayindir, and, on the other hand, NHA and PMC-JV were different. Such differences were in the financial terms, the constitution of the two entities, their level of experience and expertise, the scope of work. As a result, the tribunal concluded that 'the two contractual relationships are too different for Bayindir and the local contractors to be deemed in 'similar situations'. Therefore, it found no breach of the NT clause.

[E] Discriminatory

Another important aspect that tribunals consider is whether the measure is discriminatory on its face and whether the interest of the State in protecting the public interest is actually at issue. This point was raised by the tribunal in both, *S.D. Myers Inc. v. Canada* and in *Total S.A. v. Argentine Republic*. In *Total S.A. v. Argentine Republic*, the tribunal said that:

> [t]o determine whether treatment is discriminatory, it is necessary to compare the treatment challenged with the treatment of persons or things in a comparable situation. In economic matters the criterion of 'like situation' or 'similarly-situated' is widely followed because it requires the existence of some competitive relation between those situations compared that should not be distorted by the State's intervention against the protected foreigner. This is inherent in the very definition of the term 'discrimination' under general international law that:
>
> Mere differences of treatment do not necessarily constitute discrimination ... discrimination may in general be said to arise where those who are in all
> P 158 material ● respects the same are treated differently, or where those who are in material respects different are treated in the same way. (111)

Therefore a claimant complaining of a breach by the host State of the BIT's NT clause: (a) has to identify the local subject for comparison, (b) has to prove that the claimant-investor is in like circumstances with the identified preferred national comparator(s), and (c) must demonstrate that it received less favorable treatment in respect of its investment, as compared to the treatment granted to the specific local investor or the specific class of national comparators. (112)

§6.06 CONCLUSION

Investment treaties provide a wide range of protections to investors. These include FET, FPS, MFN and NT. Each of these protections has been the subject of many debates and controversies focusing on investor protection on the one hand, and the role of a State in regulating its affairs on the other. Standards of protection are substantive obligations that bind States toward investors, usually BITs or MITs. Those standards are usually the same in every treaty, but the wording used may change. Thus, the interpretation of each of the clauses will depend on the actual language used in the investment treaty.

There is a wide range of formulations and the differences in interpretation in some cases could be attributed to the precise language in the investment treaty. To implement and enforce those protections, investors must prove that a State infringed them under the applicable treaty in order to have a valid claim before an arbitral tribunal. Awards issued by international arbitrators against States have in numerous cases incorporated expansive interpretations of the language in investment treaties. This is especially evident in the approach adopted by many arbitration tribunals to investment treaty concepts of MFN, non-discrimination and FET. The difficulty arises from the different possible interpretations of those standards of protection and their heterogeneous

application by arbitral tribunals. Therefore, the precise content and scope of a given protection is decided on a case-by-case basis when an issue arises. The cases cited and many more that were not covered in this chapter reflect the different ways in which investment tribunals have applied treatment standards. Ideally, future international investment tribunals will be more consistent so as to create a balanced jurisprudence on the different standards.

Questions

(1) Why is FET considered controversial when it is analyzed by international arbitral tribunals?

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(2) What is the 'denial of justice' standard of protection with respect to international investments?

(3) How does 'denial of justice' compare with the standard of FPS?

(4) The 'international minimum standard' refers to States' minimum obligations to provide protections as set forth by customary international law. Do you think this offers a strong means of protection, or do you see any shortcomings in this standard?

(5) In several cases regarding MFN treatment, parties have compared provisions in multiple BITs negotiated by a certain country (e.g., the Maffezini case compared dispute settlement provisions in two of Spain's BITs: the Argentine-Spain BIT and the Chile-Spain BIT). Given that States negotiate different treaties as they see fit, do you think it is reasonable for a party to compare different BITs in order to support its MFN claim?

(6) When an NT violation is alleged by an investor against a Host State, how should a tribunal go about deciding who is 'in like circumstances' with whom?

(7) Does a finding that there is a difference in the treatment of an investor versus a national 'in like circumstances' mean there is automatically a finding that the host State violated the BIT?

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1) *See* Arghyrios A. Fatouros, *Government Guarantees to Foreign Investors*, 135–141, 214–215 (Columbia University Press 1962).
2) *Ibid.*
3) UNCTAD, *Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking* (United Nations Publication 2007).
4) CETA, http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf (accessed 30 May 2018), Art. X.9. It must be noted that CETA has replaced the traditional investor-State system by a new permanent investment court system.
5) OECD, *Fair and Equitable Treatment Standard in International Investment Law*, OECD Working Papers on International Investment 2004/03 (OECD Publishing 2004), http://dx.doi.org/10.1787/675702255435 (accessed 30 May 2018), p. 2.
6) OECD, *Fair and Equitable Treatment Standard in International Investment Law*, OECD Working Papers on International Investment 2004/03 (OECD Publishing 2004), http://dx.doi.org/10.1787/675702255435 (accessed 30 May 2018), p. 8, note 32.
7) *See* Ian Brownlie, *Principles of Public International Law,* 514 (8th ed., Oxford University Press 2012); Charles Rousseau, *Droit International Public*, 46 (Sirey 1970).
8) *L. F. H. Neer and Pauline Neer (U.S.A.) v. United Mexican States*, Award (15 Oct. 1926), IV Reports of International Arbitral Awards 60 (2006).
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12) *The Loewen Group Inc. and Raymond L. Loewen v. the United States of America*, Final Award (26 Jun. 2003), para. 132; *see also Mondev v. USA*, para. 96; *Waste Management v. Mexico*, para. 98.
13) Alwyn V. Freeman, *The International Responsibility of States for Denial of Justice*, 309 (Kraus Reprint Co. 1970) (1938).
14) *See* the 1929 Harvard draft codification, Responsibility of States for damage done in their territory to the person or property of foreigners, in 23 American Journal of International Law, Special Supplement 131 (1929), Art. 9.

15) For a general description of denial of justice, *see Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States,* ICSID Case No. ARB (AF)/97/2, Award (1 Nov. 1999), 39 ILM (2000) 537, paras 102–103.
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18) *Petrobart Limited v. The Kyrgyz Republic*, Award (29 Mar. 2005).
19) *Loewen v. United States,* ICSID Case No. ARB(AF)98/3, Award (26 Jun. 2003), para. 135.
20) *TECMED v. Mexico*, Award (29 May 2003), 43 ILM (2004) 133.
21) UNCTAD, *Fair and Equitable Treatment*, UNCTAD Series on Issues in International Investment Agreements II (United Nations Publication 2012), p. 80.
22) *Lauder v. Czech Republic,* UNCITRAL, Award (3 Sep. 2001), para. 221; *Plama Consortium Limited v. Bulgaria*, ICSID Case No. ARB/03/24, Award (27 Aug. 2008), para. 184.
23) *Joseph C. Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability (21 Jan. 2010), para. 385.
24) *Ibid.*
25) *CMS Gas Transmission Company v. the Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005, para. 290; *see also*, *Eureko B.V. v. Republic of Poland*, Partial Award under UNCITRAL Rules (19 Aug. 2005), paras 248–253.
26) *SD Myers v. Canada*, First Partial Award (13 Nov. 2000), 40 ILM (2001) 1408, para. 263; *Mondev v. USA*, Award (11 Oct. 2002), 42 ILM (2003) 85, para. 127; *Waste Management v. Mexico*, Final Award (30 Apr. 2004), 43 ILM (2004), 967, para. 98.
27) *LG&E v. Argentina*, Decision on Liability (3 Oct. 2006).
28) *Ibid.*, para. 158.
29) UNCTAD, *Fair and Equitable Treatment*, UNCTAD Series on Issues in International Investment Agreements II (United Nations Publication 2012), p. 78.
30) *Case Concerning Elettronica Sicula (ELSI),* Judgment (20 Jul. 1989), ICJ Reports 15, 76 (1989); *Asylum Case*, Judgment (20 Nov. 1950), ICJ Reports 266, 284 (1950).
31) *TECMED v. Mexico*, Award (29 May 2003), 43 ILM (2004) 133.
32) *Desert Line Projects LLC v. Yemen*, ICSID Case No. ARB/05/17, Award (6 Feb. 2008), paras 179, 185–187, 190 and 193.
33) *Pope & Talbot v. Canada*, Award on Damages (31 May 2002), 41 ILM 1347 (2002), paras 156–181.
34) UNCTAD, *Fair and Equitable Treatment*, UNCTAD Series on Issues in International Investment Agreements II (United Nations Publication 2012), p. 82.
35) *Eureko v. Poland*, Partial Award (19 Aug. 2005), para. 237.
36) *Waste Management v. Mexico*, Final Award (30 Apr. 2004), para. 138.
37) *PSEG v. Turkey*, Award (19 Jan. 2007), para. 245.
38) *See Glamis Gold, Ltd. v. United States*, UNCITRAL (NAFTA), Award (8 Jun. 2009), para. 627.
39) UNCTAD, *Fair and Equitable Treatment*, UNCTAD Series on Issues in International Investment Agreements II (United Nations Publication 2012), p. 68.
40) *Duke Energy v. Ecuador*, ICSID Case No. ARB/04/19, Award (18 Aug. 2008), para. 340.
41) OECD, *Fair and Equitable Treatment Standard in International Investment Law*, OECD Working Papers on International Investment 2004/03 (OECD Publishing 2004), http://dx.doi.org/10.1787/675702255435 (accessed 30 May 2018), p. 37.
42) *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (30 Aug. 2000).
43) *Ibid.*, para. 76.
44) *Joseph C. Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability (21 Jan. 2010).
45) *Saluka Investments BV (The Netherlands) v. Czech Republic*, UNCITRAL, Partial Award (17 Mar. 2006), para. 305.
46) *Parkerings-Compagniet AS v. Lithuania*, ICSID Case No. ARB/05/8, Award (11 Sep. 2007), para. 332. *Continental Casualty v. Argentina*, ICSID Case No. ARB/03/9, Award (5 Sep. 2008), para. 258; *Vivendi v. Argentina II*, ICSID Case No. ARB/97/3, Award (20 Aug. 2007), para. 7.4.31; *EDF v. Romania*, ICSID Case No. ARB/05/13, Award (8 Oct. 2009).
47) *Saluka Investments BV (The Netherlands) v. Czech Republic*, UNCITRAL, Partial Award (17 Mar. 2006), paras 306–308: 'The determination of a breach of [the FET obligation] requires a weighing of the Claimant's legitimate and reasonable expectations on the one hand and the Respondent's legitimate regulatory interests on the other … A foreign investor … may in any case properly expect that the [host State] implements its policies bona fide by conduct that is, as it affects the investors' investment, reasonably justifiable by public policies and that such conduct does not manifestly violate the requirements of consistency, transparency, even-handedness and non-discrimination.… The host State must never disregard the principles of procedural propriety and due process and must grant the investor freedom from coercion or harassment by its own regulatory authorities.'

48) *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award (29 May 2003) 43 ILM 133, 137 (2004), para. 154: Legitimate expectations was defined as the entitlement of investors that a host State will 'act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investment, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations. Any and all State actions conforming to such criteria should relate not only to the guidelines, directives or requirements issued, or the resolutions approved thereunder, but also to the goals underlying such regulations. The foreign investor also expects the host State to act consistently, i.e., without arbitrarily revoking any pre-existing decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities. The investor also expects the State to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments, and not to deprive the investor of its investments without the required compensation …'

49) *The Rompetrol Group N.V. v. Romania,* ICSID Case No. ARB/06/3, Award (6 May 2013), para. 278 (The tribunal noted that the legitimate expectations of a protected investor include the expectation that the State authorities will seek means to avoid unnecessary damage or at least to minimize or mitigate the adverse effects on the investment.).
50) *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award (27 Aug. 2009). (The tribunal found that the claimant's reasonable expectations as to the treatment it would be afforded had not been frustrated since 'it could not reasonably have ignored the volatility of the political conditions prevailing in Pakistan' at the time that it entered into the contract (there having been a preceding period of four years during which the contract had been negotiated, terminated and then revived by reason of changes in government.).
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56) ILC Articles on Responsibility of States for Internationally Wrongful Acts (2001), Art. 12.
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58) *Ibid.*, Art. 5(2)(b).
59) *See Wena Hotels Ltd v. Arab Republic of Egypt,* ICSID Case No. ARB/98/4, Award on Merits (8 Dec. 2000).
60) Gary Born, *International Arbitration: Law and Practice*, 431 (Kluwer Law International 2012).
61) *See also Asian Agricultural Products Ltd v. Sri Lanka, ICSID Case No. ARB/87/3,* Final Award (27 Jun. 1990).
62) *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL, 2006 (This dispute was based on the Netherlands-Czech Republic BIT.).
63) *Asian Agricultural Products v. Sri Lanka*, ICSID Case No. ARB/87/3, Final Award (27 Jun. 1990).
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66) *Ibid.*
67) *Ibid.*
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69) ILC Draft Articles on Most-Favoured Nation Clauses with Commentaries (1978).
70) Agreement between the Government of the People's Republic of Bulgaria and the Government of the Republic of Cyprus on Mutual Encouragement and Protection of Investments (12 Nov. 1987).
71) Acuerdo para la Promoción y la Protección Recíproca de Inversiones entre el Reino de España y la República Argentina (3 Oct. 1991) (Free translation from the Spanish original).
72) *Emilio Agustin Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction (25 Jan. 2000).
73) *Ibid.*, para. 24.
74) *Ibid.*, paras 29–31.

75) *Ibid.*, paras 38, 54.
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102) *Ibid.*, para. 206.
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104) *See* UNCTAD, *National Treatment*, UNCTAD Series on Issues in International Investment Agreements, UN Doc. No. UNCTAD/ITE/IIT/11 (Vol. IV), (United Nations 1999), http://unctad.org/en/Docs/psiteiitd11v4.en.pdf (accessed 30 May 2018).
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